ST/LEG/SER.F/1/Add.2

SUMMARIES OF

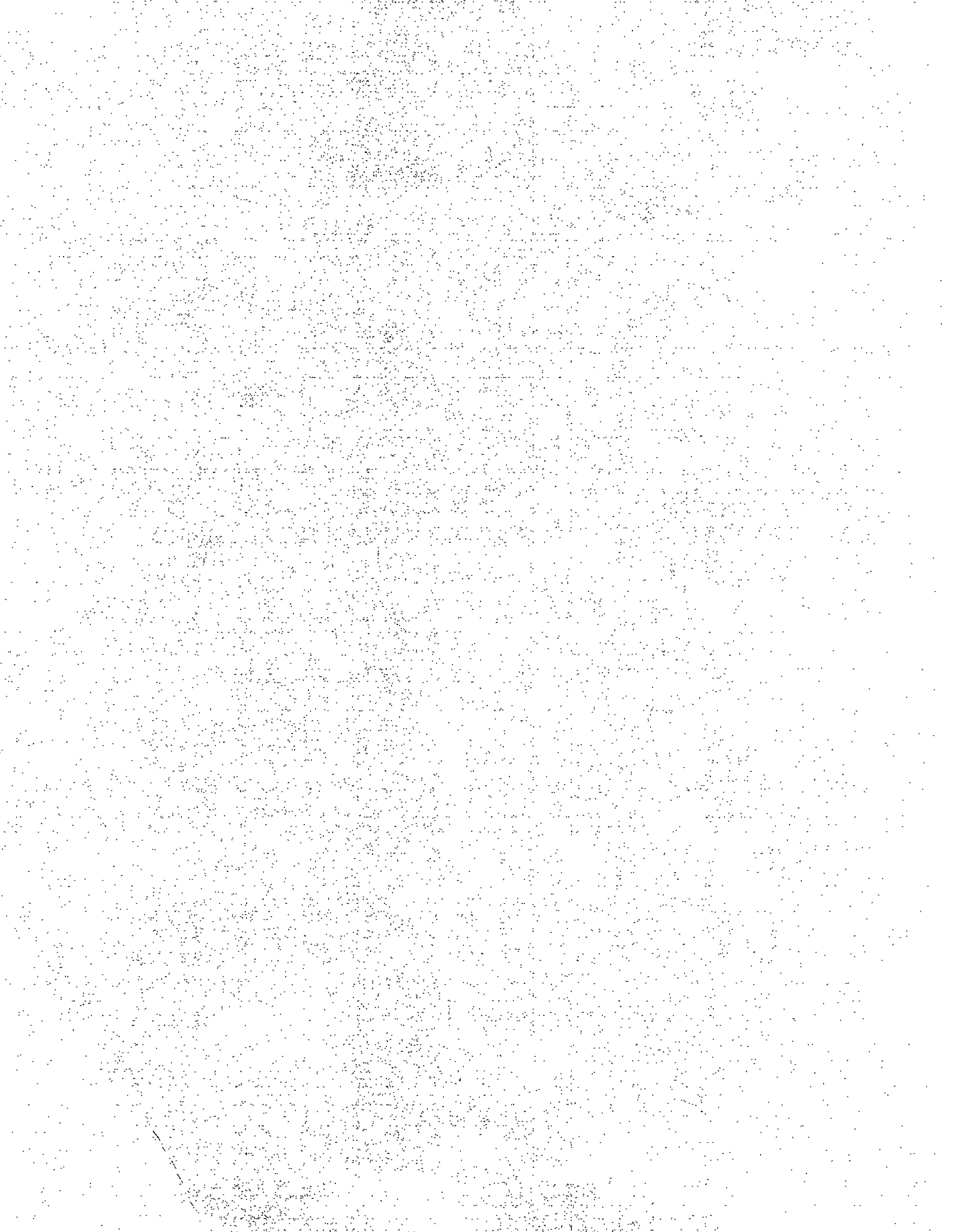
Judgments, Advisory Opinions and Orders

OF THE

International Court of Justice

1997-2002

UNITED NATIONS



ST/LEG/SER.F/1/Add.2

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

1997-2002

United Nations • New York, 2003

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FOREWORD

This publication contains summaries of judgments, advisory opinions and orders issued by the International Court of Justice from 1997 to 2002. It is a continuation of two earlier issues on the same subject (ST/LEG/SER.F/1 and ST/LEG/SER.F/1/Add.1) which covered the periods 1948-1991 and 1992-1996, respectively.

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.

107. CASE CONCERNING GABCÍKOVO-NAGYMAROS PROJECT (HUNGARY/SLOVAKIA)

Judgment of 25 September 1997

In its Judgment in the case concerning Gabcíkovo-Nagymaros Project (Hungary/Slovakia), the Court found that Hungary was not entitled to suspend and subsequently abandon, in 1989, its part of the works in the dam project, as laid down in the treaty signed in 1977 by Hungary and Czechoslovakia and related instruments; it also found that Czechoslovakia was entitled to start, in November 1991, preparation of an alternative provisional solution (called "Variant C"), but not to put that solution into operation in October 1992 as a unilateral measure; that Hungary's notification of termination of the 1977 Treaty and related instruments on 19 May 1992 did not legally terminate them (and that they are consequently still in force and govern the relationship between the Parties); and that Slovakia, as successor to Czechoslovakia became a party to the Treaty of 1977.

As to the future conduct of the Parties, the Court found: that Hungary and Slovakia must negotiate in good faith in the light of the prevailing situation, and must take all necessary measures to ensure the achievement of the objectives of the 1977 Treaty; that, unless the Parties agree otherwise, a joint operational regime for the dam on Slovak territory must be established in accordance with the Treaty of 1977; that each Party must compensate the other Party for the damage caused by its conduct; and that the accounts for the construction and operation of the works must be settled in accordance with the relevant provisions of the 1977 Treaty and its related instruments.

The Court also held that newly developed norms of environmental law are relevant for the implementation of the Treaty and that the Parties could, by agreement, incorporate them through the application of several of its articles. It found that the Parties, in order to reconcile economic development with protection of the environment, "should look afresh at the effects on the environment of the operation of the Gabcíkovo power plant. In particular they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms of the river.

The Court was composed as follows: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc Skubiszewski; Registrar Valencia-Ospina.

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

"155. For these reasons,

THE COURT,

(1) Having regard to Article 2, paragraph 1, of the Special Agreement,

A. *Finds*, by fourteen votes to one, that Hungary was not entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabcíkovo Project for which the Treaty of 16 September 1977 and related instruments attributed responsibility to it;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc Skubiszewski;

AGAINST: Judge Herczegh;

B. *Finds*, by nine votes to six, that Czechoslovakia was entitled to proceed, in November 1991, to the "provisional solution" as described in the terms of the Special Agreement;

IN FAVOUR: Vice-President Weeramantry; Judges Oda, Guillaume, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans; Judge ad hoc Skubiszewski;

AGAINST: President Schwebel; Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Rezek;

C. *Finds*, by ten votes to five, that Czechoslovakia was not entitled to put into operation, from October 1992, this "provisional solution";

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Kooijmans, Rezek;

AGAINST: Judges Oda, Koroma, Vereshchetin, Parra-Aranguren; Judge ad hoc Skubiszewski;

D. *Finds*, by eleven votes to four, that the notification, on 19 May 1992, of the termination of the Treaty of 16 September 1977 and related instruments by Hungary did not have the legal effect of terminating them;

IN FAVOUR: Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans; Judge ad hoc Skubiszewski;

AGAINST: President Schwebel; Judges Herczegh, Fleischhauer, Rezek;

(2) Having regard to Article 2, paragraph 2, and Article 5 of the Special Agreement,

A. *Finds*, by twelve votes to three, that Slovakia, as successor to Czechoslovakia, became a party to the Treaty of 16 September 1977 as from 1 January 1993;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans; Judge ad hoc Skubiszewski;

AGAINST: Judges Herczegh, Fleischhauer, Rezek;

B. *Finds*, by thirteen votes to two, that Hungary and Slovakia must negotiate in good faith in the light of the prevailing situation, and must take all necessary measures to ensure the achievement of the objectives of the Treaty of 16 September 1977, in accordance with such modalities as they may agree upon;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc Skubiszewski;

AGAINST: Judges Herczegh, Fleischhauer;

C. *Finds*, by thirteen votes to two, that, unless the Parties otherwise agree, a joint operational regime must be established in accordance with the Treaty of 16 September 1977;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc Skubiszewski;

AGAINST: Judges Herczegh, Fleischhauer;

D. *Finds*, by twelve votes to three, that, unless the Parties otherwise agree, Hungary shall compensate Slovakia for the damage sustained by Czechoslovakia and by Slovakia on account of the suspension and abandonment by Hungary of works for which it was responsible; and Slovakia shall compensate Hungary for the damage it has sustained on account of the putting into operation of the "provisional solution" by Czechoslovakia and its maintenance in service by Slovakia;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc Skubiszewski;

AGAINST: Judges Oda, Koroma, Vereshchetin;

E. *Finds*, by thirteen votes to two, that the settlement of accounts for the construction and operation of the works must be effected in accordance with the relevant provisions of the Treaty of 16 September 1977 and related instruments, taking due account of such measures as will have been taken by the Parties in application of points 2 B and C of the present operative paragraph.

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc Skubiszewski;

AGAINST: Judges Herczegh, Fleischhauer."

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* *

President Shwebel and Judge Rezek appended declarations to the Judgment of the Court. Vice-President Weeramantry, Judges Bedjaoui and Koroma appended separate opinions. Judges Oda, Ranjeva, Herczegh, Fleichhauer, Vereshchetin and Parra-Aranguren, and Judge ad hoc Skubiszewski appended dissenting opinions.

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Review of the proceedings and statement of claims
(paras. 1-14)

The Court begins by recalling that proceedings had been instituted on 2 July 1993 by a joint notification, by Hungary and Slovakia, of a Special Agreement, signed at Brussels on 7 April 1993. After setting out the text of the Agreement, the Court recites the successive stages of the proceedings, referring, among other things, to its visit, on the invitation of the parties, to the area, from 1 to 4 April 1997. It further sets out the submissions of the Parties.

History of the dispute
(paras. 15-25)

The Court recalls that the present case arose out of the signature, on 16 September 1977, by the Hungarian People's Republic and the Czechoslovak People's Republic, of a treaty "concerning the construction and operation of the Gabcíkovo-Nagymaros System of Locks" (hereinafter called the "1977 Treaty"). The names of the two contracting States have varied over the years; they are referred to as Hungary and Czechoslovakia. The 1977 Treaty entered into force on 30 June 1978. It provides for the construction and operation of a System of Locks by the parties as a "joint investment". According to its Preamble, the system was designed to attain "the broad utilization of the natural resources of the Bratislava-Budapest section of the Danube river for the development of water resources, energy, transport, agriculture and other sectors of the national economy of the Contracting Parties". The joint investment was thus essentially aimed at the production of hydroelectricity, the improvement of navigation on the relevant section of the Danube and the protection of the areas along the banks against flooding. At the same time, by the terms of the Treaty, the contracting parties undertook to ensure that the quality of water in the Danube was not impaired as a result of the Project, and that compliance with the obligations for the protection of nature arising in connection with the construction and operation of the System of Locks would be observed.

The sector of the Danube river with which this case is concerned is a stretch of approximately 200 kilometres, between Bratislava in Slovakia and Budapest in Hungary. Below Bratislava, the river gradient decreases markedly, creating an alluvial plain of gravel and sand sediment. The boundary between the two States is constituted, in the major part of that region, by the main channel of the river. Cunovo and, further downstream, Gabcíkovo, are situated in this sector of the river on Slovak territory, Cunovo on the right bank and Gabcíkovo on the left. Further downstream, after the confluence of the various branches, the river enters Hungarian territory. Nagymaros lies in a narrow valley at a bend in the Danube just before it turns south, enclosing the large river island of Szentendre before reaching Budapest (*see sketch-map No. 1*).

The 1977 Treaty describes the principal works to be constructed in pursuance of the Project. It provided for the building of two series of locks, one at Gabcíkovo (in Czechoslovak territory) and the other at Nagymaros (in Hungarian territory), to constitute "a single and indivisible operational system of works" (*see sketch-map No. 2*). The Treaty further provided that the technical specifications concerning the system would be included in the "Joint Contractual Plan" which was to be drawn up in accordance with the Agreement signed by the two Governments for this purpose on 6 May 1976. It also provided for the construction, financing and management of the works on a joint basis in which the Parties participated in equal measure.

The Joint Contractual Plan, set forth, on a large number of points, both the objectives of the system and the characteristics of the works. It also contained "Preliminary Operating and Maintenance Rules", Article 23 of which specified that "The final operating rules [should] be approved within a year of the setting into operation of the system."

The Court observes that the Project was thus to have taken the form of an integrated joint project with the two contracting parties on an equal footing in respect of the financing, construction and operation of the works. Its single and indivisible nature was to have been realized through the Joint Contractual Plan which complemented the Treaty. In particular, Hungary would have had control of the sluices at Dunakiliti and the works at Nagymaros, whereas Czechoslovakia would have had control of the works at Gabcíkovo.

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The schedule of work had for its part been fixed in an Agreement on mutual assistance signed by the two parties on 16 September 1977, at the same time as the Treaty itself. The Agreement made some adjustments to the allocation of the works between the parties as laid down by the Treaty. Work on the Project started in 1978. On Hungary's initiative, the two parties first agreed, by two Protocols signed on 10 October 1983 to slow the work down and to postpone putting into operation the power plants, and then, by a Protocol signed on 6 February 1989 to accelerate the Project.

As a result of intense criticism which the Project had generated in Hungary, the Hungarian Government decided on 13 May 1989 to suspend the works at Nagymaros pending the completion of various studies which the competent authorities were to finish before 31 July 1989. On 21 July 1989, the Hungarian Government extended the suspension of the works at Nagymaros until 31 October 1989, and, in addition, suspended the works at Dunakiliti until the same date. Lastly, on 27 October 1989, Hungary decided to abandon the works at Nagymaros and to maintain the status quo at Dunakiliti.

During this period, negotiations took place between the parties. Czechoslovakia also started investigating alternative solutions. One of them, an alternative solution subsequently known as "Variant C", entailed a unilateral diversion of the Danube by Czechoslovakia on its territory some 10 kilometres upstream of Dunakiliti (*see sketch-map No. 3*). In its final stage, Variant C included the construction at Cunovo of an overflow dam and a levee linking that dam to the south bank of the bypass canal. Provision was made for ancillary works.

On 23 July 1991, the Slovak Government decided "to begin, in September 1991, construction to put the Gabcíkovo Project into operation by the provisional solution". Work on Variant C began in November 1991. Discussions continued between the two parties but to no avail, and, on 19 May 1992, the Hungarian Government transmitted to the Czechoslovak Government a Note Verbale terminating the 1977 Treaty with effect from 25 May 1992. On 15 October 1992, Czechoslovakia began work to enable the Danube to be closed and, starting on 23 October, proceeded to the damming of the river.

The Court finally takes note of the fact that on 1 January 1993 Slovakia became an independent State; that in the Special Agreement thereafter concluded between Hungary and Slovakia the Parties agreed to establish and implement a temporary water management regime for the Danube; and that finally they concluded an Agreement in respect of it on 19 April 1995, which would come to an end 14 days after the Judgment of the Court. The Court also observes that not only the 1977 Treaty, but also the "related instruments" are covered in the preamble to the Special Agreement and that the Parties, when concentrating their reasoning on the 1977 Treaty, appear to have extended their arguments to the "related instruments".

Suspension and abandonment by Hungary, in 1989, of works on the Project
(paras. 27-59)

In terms of Article 2, paragraph 1 (a), of the Special Agreement, the Court is requested to decide first

> "whether the Republic of Hungary was entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the

Gabcíkovo Project for which the Treaty attributed responsibility to the Republic of Hungary".

The Court observes that it has no need to dwell upon the question of the applicability or non-applicability in the present case of the Vienna Convention of 1969 on the Law of Treaties, as argued by the Parties. It needs only to be mindful of the fact that it has several times had occasion to hold that some of the rules laid down in that Convention might be considered as a codification of existing customary law. The Court takes the view that in many respects this applies to the provisions of the Vienna Convention concerning the termination and the suspension of the operation of treaties, set forth in Articles 60 to 62. Neither has the Court lost sight of the fact that the Vienna Convention is in any event applicable to the Protocol of 6 February 1989 whereby Hungary and Czechoslovakia agreed to accelerate completion of the works relating to the Gabcíkovo-Nagymaros Project.

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

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

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

The Court observes, first of all, that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It considers moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis. The following basic conditions set forth in Article 33 of the Draft Article on the International Responsibility of States by the International Law Commission are relevant in the present case: it must have been occasioned by an "essential interest" of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a "grave and imminent peril"; the act being challenged must have been the "only means" of safeguarding that interest; that act must not have "seriously impair[ed] an essential interest" of the State towards which the obligation existed; and the State which is the author of that act must not have "contributed to the occurrence of the state of necessity". Those conditions reflect customary international law.

The Court has no difficulty in acknowledging that the concerns expressed by Hungary for its natural environment in the region affected by the Gabcíkovo-Nagymaros Project related to an "essential interest" of that State.

It is of the view, however, that, with respect to both Nagymaros and Gabcíkovo, the perils invoked by Hungary, without prejudging their possible gravity, were not sufficiently established in 1989, nor were they "imminent"; and that Hungary had available to it at that time means of responding to these perceived perils other than the suspension and abandonment of works with which it had been entrusted. What is more, negotiations were under way which might have led to a review of the Project and the extension of some of its time limits, without there being need to abandon it.

The Court further notes that Hungary when it decided to conclude the 1977 Treaty, was presumably aware of the situation as then known; and that the need to ensure the protection of the environment had not escaped the parties. Neither can it fail to note the positions taken by Hungary after the entry into force of the 1977 Treaty. Slowly, speeded up. The Court infers that, in the present case, even if it had been established that there was, in 1989, a state of necessity linked to the performance of the 1977 Treaty, Hungary would not have been permitted to rely upon that state of necessity in order to justify its failure to comply with its treaty obligations, as it had helped, by act or omission to bring it about.

In the light of the conclusions reached above, the Court finds that Hungary was not entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabcíkovo Project for which the 1977 Treaty and related instruments attributed responsibility to it.

Czechoslovakia's proceeding, in November 1991, to "Variant C" and putting into operation, from October 1992, this Variant
(paras. 60-88)

By the terms of Article 2, paragraph 1 (b), of the Special Agreement, the Court is asked in the second place to decide

> "(*b*) whether the Czech and Slovak Federal Republic was entitled to proceed, in November 1991, to the 'provisional solution' and to put into operation from October 1992 this system".

Czechoslovakia had maintained that proceeding to Variant C and putting it into operation did not constitute internationally wrongful acts; Slovakia adopted this argument. During the proceedings before the Court Slovakia contended that Hungary's decision to suspend and subsequently abandon the construction of works at Dunakiliti had made it impossible for Czechoslovakia to carry out the works as initially contemplated by the 1977 Treaty and that the latter was therefore entitled to proceed with a solution which was as close to the original Project as possible. Slovakia invoked what it described as a "principle of approximate application" to justify the construction and operation of Variant C. It explained that this was the only possibility remaining to it "of fulfilling not only the purposes of the 1977 Treaty, but the continuing obligation to implement it in good faith".

The Court observes that it is not necessary to determine whether there is a principle of international law or a general principle of law of "approximate application" because, even if such a principle existed, it could by definition only be employed within the limits of the treaty in question. In the view of the Court, Variant C does not meet that cardinal condition with regard to the 1977 Treaty.

As the Court has already observed, the basic characteristic of the 1977 Treaty is, according to Article 1, to provide for the construction of the Gabcíkovo-Nagymaros System of Locks as a joint investment constituting a single and indivisible operational system of works. This element is equally reflected in Articles 8 and 10 of the Treaty providing for joint ownership of the most important works of the Gabcíkovo-Nagymaros project and for the operation of this joint property as a coordinated single unit. By definition all this could not be carried out by unilateral action. In spite of having a certain external physical similarity with the original Project, Variant C thus differed sharply from it in its legal characteristics. The Court accordingly concludes that Czechoslovakia, in putting Variant C into operation, was not applying the 1977 Treaty but, on the contrary, violated certain of its express provisions, and, in so doing, committed an internationally wrongful act.

The Court notes that between November 1991 and October 1992, Czechoslovakia confined itself to the execution, on its own territory, of the works which were necessary for the implementation of Variant C, but which could have been abandoned if an agreement had been reached between the parties and did not therefore predetermine the final decision to be taken. For as long as the Danube had not been unilaterally dammed, Variant C had not in fact been applied. Such a situation is not unusual in international law or, for that matter, in domestic law. A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which is of a preparatory character and which "does not qualify as a wrongful act".

Slovakia also maintained that it was acting under a duty to mitigate damages when it carried out Variant C. It stated that "It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained." But the Court observes that, while this principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act. The Court further considers that the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate.

In the light of the conclusions reached above, the Court finds that Czechoslovakia was entitled to proceed, in November 1991, to Variant C insofar as it then confined itself to undertaking works which did not predetermine the final decision to be taken by it. On the other hand, Czechoslovakia was not entitled to put that Variant into operation from October 1992.

Notification by Hungary, on 19 May 1992, of the termination of the 1977 Treaty and related instruments
(paras. 89-115)

By the terms of Article 2, paragraph 1 (c), of the Special Agreement, the Court is asked, thirdly, to determine

> "what are the legal effects of the notification, on 19 May 1992, of the termination of the Treaty by the Republic of Hungary".

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

State of necessity

The Court observes that, even if a state of necessity is found to exist, it is not a ground for the termination of a treaty. It may only be invoked to exonerate from its responsibility a State which has failed to implement a treaty.

Impossibility of performance

The Court finds that it is not necessary to determine whether the term "object" in Article 61 of the Vienna Convention of 1969 on the Law of Treaties (which speaks of "permanent disappearance or destruction of an object indispensable for the execution of the treaty" as a ground for terminating or withdrawing from it) can also be understood to embrace a legal regime as in any event, even if that were the case, it would have to conclude that in this instance that regime had not definitively ceased to exist. The 1977 Treaty — and in particular its Articles 15, 19 and 20 — actually made available to the parties the necessary means to

proceed at any time, by negotiation, to the required readjustments between economic imperatives and ecological imperatives.

Fundamental change of circumstances

In the Court's view, the prevalent political conditions were not so closely linked to the object and purpose of the Treaty that they constituted an essential basis of the consent of the parties and, in changing, radically altered the extent of the obligations still to be performed. The same holds good for the economic system in force at the time of the conclusion of the 1977 Treaty. Nor does the Court consider that new developments in the state of environmental knowledge and of environmental law can be said to have been completely unforeseen. What is more, the formulation of Articles 15, 19 and 20 is designed to accommodate change. The changed circumstances advanced by Hungary are thus, in the Court's view, not of such a nature, either individually or collectively, that their effect would radically transform the extent of the obligations still to be performed in order to accomplish the Project.

Material breach of the Treaty

Hungary's main argument for invoking a material breach of the Treaty was the construction and putting into operation of Variant C. The Court pointed out that it had already found that Czechoslovakia violated the Treaty only when it diverted the waters of the Danube into the bypass canal in October 1992. In constructing the works which would lead to the putting into operation of Variant C, Czechoslovakia did not act unlawfully. In the Court's view, therefore, the notification of termination by Hungary on 19 May 1992 was premature. No breach of the Treaty by Czechoslovakia had yet taken place and consequently Hungary was not entitled to invoke any such breach of the Treaty as a ground for terminating it when it did.

Development of new norms of international environmental law

The Court notes that neither of the Parties contended that new peremptory norms of environmental law had emerged since the conclusion of the 1977 Treaty; and the Court will consequently not be required to examine the scope of Article 64 of the Vienna Convention on the Law of Treaties (which treats of the voidance and termination of a treaty because of the emergence of a new peremptory norm of general international law (*jus cogens*)). On the other hand, the Court wishes to point out that newly developed norms of environmental law are relevant for the implementation of the Treaty and that the parties could, by agreement, incorporate them through the application of Articles 15, 19 and 20 of the Treaty. These articles do not contain specific obligations of performance but require the parties, in carrying out their obligations to ensure that the quality of water in the Danube is not impaired and that nature is protected, to take new environmental norms into consideration when agreeing upon the means to be specified in the Joint Contractual Plan. By inserting these evolving provisions in the Treaty, the parties recognized the potential necessity to adapt the Project. Consequently, the Treaty is not static, and is open to adapt to emerging norms of international law. By means of Articles 15 and 19, new environmental norms can be incorporated in the Joint Contractual Plan. The awareness of the vulnerability of the environment and the recognition that environmental risks have to be assessed on a continuous basis have become much stronger in the years since the Treaty's conclusion. These new concerns have enhanced the relevance of Articles 15, 19 and 20. The Court recognizes that both Parties agree on the need to take environmental concerns seriously and to take the required precautionary measures, but they fundamentally disagree on the consequences this has for the joint Project. In such a case, third-party involvement may be helpful and instrumental in finding a solution, provided each of the Parties is flexible in its position.

Finally, the Court is of the view that although it has found that both Hungary and Czechoslovakia failed to comply with their obligations under the 1977 Treaty, this reciprocal wrongful conduct did not bring the Treaty to an end nor justify its termination.

In the light of the conclusions it has reached above, the Court finds that the notification of termination by Hungary of 19 May 1992 did not have the legal effect of terminating the 1977 Treaty and related instruments.

Dissolution of Czechoslovakia
(paras. 117-124)

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

The Court does not find it necessary for the purposes of the present case to enter into a discussion of whether or not Article 34 of the 1978 Vienna Convention on Succession of States in respect of treaties (in which a rule of automatic succession to all treaties is provided for) reflects the state of customary international law. More relevant to its present analysis is the particular nature and character of the 1977 Treaty. An examination of this Treaty confirms that, aside from its undoubted nature as a joint investment, its major elements were the proposed construction and joint operation of a large, integrated and indivisible complex of structures and installations on specific parts of the respective territories of Hungary and Czechoslovakia along the Danube. The Treaty also established the navigational regime for an important sector of an international waterway, in particular the relocation of the main international shipping lane to the bypass canal. In so doing, it inescapably created

a situation in which the interests of other users of the Danube were affected. Furthermore, the interests of third States were expressly acknowledged in Article 18, whereby the parties undertook to ensure "uninterrupted and safe navigation on the international fairway" in accordance with their obligations under the Convention of 18 August 1948 concerning the Régime of Navigation on the Danube.

The Court then refers to Article 12 of the 1978 Vienna Convention on Succession of States in respect of Treaties, which reflects the principle that treaties of a territorial character have been regarded both in traditional doctrine and in modern opinion as unaffected by a succession of States. The Court considers that Article 12 reflects a rule of customary international law; and notes that neither of the Parties disputed this. It concludes that the content of the 1977 Treaty indicates that it must be regarded as establishing a territorial regime within the meaning of Article 12 of 1978 Vienna Convention. It created rights and obligations "attaching to" the parts of the Danube to which it relates; thus the Treaty itself could not be affected by a succession of States. The Court therefore concludes that the 1977 Treaty became binding upon Slovakia on 1 January 1993.

Legal consequences of the Judgment
(paras. 125-154)

The Court observes that the part of its Judgment which answers the questions in Article 2, paragraph 1, of the Special Agreement has a declaratory character. It deals with the past conduct of the Parties and determines the lawfulness or unlawfulness of that conduct between 1989 and 1992 as well as its effects on the existence of the Treaty. Now the Court has, on the basis of the foregoing findings, to determine what the *future* conduct of the Parties should be. This part of the Judgment is prescriptive rather than declaratory because it determines what the rights and obligations of the Parties are. The Parties will have to seek agreement on the modalities of the execution of the Judgment in the light of this determination, as they agreed to do in Article 5 of the Special Agreement.

In this regard it is of cardinal importance that the Court has found that the 1977 Treaty is still in force and consequently governs the relationship between the Parties. That relationship is also determined by the rules of other relevant conventions to which the two States are party, by the rules of general international law and, in this particular case, by the rules of State responsibility; but it is governed, above all, by the applicable rules of the 1977 Treaty as a *lex specialis*. The Court observes that it cannot, however, disregard the fact that the Treaty has not been fully implemented by either party for years, and indeed that their acts of commission and omission have contributed to creating the factual situation that now exists. Nor can it overlook that factual situation — or the practical possibilities and impossibilities to which it gives rise — when deciding on the legal requirements for the future conduct of the Parties. What is essential, therefore, is that the factual situation as it has developed since 1989 shall be placed within the context of the preserved and developing treaty relationship, in order to achieve its object and purpose insofar as that is feasible. For it is only then that the irregular state of affairs which exists as the result of the failure of both Parties to comply with their treaty obligations can be remedied.

The Court points out that the 1977 Treaty is not only a joint investment project for the production of energy, but it was designed to serve other objectives as well: the improvement of the navigability of the Danube, flood control and regulation of ice-discharge, and the protection of the natural environment. In order to achieve these objectives the parties accepted obligations of conduct, obligations of performance, and obligations of result. The Court is of the opinion that the Parties are under a legal obligation, during the negotiations to be held by virtue of Article 5 of the Special Agreement, to consider, within the context of the 1977 Treaty, in what way the multiple objectives of the Treaty can best be served, keeping in mind that all of them should be fulfilled.

It is clear that the Project's impact upon, and its implications for, the environment are of necessity a key issue. In order to evaluate the environmental risks, current standards must be taken into consideration. This is not only allowed by the wording of Articles 15 and 19, but even prescribed, to the extent that these articles impose a continuing — and thus necessarily evolving — obligation on the parties to maintain the quality of the water of the Danube and to protect nature. The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage. New norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. For the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment of the operation of the Gabcíkovo power plant. In particular they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river.

What is required in the present case by the rule *pacta sunt servanda*, as reflected in Article 26 of the Vienna Convention of 1969 on the Law of Treaties, is that the Parties find an agreed solution within the co-operative context of the Treaty. Article 26 combines two elements, which are of equal importance. It provides that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith". This latter element, in the Court's view, implies that, in this case, it is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application. The principle of good faith obliges the Parties to apply it in a

reasonable way and in such a manner that its purpose can be realized.

The 1977 Treaty not only contains a joint investment programme, it also establishes a regime. According to the Treaty, the main structures of the System of Locks are the joint property of the Parties; their operation will take the form of a coordinated single unit; and the benefits of the project shall be equally shared. Since the Court has found that the Treaty is still in force and that, under its terms, the joint regime is a basic element, it considers that, unless the Parties agree otherwise, such a regime should be restored. The Court is of the opinion that the works at Cunovo should become a jointly operated unit within the meaning of Article 10, paragraph 1, in view of their pivotal role in the operation of what remains of the Project and for the water-management regime. The dam at Cunovo has taken over the role which was originally destined for the works at Dunakiliti, and therefore should have a similar status. The Court also concludes that Variant C, which it considers operates in a manner incompatible with the Treaty, should be made to conform to it. It observes that re-establishment of the joint regime will also reflect in an optimal way the concept of common utilization of shared water resources for the achievement of the several objectives mentioned in the Treaty.

Having thus far indicated what in its view should be the effects of its finding that the 1977 Treaty is still in force, the Court turns to the legal consequences of the internationally wrongful acts committed by the Parties, as it had also been asked by both Parties to determine the consequences of the Judgment as they bear upon payment of damages.

The Court has not been asked at this stage to determine the quantum of damages due, but to indicate on what basis they should be paid. Both Parties claimed to have suffered considerable financial losses and both claim pecuniary compensation for them.

In the Judgment, the Court has concluded that both Parties committed internationally wrongful acts, and it has noted that those acts gave rise to the damage sustained by the Parties; consequently, Hungary and Slovakia are both under an obligation to pay compensation and are both entitled to obtain compensation. The Court observes, however, that given the fact, that there have been intersecting wrongs by both Parties, the issue of compensation could satisfactorily be resolved in the framework of an overall settlement if each of the Parties were to renounce or cancel all financial claims and counter-claims. At the same time, the Court wishes to point out that the settlement of accounts for the construction of the works is different from the issue of compensation, and must be resolved in accordance with the 1977 Treaty and related instruments. If Hungary is to share in the operation and benefits of the Cunovo complex, it must pay a proportionate share of the building and running costs.

Declaration of President Schwebel

I am largely in agreement with the Court's Judgment and accordingly I have voted for most of its operative paragraphs. I have voted against operative paragraph 1 B essentially because I view the construction of "Variant C", the "provisional solution", as inseparable from its being put into operation. I have voted against operative paragraph 1 D essentially because I am not persuaded that Hungary's position as the Party initially in breach deprived it of a right to terminate the Treaty in response to Czechoslovakia's material breach, a breach which in my view (as indicated by my vote on paragraph 1 B) was in train when Hungary gave notice of termination.

At the same time, I fully support the conclusions of the Court as to what should be the future conduct of the Parties and as to disposition of issues of compensation.

Declaration of Judge Rezek

Judge Rezek considers that the 1977 Treaty is no longer in existence, since it has been abrogated by the attitude of the two Parties. From that conclusion, however, he infers consequences very similar to those which the majority infers from the continued existence of the treaty. First, there is what has been accomplished, and accomplished in good faith. There is, also and above all, the very principle of good faith which must lead here to the fulfilment of reciprocal duties remaining from a treaty which has not been implemented through the reciprocal fault of the two Parties.

Separate opinion of Vice-President Weeramantry

Judge Weeramantry agreed with the majority of the Court in all their conclusions.

However, in his separate opinion, he addressed three questions dealing with aspects of environmental law — the principle of sustainable development in balancing the competing demands of development and environmental protection, the principle of continuing environmental impact assessment, and the question of the appropriateness of the use of an *inter partes* legal principle such as estoppel in the resolution of issues with *erga omnes* implications such as a claim that environmental damage is involved.

On the first question, his opinion states that both the right to development and the right to environmental protection are principles currently forming part of the corpus of international law. They could operate in collision with each other unless there was a principle of international law which indicated how they should be reconciled. That principle is the principle of sustainable development which, according to this opinion, is more than a mere concept, but is itself a recognized principle of contemporary international law.

In seeking to develop this principle, the Court should draw upon prior human experience, for humanity has lived for millennia with the need to reconcile the principles of development and care for the environment. Sustainable development is therefore not a new concept and, for developing it today, a rich body of global experience is available. The opinion examines a number of ancient irrigation civilizations for this purpose. The Court, as representing the main forms of civilization, needs to draw

upon the wisdom of all cultures, especially in regard to areas of international law which are presently in a developmental phase. Among the principles that can be so derived from these cultures are the principles of trusteeship of earth resources, intergenerational rights, protection of flora and fauna, respect for land, maximization of the use of natural resources while preserving their regenerative capacity, and the principle that development and environmental protection should go hand in hand.

In his opinion, Judge Weeramantry stresses the importance of continuous environmental impact assessment of a project as long as it continues in operation. The duty of environmental impact assessment is not discharged merely by resort to such a procedure before the commencement of a project. The standards to be applied in such continuous monitoring are the standards prevalent at the time of assessment and not those in force at the commencement of the project.

The third aspect of environmental law referred to is the question whether principles of estoppel which might operate between parties are appropriate in matters such as those relating to the environment, which are of concern not merely to the two Parties, but to a wider circle. Questions involving duties of an *erga omnes* nature may not always be appropriately resolved by rules of procedure fashioned for *inter partes* disputes. Judge Weeramantry draws attention to this aspect as one which will need careful consideration.

Separate opinion of Judge Bedjaoui

Judge Bedjaoui considers that the majority of the Court has not sufficiently clarified the question of applicable law and that of the nature of the 1977 Treaty. On the first point, he states that an "*evolutionary interpretation*" of the 1977 Treaty can only be applied if the general rule of interpretation in Article 31 of the Vienna Convention on the Law of Treaties is respected, and that the "*definition*" of a concept must not be confused with the "*law*" applicable to that concept, nor should the "*interpretation*" of a treaty be confused with its "*revision*". Judge Bedjaoui recommends that subsequent law be taken into account only in very special situations. This applies in the present case. It is the first major case brought before the Court in which the ecological background is so sensitive that it has moved to centre stage, threatening to divert attention from treaty law. International opinion would not have understood had the Court disregarded the new law, the application of which was demanded by Hungary. Fortunately, the Court has been able to graft the new law on to the stock of Articles 15, 19 and 20 of the 1977 Treaty. Nor was Slovakia opposed to taking this law into consideration. However, in applying the so-called principle of the *evolutionary interpretation* of a treaty in the present case, the Court should have clarified the issue more and should have recalled that the general rule governing the interpretation of a treaty remains that set out in Article 31 of the 1969 Vienna Convention.

As for the *nature* of the 1977 Treaty and its related instruments, in Judge Bedjaoui's view this warranted more attention from the majority of the Court. It is a crucial question. The nature of the Treaty largely conditions the succession of Slovakia to this instrument, which constitutes the substance of the applicable law, and which remains in force despite *intersecting violations* by both Parties.

The 1977 Treaty (including related instruments) has the threefold characteristic

— of being a *territorial treaty*,

— of being a treaty to which Slovakia validly *succeeded*, and

— of being a treaty which is still *in force today*.

In substance, Judge Bedjaoui does not share the opinion of the majority of the Court as to the legal characterization of Variant C, which he considers to be an offence, the unlawfulness of which affects each of the acts of the construction of this variant. The construction could be neither innocent nor neutral; it bore the stamp of the end purpose of Variant C, which was the diversion of the waters of the river. It is therefore not possible to separate construction on the one hand and diversion on the other; Variant C as a whole is unlawful.

On a different subject, Judge Bedjaoui considers that both Parties, Hungary just as much as Slovakia, have breached the 1977 Treaty. The situation created by them is characterized by *intersecting violations* countering each other. However it is not easy to determine the links of cause and effect in each case with certainty. The acts and conduct of the Parties sometimes intercut. A deep mutual distrust has unfortunately characterized relations between the parties for many years.

On the ground, these *intersecting violations* gave rise to a reality which the majority of the Court did not deem it useful to characterize. For Judge Bedjaoui it seemed necessary and important to note that these intersecting violations created *two effectivités* which will continue to mark the landscape of the region in question.

Judge Bedjaoui indicated *the significance to be attached to taking account of the effectivités*. In this case, taking account of the *effectivités* is not tantamount to a negation of the title. The title does not disappear; it merely adapts and does so, moreover, through involving the responsibility of the authors of these *effectivités*, who will be liable for all the necessary compensation.

These *effectivités*, adapted as they have been or will be to fit the mould of a new treaty, may have breached and exceeded the existing law, but the law reins them in and governs them again in three ways:

— these *effectivités* do not kill the Treaty, which survives them;

— these *effectivités* do not go unpunished and entail sanctions and compensation;

— and above all, these *effectivités* will be "recast", or inserted into the Treaty, whose new content to be negotiated will serve as a *legitimizing text* for them.

Judge Bedjaoui finally turns to the necessity for the Parties *to negotiate again and to do so in good faith*. The renegotiation must be seen as a strict obligation, exactly like the good faith conduct it implies. This obligation flows not

only from the Treaty itself, but also from general international law as it has developed in the spheres of international watercourses and the environment.

Separate opinion of Judge Koroma

In his separate opinion, Judge Koroma stated that he supported the Court's findings that Hungary was not entitled to suspend and subsequently to abandon the works on the Project for which the Treaty had attributed responsibility to it, and that the Treaty continues to be in force. These findings, in his view, were not only in accordance with the Treaty but with the principle of *pacta sunt servanda*, one of the foremost principles of international law and indeed an integral part of it. In Judge Koroma's view a contrary finding would have suggested that at any time a State might unilaterally repudiate any treaty when it found its obligation to be inconvenient; this, he maintained, would seriously undermine the principle of *pacta sunt servanda* and the whole treaty relationship.

While he shares the Court's understanding of Hungary's concern about the effects of the Project on its natural environment, he agreed that the material before the Court could not justify the unilateral repudiation of the Treaty.

Judge Koroma, however, disagreed with the finding of the Court that Czechoslovakia was not entitled to put Variant C into operation. He felt that this finding did not give sufficient weight to the provisions of the Treaty, nor to the financial damage and environmental harm that Czechoslovakia would have incurred and endured had the Project been left uncompleted as Hungary's action dictated. He regarded Variant C as a genuine attempt to implement the Treaty so as to realize its aim and objective.

He also did not agree that the Court appeared to treat the consequences of the Parties' "wrongful conduct" as if they were equivalent.

Dissenting opinion of Judge Oda

Judge Oda has voted against operative paragraph 1 C, since, in his view, not only the construction, but also the operation of the Cunovo dam was simply the execution of the Project as described in the 1977 Treaty between Czechoslovakia and Hungary concerning the Gabcíkovo-Nagymaros System of Locks. He considers that the provisional solution, Variant C, was the only possible option for fulfilment of the original Project on the river Danube. Judge Oda does not understand why the Court decided that, while the construction of Variant C — that is to say, the Cunovo dam — is lawful, the operation of it is a wrongful act.

Judge Oda made a clear distinction between the Joint Contractual Plan (JCP), as the execution of the Project, and the 1977 Treaty, which underlies the whole Project and which had been worked out over a period of several decades. The JCP, which is similar to a "partnership" contract should have been subject to amendment and revision, as proved necessary, in a more flexible manner.

The fundamental purpose of the 1977 Treaty was, in his view, to carry out the construction of the bypass canal and of the power plants at the dams of Gabcíkovo and Nagymaros. Firstly, Hungary's failure to perform its treaty obligations cannot be justified on the basis of the new international norm of environmental protection. The whole Project and the 1977 Treaty, in particular, were undoubtedly sketched out in the 1970s with due consideration for the environment of the river Danube. There is no proof with which to overturn this assumption. Secondly, it was not a violation of the Treaty for Czechoslovakia to proceed to the provisional solution — Variant C — as the only option open to it in order to carry out the basic Project in the event of Hungary failing to fulfil its obligation to construct the Dunakiliti dam.

With regard to future negotiations between the Parties on the modalities of the execution of the Judgment, as agreed upon in the Special Agreement, Judge Oda suggests that the JCP be modified in order to include the work on the Cunovo dam which enabled the whole Project to be accomplished. As far as the environment is concerned, the Parties should proceed to an assessment of the environment of the river Danube in an effort to seek out technological solutions limiting or remedying any environmental damage caused by Czechoslovakia's construction of the bypass canal and Hungary's abandonment of the Nagymaros dam.

The damages and losses suffered by Czechoslovakia owing to Hungary's failure to fulfil its Treaty obligations must be compensated. However, Hungary's abandonment of the Nagymaros dam, though that dam formed a part of the whole Project, did not cause any practical damage to Czechoslovakia. Hungary must bear a part of the cost of construction of the Cunovo dam, as that work gave life to the whole Project. It may well be admitted, however, that the whole Project (that is, the bypass canal and the Gabcíkovo power plant on that canal) are simply of benefit to Czechoslovakia and Slovakia, and that Hungary has nothing to gain from it. This point should be taken into account when the matter of compensation for loss and damage to be paid by Hungary to Slovakia is considered.

Dissenting opinion of Judge Ranjeva

Judge Ranjeva disagreed with the majority of the Court in that in paragraph 155 1 C the Judgment restricts the unlawfulness of Variant C to its being put into operation and maintained in service to date. Judge Ranjeva first remarks that there is a contradiction in terms of logic between subparagraphs B and C of this same paragraph of the operative part. How can the construction of this Variant C be acknowledged to be lawful at the same time as putting it into operation is declared to be unlawful? The Judgment, in his opinion, came to this conclusion because it restricted the significance of the reciprocal wrongs ascribable to Hungary and to Czechoslovakia and Slovakia to the sole issue of the obligation to compensate for the consequences of the damage; in so doing, the Court resurrected a rule of Roman law, the rule of Pomponius. However the Court failed to examine the significance of these intersecting wrongs on

another point: the causality in the sequence of events leading to the situation which is the subject of the dispute before the Court. For Judge Ranjeva, the circumstances of fact against a background of chaotic relations marked by distrust and suspicion not only made it difficult to identify the original cause of this situation but above all resulted in the fact that a wrong committed by one of the Parties triggered off a wrong committed by the other. Taking a position counter to the linear analysis of the Court, for the author it is not a matter of several wrongs which merely succeed each other but of distinct wrongs which gradually contributed to creating the situation which is the subject of the present dispute. The conclusion drawn by Judge Ranjeva is that the unlawfulness of the Hungarian decision, a decision which was undeniably unlawful, was not the cause but the ground or motive taken into consideration by Czechoslovakia then by Slovakia in order to justify their subsequent conduct. The second conclusion reached by the author relates to the lawfulness of Variant C. In his opinion, the distinction made between proceeding to the provisional solution and putting into operation is in fact an artificial one; it would have been plausible if there had been true equipollence between these two elements and if one of the elements could not absorb the other. Proceeding to the provisional solution was significant only if it was carried through. Thus the unlawfulness of Variant C, for Judge Ranjeva, resided not so much in its construction or commissioning, or even in the diversion of the Danube, but in replacing an international project by a national project; Variant C could not be related to any obligation under the 1977 Treaty once the Court rightly dismissed the idea of an approximate application or of an obligation to limit damage in treaty law.

Dissenting opinion of Judge Herczegh

The dissenting opinion exhaustively presents the case for the existence of a state of necessity on the part of Hungary with regard to the construction of the Nagymaros dam. It holds that not only the putting into operation by Czechoslovakia of the "provisional solution", called "Variant C", but also the proceeding to this solution constituted a serious breach of the 1977 Treaty. Hungary was therefore justified in terminating the Treaty. Judge Herczegh consequently voted against the points of the operative part which refer expressly to the Treaty, but voted for mutual compensation by Slovakia and by Hungary for the damage each sustained on account of the construction of the system of locks forming the subject of the dispute.

Dissenting opinion of Judge Fleischhauer

Judge Fleischhauer dissents on the Court's central finding that Hungary's notification of 19 May 1992 of the termination of the 1977 Treaty did not have the effect of terminating it, as the notification is found to have been premature and as Hungary is said to have forfeited its right to terminate by its own earlier violation of the Treaty. The Judge shares the finding of the Court that Hungary has violated its obligations under the 1977 Treaty when it suspended, in 1989, and later abandoned, its share in the works on the Nagymaros and on part of the Gabcíkovo Project. He also agrees with the conclusion that Czechoslovakia was not entitled to put into operation, as from October 1992, Variant C, a unilateral solution which implies the appropriation by Czechoslovakia and later Slovakia, essentially for its own use, of 80 to 90 per cent of the waters of the Danube in the Treaty area, and is therefore not proportionate. However, he is of the view that when Czechoslovakia, in November 1991, moved into construction of Variant C, the point of no return was passed on both sides; at that point in time it was certain that neither would Hungary come back to the Treaty nor would Czechoslovakia agree to further delaying the damming of the Danube. The internationally wrongful act therefore was not confined to the actual damming of the river, but started in November 1991, more than six months prior to Hungary's notification of termination. Judge Fleischhauer thinks, moreover, that Hungary, although it had breached the Treaty first, had not forfeited its right to react to Variant C by termination of the Treaty, because international law does not condone retaliation that goes beyond the limits of proportionality. In situations like this, the corrective element rather lies in a limitation of the first offender's right to claim redress. As he considers the validity of the Treaty as having lapsed, he has voted against the conclusions of the Court on the consequences of the Judgment inasmuch as they are based on the continuing validity of the Treaty (2 A, B, C, E). In his view the installations on Slovak territory do not have to be dismantled, but in order to lawfully continue to use them Slovakia will have to negotiate with Hungary a water-management regime. Hungary does not have to construct Nagymaros any more, but Slovakia is no longer committed to the joint running of the Project.

Dissenting opinion of Judge Vereshchetin

Judge Vereshchetin takes the view that Czechoslovakia was fully entitled in international law to put into operation from October 1992 the "provisional solution" (Variant C) as a countermeasure so far as its partner in the Treaty persisted in violating its obligations. Therefore, he could not associate himself with paragraph 155 1 C of the Judgment, nor fully with paragraph 155 2 D.

According to the Court's jurisprudence, established wrongful acts justify "proportionate countermeasures on the part of the State which ha[s] been the victim of these acts ..." (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Judgment, I.C.J. Reports 1986*, p. 127, para. 249). In the view of Judge Vereshchetin, all the basic conditions for a countermeasure to be lawful were met when Czechoslovakia put Variant C into operation in October 1992. These conditions include: (1) the presence of a prior illicit act, committed by the State at which the countermeasure is targeted; (2) the necessity of the countermeasure; and (3) its proportionality in the circumstances of the case.

Recognizing that the test of proportionality is very important in the regime of countermeasures, Judge

Vereshchetin believes the Court should have assessed and compared separately: (1) the economic and financial effects of the breach as against the economic and financial effects of the countermeasure; (2) the environmental effects of the breach as against the environmental effects of the countermeasure; and (3) the effects of the breach on the exercise of the right to use commonly shared water resources as against the effects of the countermeasure on the exercise of this right.

Judge Vereshchetin makes his assessment of those effects and observes in conclusion that even assuming that Czechoslovakia, as a matter of equity, should have discharged more water than it actually did into the old river bed, this assumption would have related to only one of the many aspects of the proportionality of the countermeasure, which could not in itself warrant the general conclusion of the Court that Czechoslovakia was not entitled to put Variant C into operation from October 1992.

Dissenting opinion of Judge Parra-Aranguren

My vote against paragraph 1 C of the operative part of the Judgment is the consequence of the recognition that Hungary was not entitled to suspend and subsequently abandon, in 1989, the works which were its responsibility, in accordance with the Treaty of 16 September 1977 and related instruments. Because of that the position of Czechoslovakia was extremely difficult, not only for the huge sums invested so far but also for the environmental consequences of leaving unfinished and useless the constructions already in place, almost complete in some sections of the Gabcíkovo Project. Faced with that situation, in my opinion, Czechoslovakia was entitled to take all necessary action and for that reason the construction and putting into operation of the "provisional solution" (Variant C) cannot be considered an internationally wrongful act. Therefore, in principle, Slovakia shall not compensate Hungary on the account of the construction and putting into operation of "the provisional solution" (Variant C) and its maintenance in service by Slovakia, unless a manifest abuse of rights on its part is clearly evidenced.

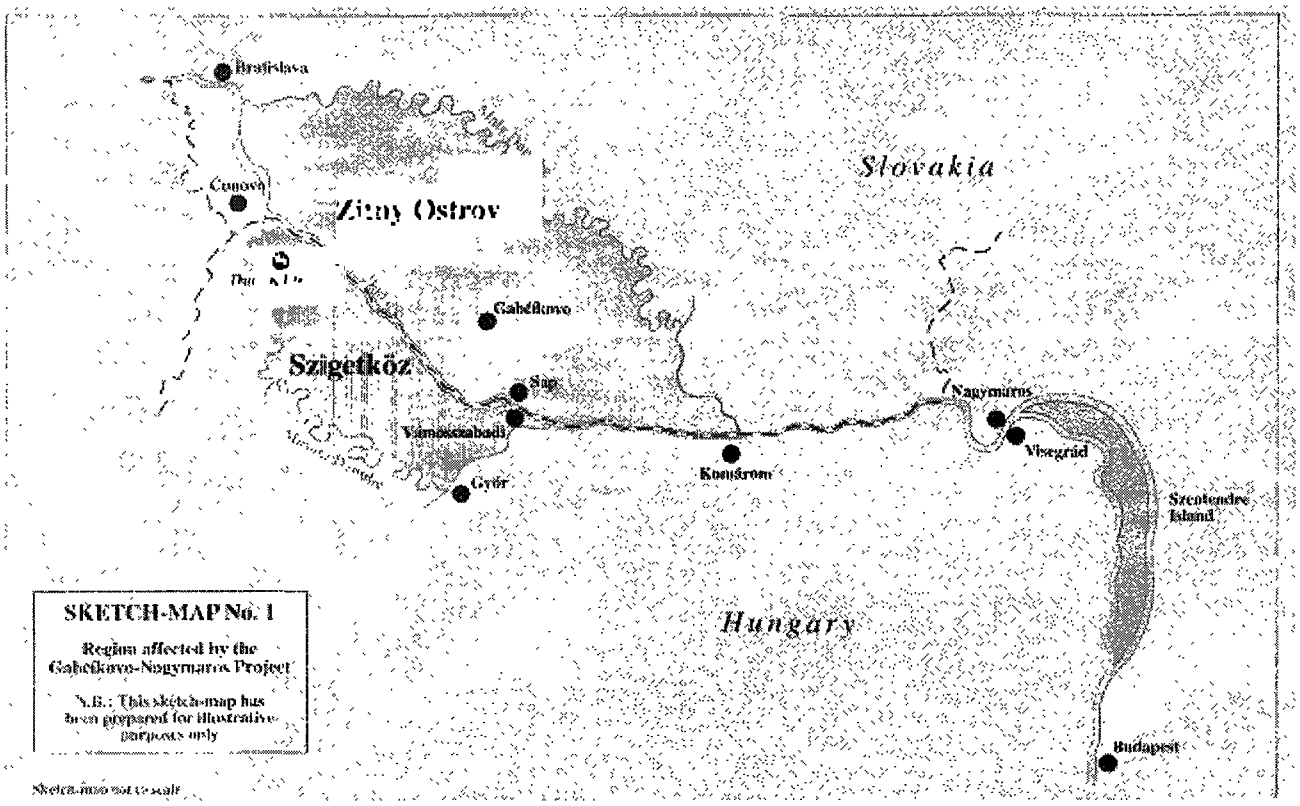
In my opinion, paragraph 2 A, of the operative part of the Judgment should not have been included, because the succession of Slovakia to the 1977 Treaty was neither a question submitted to the Court in the Special Agreement, nor is it a legal consequence arising out of the decision of the questions submitted by the Parties in its Article 2, paragraph 1. Furthermore, the answer of the Court is incomplete, since nothing is said in respect to the "related instruments" to the 1977 Treaty; and it does not take into consideration the position adopted by the dissenting judges who maintained that the 1977 Treaty was no longer in force.

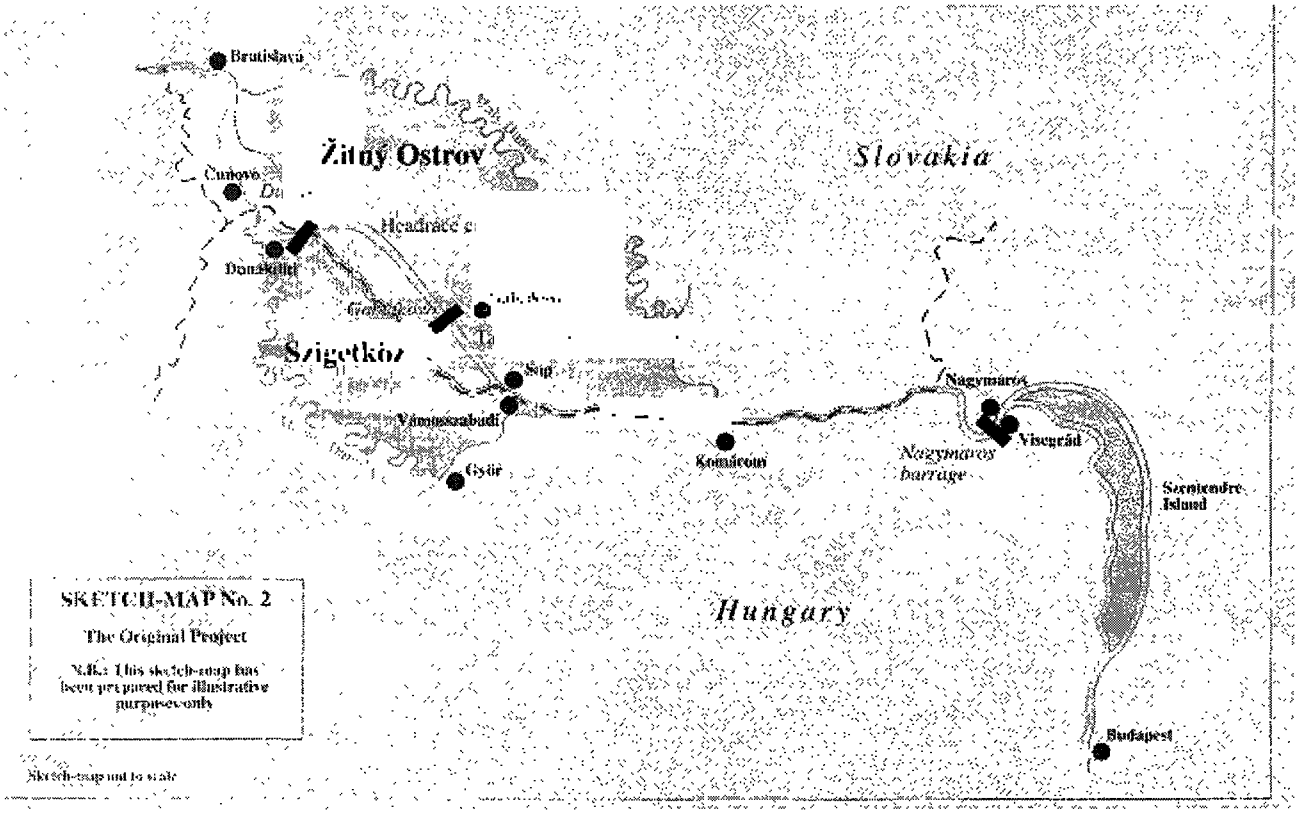
Dissenting opinion of Judge ad hoc Skubiszewski

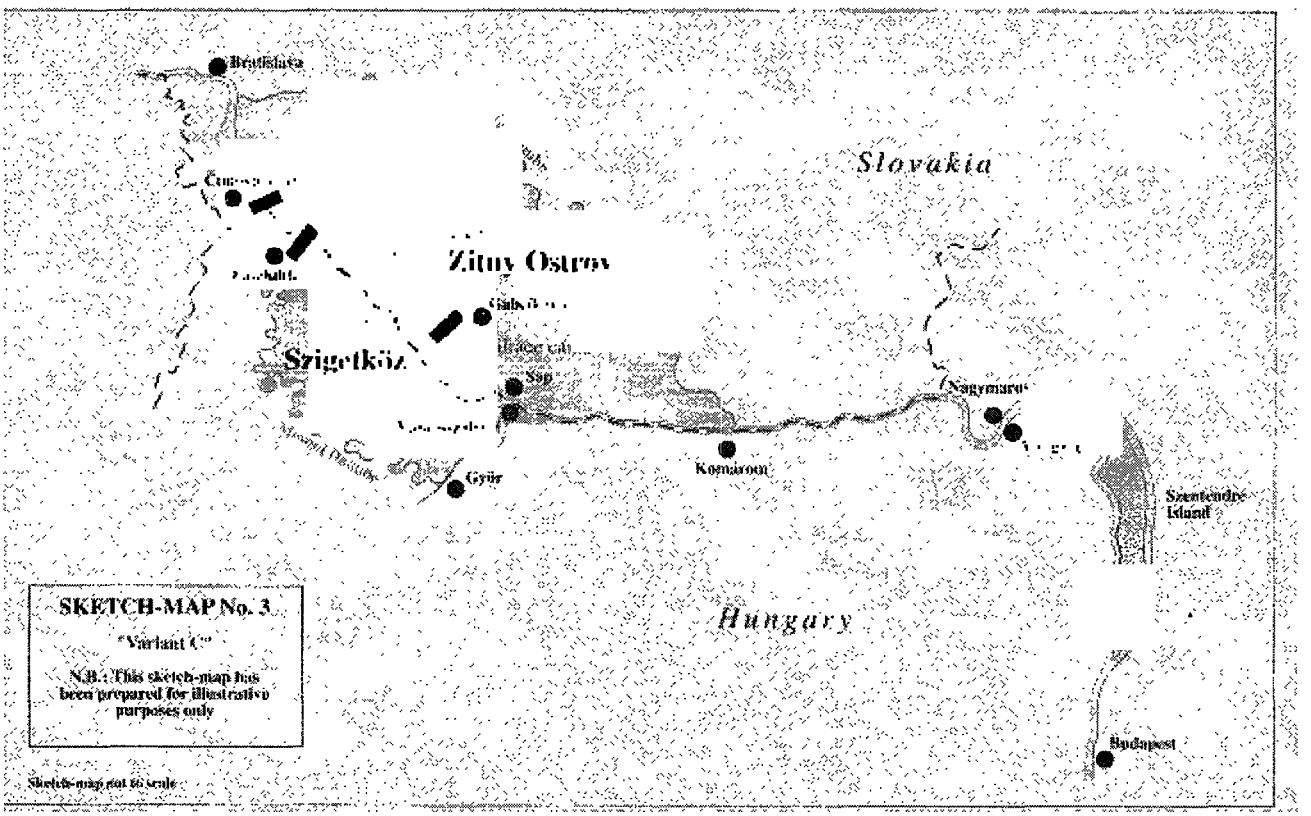
While agreeing with the Court in all its other holdings, Judge ad hoc Skubiszewski is unable to concur in the broad finding that Czechoslovakia was not entitled to put Variant C into operation from October 1992 (Judgment, para. 155, point 1 C). The finding is too general. In his view the Court should have distinguished between, on the one hand, Czechoslovakia's right to take steps to execute and operate certain works on her territory and, on the other, her responsibility (and, subsequently, that of Slovakia) towards Hungary resulting from the diversion of most of the waters of the Danube into Czechoslovak territory, especially in the period preceding the conclusion of the Hungarian-Slovak Agreement of 19 April 1995.

The withdrawal of Hungary from the Project left Czechoslovakia with the legal possibility of doing on her territory what she was allowed to do by general law on international rivers. As a whole, the "provisional solution" was and is lawful. That evaluation is not changed by one element of it, i.e., sharing of the waters of the Danube, which called for redress and remedy. Having recognized the serious problems with which Czechoslovakia was confronted as a result of Hungary's action, the Court should have applied equity as part of international law. It would then arrive at a holding that would have given more nuance to its decision.

Notwithstanding the Parties' mutual legal claims for compensation much speaks in favour of a "zero option" (Judgment, para. 153). That option should facilitate the settlement of the dispute.


Bratislava
Čunovo
Žitný Ostrov
Slovakia
Gabčíkovo
Szigetköz
Sap
Nagymaros
Vámosszabadi
Visegrád
Komárom
Győr
Szentendre Island
Hungary
Budapest
SKETCH-MAP No. 1
Region affected by the Gabčíkovo-Nagymaros Project
N.B.: This sketch-map has been prepared for illustrative purposes only


Bratislava
Žitný Ostrov
Slovakia
Čunovo
Szigetköz
Sap
Nagymaros
Vámosszabadi
Visegrád
Komárom
Nagymaros barrage
Győr
Szentendre Island
Hungary
Budapest
SKETCH-MAP No. 2
The Original Project
N.B.: This sketch-map has been prepared for illustrative purposes only


Bratislava
Slovakia
Žitný Ostrov
Szigetköz
Sap
Győr
Komárom
Nagymaros
Szentendre Island
Hungary
Budapest
SKETCH-MAP No. 3
"Variant C"
N.B.: This sketch-map has been prepared for illustrative purposes only
Sketch-map not to scale

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

Judgment of 27 February 1998

In its Judgment on the preliminary objections raised by the United Kingdom 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 that it had jurisdiction to deal with the merits of the case brought by Libya against the United Kingdom concerning the aerial incident at Lockerbie. It also found that the Libyan claims were admissible.

The Court was composed as follows in the case: Vice-President Weeramantry, Acting President; President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; Judges ad hoc Sir Robert Jennings, El-Kosheri; Registrar Valencia-Ospina.

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* *

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

"53. For these reasons:

THE COURT,

(1) (*a*) by thirteen votes to three, *rejects* the objection to jurisdiction raised by the United Kingdom on the basis of the alleged absence of a dispute between the Parties concerning the interpretation or application of the Montreal Convention of 23 September 1971;

IN FAVOUR: Vice-President Weeramantry, Acting President; Judges Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc El-Kosheri;

AGAINST: President Schwebel; Judge Oda; Judge ad hoc Sir Robert Jennings;

(*b*) by thirteen votes to three, *finds* that it has jurisdiction, on the basis of Article 14, paragraph 1, of the Montreal Convention of 23 September 1971, to hear the disputes between Libya and the United Kingdom as to the interpretation or application of the provisions of that Convention;

IN FAVOUR: Vice-President Weeramantry, Acting President; Judges Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc El-Kosheri;

AGAINST: President Schwebel; Judge Oda; Judge ad hoc Sir Robert Jennings;

(2) (*a*) by twelve votes to four, *rejects* the objection to admissibility derived by the United Kingdom from Security Council resolutions 748 (1992) and 883 (1993);

IN FAVOUR: Vice-President Weeramantry, Acting President; Judges Bedjaoui, Guillaume, Ranjeva, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc El-Kosheri;

AGAINST: President Schwebel; Judges Oda, Herczegh; Judge ad hoc Sir Robert Jennings;

(*b*) by twelve votes to four, *finds* that the Application filed by Libya on 3 March 1992 is admissible.

IN FAVOUR: Vice-President Weeramantry, Acting President; Judges Bedjaoui, Guillaume, Ranjeva, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc El-Kosheri;

AGAINST: President Schwebel; Judges Oda, Herczegh; Judge ad hoc Sir Robert Jennings;

(3) by ten votes to six, *declares* that the objection raised by the United Kingdom according to which Security Council resolutions 748 (1992) and 883 (1993) have rendered the claims of Libya without object does not, in the circumstances of the case, have an exclusively preliminary character.

IN FAVOUR: Vice-President Weeramantry, Acting President; Judges Bedjaoui, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc El-Kosheri;

AGAINST: President Schwebel; Judges Oda, Guillaume, Herczegh, Fleischhauer; Judge ad hoc Sir Robert Jennings."

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Judges Bedjaoui, Guillaume and Ranjeva appended a joint declaration to the Judgment of the Court; Judges Bedjaoui, Ranjeva and Koroma appended a joint declaration; Judges Guillaume and Fleischhauer appended a joint declaration; Judge Herczegh appended a declaration. Judges Kooijmans and Rezek appended separate opinions. President Schwebel, Judge Oda and Judge ad hoc Sir Robert Jennings appended dissenting opinions.

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Review of the proceedings and submissions
(paras. 1-16)

In its Judgment, the Court recalls that on 3 March 1992 Libya filed in the Registry of the Court an Application instituting proceedings against the United Kingdom in respect of a "dispute between Libya and the United Kingdom concerning the interpretation or application of the Montreal Convention" of 23 September 1971 for the Suppression of Unlawful Acts against the Safety of Civil Aviation (hereinafter called "the Montreal Convention"). The Application referred to the destruction, on 21 December 1988, over Lockerbie (Scotland), of the aircraft on Pan Am flight 103, and to charges brought by the Lord Advocate for Scotland in November 1991 against two Libyan nationals suspected of having caused a bomb to be placed aboard the aircraft, which bomb had exploded causing the aeroplane to crash. The Application invoked as the basis for jurisdiction Article 14, paragraph 1, of the Montreal Convention.

On 3 March 1992, immediately after the filing of its Application, Libya submitted a request for the indication of provisional measures under Article 41 of the Statute. By an Order dated 14 April 1992, the Court, after hearing the Parties, found that the circumstances of the case were not such as to require the exercise of its power to indicate provisional measures.

Libya filed a Memorial on the merits within the prescribed time limit. In the Memorial Libya requests the Court to adjudge and declare:

"(*a*) that the Montreal Convention is applicable to this dispute;

(*b*) that Libya has fully complied with all of its obligations under the Montreal Convention and is justified in exercising the criminal jurisdiction provided for by that Convention;

(*c*) that the United Kingdom has breached, and is continuing to breach, its legal obligations to Libya under Article 5, paragraphs 2 and 3, Article 7, Article 8, paragraph 3, and Article 11 of the Montreal Convention;

(*d*) that the United Kingdom is under a legal obligation to respect Libya's right not to have the Convention set aside by means which would in any case be at variance with the principles of the United Nations Charter and with the mandatory rules of general international law prohibiting the use of force and the violation of the sovereignty, territorial integrity, sovereign equality and political independence of States."

Within the time limit fixed for the filing of its Counter-Memorial, the United Kingdom filed Preliminary Objections to the jurisdiction of the Court and the admissibility of the Application. Libya for its part, filed a written statement of its observations and submissions on the Preliminary Objections within the time limit fixed by the Court. Hearings were held between 13 and 22 October 1997.

At the hearing the United Kingdom presented the following final submissions:

"[T]he Court [is requested to] adjudge and declare that:

it lacks jurisdiction over the claims brought against the United Kingdom by the Libyan Arab Jamahiriya

and/or

those claims are inadmissible;

and that the Court dismiss the Libyan Application accordingly."

The final submissions of Libya were as follows:

"The Libyan Arab Jamahiriya requests the Court to adjudge and declare:

— that the Preliminary Objections raised by the United Kingdom ... must be rejected and that, as a consequence:

(*a*) the Court has jurisdiction to entertain the Application of Libya;

(*b*) that the Application is admissible;

— that the Court should proceed to the merits."

Jurisdiction of the Court
(paras. 17-39)

The Court first considers the objection raised by the United Kingdom to its jurisdiction.

Libya submits that the Court has jurisdiction on the basis of Article 14, paragraph 1, of the Montreal Convention, which provides that:

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

The Parties agree that the Montreal Convention is in force between them and that it was already in force both at the time of the destruction of the Pan Am aircraft over Lockerbie, on 21 December 1988, and at the time of filing of the Application, on 3 March 1992. However, the Respondent contests the jurisdiction of the Court because, in its submission, all the requisites laid down in Article 14, paragraph 1, of the Montreal Convention have not been complied with in the present case.

The Respondent expressly stated that it did not wish to contest the jurisdiction of the Court on all of the same grounds it had relied upon in the provisional measures phase of the proceedings, and restricted itself to alleging that Libya had failed to show, first, that there existed a legal dispute between the Parties and second, that such dispute, if any, concerned the interpretation or application of the Montreal Convention and fell, as a result, within the terms of Article 14, paragraph 1, of that Convention. Consequently, the United Kingdom did not, in the present phase of the proceedings, reiterate its earlier arguments as to whether or not the dispute that, in the opinion of Libya, existed between the Parties could be settled by negotiation;

whether Libya had made a proper request for arbitration; and whether the six-month period required by Article 14, paragraph 1, of the Convention had been complied with.

The Court nonetheless considers it necessary to deal briefly with these arguments. Having examined them the Court concludes that the alleged dispute between the Parties could not be settled by negotiation or submitted to arbitration under the Montreal Convention, and the refusal of the Respondent to enter into arbitration to resolve that dispute absolved Libya from any obligation under Article 14, paragraph 1, of the Convention to observe a six-month period starting from the request for arbitration, before seizing the Court.

Existence of a legal dispute of a general nature concerning the Convention
(paras. 22-25)

In its Application and Memorial, Libya maintained that the Montreal Convention was the only instrument applicable to the destruction of the Pan Am aircraft over Lockerbie.

The United Kingdom does not deny that, as such, the facts of the case could fall within the terms of the Montreal Convention. However, it emphasizes that, in the present case, from the time Libya invoked the Montreal Convention, the United Kingdom has claimed that it was not relevant as the question to be resolved had to do with "the ... reaction of the international community to the situation arising from Libya's failure to respond effectively to the most serious accusations of State involvement in acts of terrorism".

The Court finds that consequently, the Parties differ on the question whether the destruction of the Pan Am aircraft over Lockerbie is governed by the Montreal Convention. A dispute thus exists between the Parties as to the legal regime applicable to this event. Such a dispute, in the view of the Court, concerns the interpretation and application of the Montreal Convention, and, in accordance with Article 14, paragraph 1, of the Convention, falls to be decided by the Court.

Existence of a specific dispute concerning Article 7 of the Convention
(paras. 26-29)

The Court finds that in view of the positions put forward by the Parties with respect to the rights and obligations which Articles 1, 5, 6, 7 and 8 of the Convention would entail for them, there exists between them not only a dispute of a general nature, as defined above, but also a specific dispute which concerns the interpretation and application of Article 7 — read in conjunction with Article 1, Article 5, Article 6 and Article 8 — of the Convention and which, in accordance with Article 14, paragraph 1, of the Convention, falls to be decided by the Court.

Article 7 is worded in the following terms:

"Article 7

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State."

Existence of a specific dispute concerning Article 11 of the Convention
(paras. 30-33)

Furthermore, having taken account of the positions of the Parties as to the duties imposed by Article 11 of the Montreal Convention, the Court concludes that there equally exists between them a dispute which concerns the interpretation and application of that provision, and which, in accordance with Article 14, paragraph 1, of the Convention, falls to be decided by the Court.

Article 11 is worded as follows:

"Article 11

1. Contracting States shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences. The law of the State requested shall apply in all cases.

2. The provisions of paragraph 1 of this Article shall not affect obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual assistance in criminal matters."

Lawfulness of the actions of the Respondent
(paras. 34-36)

With respect to the last submission of Libya (see above, submission (*d*) of the Memorial), the United Kingdom maintains that it is not for the Court, on the basis of Article 14, paragraph 1, of the Montreal Convention, to decide on the lawfulness of actions which are in any event in conformity with international law, and which were instituted by the Respondent to secure the surrender of the two alleged offenders. It concludes from this that the Court lacks jurisdiction over the submissions presented on this point by Libya.

The Court points out that it cannot uphold the line of argument thus formulated. Indeed, it is for the Court to decide, on the basis of Article 14, paragraph 1, of the Montreal Convention, on the lawfulness of the actions criticized by Libya, insofar as those actions would be at variance with the provisions of the Montreal Convention.

Effect of the resolutions of the Security Council
(paras. 37-38)

In the present case, the United Kingdom has contended, however, that even if the Montreal Convention did confer on Libya the rights it claims, they could not be exercised in this case because they were superseded by Security Council resolutions 748 (1992) and 883 (1993) which, by virtue of Articles 25 and 103 of the United Nations Charter, have

priority over all rights and obligations arising out of the Montreal Convention. The Respondent has also argued that, because of the adoption of those resolutions, the only dispute which existed from that point on was between Libya and the Security Council; this, clearly, would not be a dispute falling within the terms of Article 14, paragraph 1, of the Montreal Convention and thus not one which the Court could entertain.

The Court finds that it cannot uphold this line of argument. Security Council resolutions 748 (1992) and 883 (1993) were in fact adopted after the filing of the Application on 3 March 1992. In accordance with its established jurisprudence, if the Court had jurisdiction on that date, it continues to do so; the subsequent coming into existence of the above-mentioned resolutions cannot affect its jurisdiction once established.

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In the light of the foregoing, the Court concludes that the objection to jurisdiction raised by the United Kingdom on the basis of the alleged absence of a dispute between the Parties concerning the interpretation or application of the Montreal Convention must be rejected, and that the Court has jurisdiction to hear the disputes between Libya and the United Kingdom as to the interpretation or application of the provisions of that Convention.

Admissibility of the Libyan Application
(paras. 40-45)

The Court will now proceed to consider the objection of the United Kingdom that the Libyan Application is not admissible.

The principal argument of the United Kingdom in this context is that

> "what Libya claims to be the issue or issues in dispute between it and the United Kingdom are now regulated by decisions of the Security Council, taken under Chapter VII of the Charter of the United Nations, which are binding on both Parties and that (if there is any conflict between what the resolutions require and rights or obligations alleged to arise under the Montreal Convention) the resolutions have overriding effect in accordance with Article 103 of the Charter".

In this connection, the United Kingdom explains that

> "resolutions 748 and 883 are legally binding and they create legal obligations for Libya and the United Kingdom which are determinative of any dispute over which the Court might have jurisdiction".

According to the United Kingdom, those resolutions require the surrender of the two suspects by Libya to the United Kingdom or the United States for trial, and this determination by the Security Council is binding on Libya irrespective of any rights it may have under the Montreal Convention. On this basis, the United Kingdom maintains that

> "the relief which Libya seeks from the Court under the Montreal Convention is not open to it, and that the Court should therefore exercise its power to declare the Libyan Application inadmissible".

For its part, Libya argues that it is clear from the actual terms of resolutions 731 (1992), 748 (1992) and 883 (1993) that the Security Council has never required it to surrender its nationals to the United Kingdom or the United States; it stated at the hearing that this remained "Libya's principal argument". It added that the Court must interpret those resolutions "in accordance with the Charter, which determined their validity" and that the Charter prohibited the Council from requiring Libya to hand over its nationals to the United Kingdom or the United States. Libya concludes that its Application is admissible "as the Court can usefully rule on the interpretation and application of the Montreal Convention ... independently of the legal effects of resolutions 748 (1992) and 883 (1993)". Libya furthermore draws the Court's attention to the principle that "The critical date for determining the admissibility of an application is the date on which it is filed".

In the view of the Court, this last submission of Libya must be upheld. The date, 3 March 1992, on which Libya filed its Application, is in fact the only relevant date for determining the admissibility of the Application. Security Council resolutions 748 (1992) and 883 (1993) cannot be taken into consideration in this regard since they were adopted at a later date. As to Security Council resolution 731 (1992), adopted before the filing of the Application, it could not form a legal impediment to the admissibility of the latter because it was a mere recommendation without binding effect, as was recognized moreover by the United Kingdom itself. Consequently, Libya's Application cannot be held inadmissible on these grounds.

In the light of the foregoing, the Court concluded that the objection to admissibility derived by the United Kingdom from Security Council resolutions 748 (1992) and 883 (1993) must be rejected, and that Libya's Application is admissible.

Objection that the Applicant's claims are without object
(paras. 46-51)

In dealing with admissibility, the Agent of the United Kingdom also stated that his Government "ask[ed] the Court to rule that the intervening resolutions of the Security Council have rendered the Libyan claims without object".

The Court notes that it has already acknowledged, on several occasions in the past, that events subsequent to the filing of an application may "render an application without object" and "therefore the Court is not called upon to give a decision thereon". In the present case, the United Kingdom puts forward an objection aimed at obtaining from the Court a decision not to proceed to judgment on the merits, which objection must be examined within the framework of this jurisprudence.

The Court must satisfy itself that such an objection does indeed fall within the provisions of Article 79 of the Rules, relied upon by the Respondent. In paragraph 1, this Article refers to "Any objection ... to the jurisdiction of the Court or

to the admissibility of the application, *or other objection*" (emphasis added); its field of application *ratione materiae* is thus not limited solely to objections regarding jurisdiction or admissibility. However, if it is to be covered by Article 79, an objection must also possess a "preliminary" character. Paragraph 1 of Article 79 of the Rules of Court characterizes as "preliminary" an objection "the decision upon which is requested before any further proceedings". The Court considers in this respect that, insofar as the purpose of the objection raised by the United Kingdom that there is no ground for proceeding to judgment on the merits is, effectively, to prevent, *in limine*, any consideration of the case on the merits, so that its "effect [would] be, if the objection is upheld, to interrupt further proceedings in the case", and "it [would] therefore be appropriate for the Court to deal with [it] before enquiring into the merits", this objection possesses a preliminary character and does indeed fall within the provisions of Article 79 of the Rules of Court. It notes moreover that the objection concerned was duly submitted in accordance with the formal conditions laid down in Article 79.

Libya does not dispute any of these points. What Libya contends is that this objection falls within the category of those which paragraph 7 of Article 79 of the Rules of Court characterizes as objections "not possess[ing], in the circumstances of the case, an exclusively preliminary character".

On the contrary, the United Kingdom considers that the objection concerned possesses an "exclusively preliminary character" within the meaning of that provision; and, at the hearing, its Agent insisted on the need for the Court to avoid any proceedings on the merits, which to his mind were not only "likely to be lengthy and costly" but also, by virtue of the difficulty that "the handling of evidentiary material ... might raise serious problems".

The Court finds that thus it is on the question of the "exclusively" or "non-exclusively" preliminary character of the objection here considered that the Parties are divided; and it concludes that it must therefore ascertain whether, in the present case, the United Kingdom's objection based on the Security Council decisions contains "both preliminary aspects and other aspects relating to the merits" or not.

The Court observes that that objection relates to many aspects of the dispute. By maintaining that Security Council resolutions 748 (1992) and 883 (1993) have rendered the Libyan claims without object, the United Kingdom seeks to obtain from the Court a decision not to proceed to judgment on the merits, which would immediately terminate the proceedings. However, by requesting such a decision, the United Kingdom is requesting, in reality, at least two others which the decision not to proceed to judgment on the merits would necessarily postulate: on the one hand a decision establishing that the rights claimed by Libya under the Montreal Convention are incompatible with its obligations under the Security Council resolutions; and, on the other hand, a decision that those obligations prevail over those rights by virtue of Articles 25 and 103 of the Charter.

The Court therefore has no doubt that Libya's rights on the merits would not only be affected by a decision, at this stage of the proceedings, not to proceed to judgment on the merits, but would constitute, in many respects, the very subject matter of that decision. The objection raised by the United Kingdom on that point has the character of a defence on the merits.

The Court notes furthermore that the United Kingdom itself broached many substantive problems in its written and oral pleadings in this phase, and pointed out that those problems had been the subject of exhaustive exchanges before the Court; the United Kingdom Government thus implicitly acknowledged that the objection raised and the merits of the case were "closely interconnected".

The Court concludes that if it were to rule on that objection, it would therefore inevitably be ruling on the merits; in relying on the provisions of Article 79 of the Rules of Court, the Respondent has set in motion a procedure the precise aim of which is to prevent the Court from so doing.

The Court concluded from the foregoing that the objection of the United Kingdom according to which the Libyan claims have been rendered without object does not have "an exclusively preliminary character" within the meaning of that Article.

Having established its jurisdiction and concluded that the Application is admissible, the Court will be able to consider this objection when it reaches the merits of the case.

The Court finally specified that, in accordance with Article 79, paragraph 7, of the Rules of Court, time limits for the further proceedings shall be fixed subsequently by it.

Joint declaration of Judges Bedjaoui, Guillaume and Ranjeva

In their declaration, Judges Bedjaoui, Guillaume and Ranjeva wondered whether, in this case, the United Kingdom was entitled to appoint a judge ad hoc to replace Judge Higgins who had stood down.

The authors of the declaration pointed out that, in this phase of the proceedings, the United States and the United Kingdom had made the same submissions. They concluded from this that those two States were in the same interest. They noted that, furthermore, the Court had given two almost identical judgments. The authors of the declaration therefore considered, on the basis of Article 37 of the Rules of Court which covers the question of parties being "in the same interest", that the United Kingdom was not entitled to appoint a judge ad hoc in this phase of the proceedings. On this point, they dissociated themselves from the decision taken by the Court.

Joint declaration of Judges Bedjaoui, Ranjeva and Koroma

Judges Bedjaoui, Ranjeva and Koroma consider that to qualify the United Kingdom objection that the Security

Council resolutions rendered the Libyan claims without object as *not exclusively preliminary* and to refer it back to be considered at the merits stage means that it is not sufficient to invoke the provisions of Chapter VII of the Charter so as to bring to an end ipso facto and with immediate effect all argument on the Security Council's decisions.

Joint declaration of Judges Guillaume and Fleischhauer

In a joint declaration, Judges Guillaume and Fleischhauer have stated their views as to how the Court should have dealt with the objection of the United Kingdom according to which "Security Council resolutions 748 (1992) and 883 (1993) have rendered the claims of Libya without object".

Judges Guillaume and Fleischhauer think that the Court could have decided on that objection without pronouncing on the merits of the rights and obligations of the Parties under the Montreal Convention. They reach the conclusion that the objection had an exclusively preliminary character and that the Court could and should have taken a decision as of now. They regret that the decision on the objection has been put off and underline that the solution arrived at by the Court runs counter to the objective of the revision in 1972 of Article 79 of the Rules of Court, i.e., the simplification of procedure and the sound administration of justice.

Declaration of Judge Herczegh

In his declaration, Judge Herczegh summarizes the reasons why he voted against paragraph 2 (*a*) and (*b*), and against paragraph 3 of the operative part. He considers that the Libyan claims are governed by the binding Security Council resolutions which rendered the Libyan Application without object. The objection raised by the Respondent in that connection has an exclusively preliminary character. The objection should therefore have been upheld and the Libyan claim rejected.

Separate opinion of Judge Kooijmans

In his separate opinion, Judge Kooijmans expresses his support for the conclusions of the Court. He wishes to place on record, however, his views with regard to a number of arguments brought forward by the Parties. In his opinion the motives which the Applicant may have had when filing its Application, are irrelevant to the Court whose only function is to determine whether there is a justiciable dispute. The fact that a situation has been brought to the attention of the Security Council and that the Council has taken action with regard to that situation can in no way detract from the Court's own competence and responsibility to objectively determine the existence or non-existence of a dispute.

With regard to the objection that the Libyan claims have been rendered without object or moot by Security Council resolutions 748 (1992) and 883 (1993), Judge Kooijmans shares the Court's view that this objection has not an exclusively preliminary character.

He is, however, also of the opinion that these resolutions, although authoritative, have no final and definitive character, and therefore cannot render the case moot in the preliminary phase.

Separate opinion of Judge Rezek

Judge Rezek deems that the Judgment would more fully convey the line of argument advanced by the Parties were it to devote a few lines to the subject of the jurisdiction of the Court in relation to that of the political organs of the Organization.

He is of the opinion that the Court has full jurisdiction to interpret and apply the law in a contentious case, even when the exercise of such jurisdiction may entail the critical scrutiny of a decision of another organ of the United Nations. It does not directly represent the member States of the Organization but it is precisely because it is impermeable to political injunctions that the Court is the interpreter par excellence of the law and the natural place for reviewing the acts of political organs in the name of the law, as is the rule in democratic regimes.

Dissenting opinion of President Schwebel

In Judge Schwebel's view, the Court's Judgment does not show (as contrasted with concluding) that the Respondent can be in violation of provisions of the Montreal Convention; with the possible exception of Article 11 of the Convention, the Court does not show that there is a dispute between the Parties over such alleged violations. There is dispute over the meaning, legality and effectiveness of the pertinent resolutions of the Security Council. That dispute may not be equated with a dispute under the Convention, the sole basis of the Court's jurisdiction in the case.

The fact the Security Council resolutions 748 (1992) and 883 (1993) were adopted after the filing of Libya's Application is not determinative. While jurisdiction is normally determined as of the date of application, it need not invariably be so. The cases on which the Court relies are not in point.

The Court rejects the Respondent's contention that Libya's case is inadmissible on the sole ground that the critical date for determining admissibility of an application is the date on which it is filed. But the single case on which the Court relies is distinguishable. Moreover, that case, as others, recognizes that events subsequent to the filing of an application may render an application without object.

In this case, Security Council resolutions 748 (1992) and 883 (1993) supervene any rights of Libya under the Montreal Convention, and thus render reliance upon it without object and moot. By virtue of Article 103 of the United Nations Charter, decisions of the Security Council prevail over any rights and obligations Libya and the Respondent may have under the Montreal Convention.

The Court finds that it cannot uphold the mootness claim because it is not exclusively preliminary in character under the Court's Rules. But since jurisdiction in this case flows only from the Montreal Convention, a plea citing resolutions of the Security Council in bar of reliance upon that Convention is of an exclusively preliminary character.

The Court's Judgment may be seen as prejudicing the efforts of the Security Council to combat terrorism and as appearing to offer recalcitrant States a means to parry and frustrate its decisions by appeal to the Court. That raises the question of whether the Court possesses a power of judicial review over Council decisions.

In Judge Schwebel's view, the Court is not generally so empowered, and it is particularly without power to overrule or undercut decisions of the Security Council determining whether there is a threat to the peace and what measures shall be taken to deal with the threat. The Court more than once has disclaimed a power of judicial review.

The terms of the Charter furnish no shred of support for such a power. In fact, they import the contrary, since, if the Court could overrule the Council, it would be it and not the Council which would exercise dispositive and hence primary authority in a sphere in which the Charter accords primary authority to the Council.

The terms and drafting history of the Charter demonstrate that the Security Council is subject to the rule of law, and at the same time is empowered to derogate from international law if the maintenance of international peace requires. It does not follow from the fact that the Council is so subject, and that the Court is the United Nations principal judicial organ, that the Court is authorized to ensure that the Council's decisions do accord with law. In many legal systems, the subjection of the acts of an organ to law by no means entails the subjection of the legality of its actions to judicial review. The tenor of the discussions at San Francisco indicate the intention of the Charter's drafters not to accord the Court a power of judicial review.

To engraft upon the Charter regime a power of judicial review would not be a development but a departure justified neither by Charter terms nor by customary international law nor by the general principles of law. It would entail the Court giving judgment over an absentee, the Security Council, contrary to fundamental judicial principles. It could give rise to the question, is a holding by the Court that the Council has acted *ultra vires* a holding which of itself is *ultra vires*?

Dissenting opinion of Judge Oda

In his dissenting opinion, Judge Oda began by stating that the crux of the case before the International Court of Justice is simply the different positions adopted by both Parties concerning the surrender of the two Libyans, presently located in Libya, who are accused of the destruction of Pan Am flight 103 over Lockerbie in United Kingdom territory.

What, in fact, occurred between the United Kingdom and Libya was simply a demand by the United Kingdom that the suspects located in Libya be surrendered to it and a refusal by Libya to comply with that demand. No dispute has existed between Libya and the United Kingdom "concerning the interpretation or application of the [Montreal] Convention" as far as the demand for the surrender of the suspects and the refusal to accede to that demand — the main issue in the present case — are concerned. In Judge Oda's view, the Application by which Libya instituted proceedings against the United Kingdom pursuant to Article 14, paragraph 1, of the Montreal Convention should be dismissed on this sole ground.

If the Court's jurisdiction is denied, as Judge Oda believes it should be, the issue of whether the Application is or is not admissible does not arise. He considers it meaningless to discuss the question of admissibility. However, after finding that it has jurisdiction, the Court continues to deal with the question of admissibility by rejecting the objection to admissibility derived by the United Kingdom from Security Council resolutions 748 and 883. Judge Oda then commented on the impact of those Security Council resolutions in the present case. In his view, if the adoption of Security Council resolutions 748 and 883 is to be dealt with in connection with the question of admissibility of the Application, it should be dealt with at the present (preliminary) stage irrespective of whether this question possesses or not an *exclusively* preliminary character. The question of whether Libya's 3 March 1992 Application has become without object after the adoption of these two Security Council resolutions, is totally irrelevant to the present case. The Security Council manifestly passed those resolutions because it believed that Libya's refusal to surrender the accused constituted "threats to the peace" or "breaches of the peace". Judge Oda expressed his view that these Security Council resolutions, having a political connotation, have nothing to do with the present case, since the case must cover only legal matters existing between the United Kingdom and Libya before the resolutions were adopted.

If there is any dispute in this respect, it could be a dispute between Libya and the Security Council or between Libya and the United Nations, or both, but *not* between Libya and the United Kingdom. The effect of the Security Council resolutions upon member States is a matter quite irrelevant to this case and the question of whether the Application has become without object after the adoption of those resolutions hardly arises.

Dissenting opinion of Judge Sir Robert Jennings

Judge Sir Robert Jennings thought the Court should have found that it did not have jurisdiction in the case; and even if it had jurisdiction, that the Libyan case should have been dismissed as inadmissible.

Jurisdiction depended upon whether the Libyan case could be brought under the terms of Article 14, paragraph 1, of the Montreal Convention. An examination of Libya's requests showed that there existed no genuine dispute about the Convention. The true dispute was between Libya and the Security Council.

Since the Court had found that it did have jurisdiction, it should then have found the Libyan claim inadmissible because the dispute between Libya and the United Kingdom was now regulated by decisions of the Security Council made under Chapter VII of the Charter and so binding on both Parties. The Court had, however, rejected the United Kingdom's "inadmissibility" objection because the binding Security Council resolutions were made after the date of the Libyan Application to the Court; and the United Kingdom's alternative objection that the Libyan case had, by the Security Council's decisions, been rendered "without object", was rejected on the ground that this was not an objection of "an exclusively preliminary character" within the meaning of Article 79, paragraph 7, of the Court's Rules. Judge Jennings wondered whether the Court had sufficiently weighed the gravity of dealing with a question involving binding and peacekeeping decisions of the Security Council in so technical, not to say legalistic, a fashion.

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109. QUESTIONS OF INTERPRETATION AND APPLICATION OF THE 1971 MONTREAL CONVENTION ARISING FROM THE AERIAL INCIDENT AT LOCKERBIE (LIBYAN ARAB JAMAHIRIYA *v.* UNITED STATES OF AMERICA) (PRELIMINARY OBJECTIONS)

Judgment of 27 February 1998

In its Judgment on the preliminary objections raised by the United States 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 that it had jurisdiction to deal with the merits of the case brought by Libya against the United States of America concerning the aerial incident at Lockerbie. It also found that the Libyan claims were admissible.

The Court was composed as follows in the case: Vice-President Weeramantry, Acting President; President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc El-Kosheri; Registrar Valencia-Ospina.

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

"53. For these reasons:

THE COURT,

(1) (*a*) by thirteen votes to two, *rejects* the objection to jurisdiction raised by the United States on the basis of the alleged absence of a dispute between the Parties concerning the interpretation or application of the Montreal Convention of 23 September 1971;

IN FAVOUR: Vice-President Weeramantry, Acting President; Judges Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc El-Kosheri;

AGAINST: President Schwebel; Judge Oda;

(*b*) by thirteen votes to two, *finds* that it has jurisdiction, on the basis of Article 14, paragraph 1, of the Montreal Convention of 23 September 1971, to hear the disputes between Libya and the United States as to the interpretation or application of the provisions of that Convention;

IN FAVOUR: Vice-President Weeramantry, Acting President; Judges Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc El-Kosheri;

AGAINST: President Schwebel; Judge Oda;

(2) (*a*) by twelve votes to three, *rejects* the objection to admissibility derived by the United States from Security Council resolutions 748 (1992) and 883 (1993);

IN FAVOUR: Vice-President Weeramantry, Acting President; Judges Bedjaoui, Guillaume, Ranjeva, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc El-Kosheri;

AGAINST: President Schwebel; Judges Oda, Herczegh;

(*b*) by twelve votes to three, *finds* that the Application filed by Libya on 3 March 1992 is admissible.

IN FAVOUR: Vice-President Weeramantry, Acting President; Judges Bedjaoui, Guillaume, Ranjeva, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc El-Kosheri;

AGAINST: President Schwebel; Judges Oda, Herczegh;

(3) by ten votes to five, *declares* that the objection raised by the United States according to which the claims of Libya became moot because Security Council resolutions 748 (1992) and 883 (1993) rendered them without object, does not, in the circumstances of the case, have an exclusively preliminary character.

IN FAVOUR: Vice-President Weeramantry, Acting President; Judges Bedjaoui, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc El-Kosheri;

AGAINST: President Schwebel; Judges Oda, Guillaume, Herczegh, Fleischhauer."

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* *

Judges Bedjaoui, Ranjeva and Koroma appended a joint declaration to the Judgment of the Court; Judges Guillaume and Fleischhauer appended a joint declaration to the Judgment of the Court; Judge Herczegh appended a declaration to the Judgment of the Court. Judges Kooijmans and Rezek appended separate opinions to the Judgment of the Court. President Schwebel and Judge Oda appended dissenting opinions to the Judgment of the Court.

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* *

Review of the proceedings and submissions
(paras. 1-15)

On 3 March 1992, Libya filed in the Registry of the Court an Application instituting proceedings against the United States in respect of a "dispute between Libya and the United States concerning the interpretation or application of the Montreal Convention" of 23 September 1971 for the Suppression of Unlawful Acts against the Safety of Civil Aviation (hereinafter called "the Montreal Convention"). The Application referred to the destruction, on 21 December 1988, over Lockerbie (Scotland), of the aircraft on Pan Am flight 103, and to charges brought by a Grand Jury of the United States in November 1991 against two Libyan nationals suspected of having caused a bomb to be placed aboard the aircraft, which bomb had exploded causing the aeroplane to crash. The Application invoked as the basis for jurisdiction Article 14, paragraph 1, of the Montreal Convention.

On 3 March 1992, immediately after the filing of its Application, Libya submitted a request for the indication of provisional measures under Article 41 of the Statute. By an Order dated 14 April 1992, the Court, after hearing the Parties, found that the circumstances of the case were not such as to require the exercise of its power to indicate provisional measures.

Libya filed a Memorial on the merits within the prescribed time limit. In the Memorial Libya requests the Court to adjudge and declare:

"(*a*) that the Montreal Convention is applicable to this dispute;

(*b*) that Libya has fully complied with all of its obligations under the Montreal Convention and is justified in exercising the criminal jurisdiction provided for by that Convention;

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

(*d*) that the United States is under a legal obligation to respect Libya's right not to have the Convention set aside by means which would in any case be at variance with the principles of the United Nations Charter and with the mandatory rules of general international law prohibiting the use of force and the violation of the sovereignty, territorial integrity, sovereign equality and political independence of States."

Within the time limit fixed for the filing of its Counter-Memorial, the United States filed Preliminary Objections to the jurisdiction of the Court and the admissibility of the Application. Libya for its part filed a statement of its observations and submissions on the Preliminary Objections within the time limit fixed by the Court. Hearings were held between 13 and 22 October 1997.

At the hearing the United States presented the following final submissions:

"The United States of America requests that the Court uphold the objections of the United States to the jurisdiction of the Court and decline to entertain 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 final submissions of Libya read as follows:

"The Libyan Arab Jamahiriya requests the Court to adjudge and declare:

— that the Preliminary Objections raised by ... the United States must be rejected and that, as a consequence:

(*a*) the Court has jurisdiction to entertain the Application of Libya;

(*b*) that the Application is admissible;

— that the Court should proceed to the merits."

Jurisdiction of the Court
(paras. 16-38)

The Court first considers the objection raised by the United States to its jurisdiction. Libya submits that the Court has jurisdiction on the basis of Article 14, paragraph 1, of the Montreal Convention, which provides that:

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

The Parties agree that the Montreal Convention is in force between them and that it was already in force both at the time of the destruction of the Pan Am aircraft over

Lockerbie, on 21 December 1988, and at the time of filing of the Application, on 3 March 1992. However, the Respondent contests the jurisdiction of the Court because, in its submission, all the requisites laid down in Article 14, paragraph 1, of the Montreal Convention have not been complied with in the present case.

The United States contests the jurisdiction of the Court mainly on the basis of Libya's failure to show, firstly, that there exists a legal dispute between the Parties, and, secondly, that such dispute, if any, concerns the interpretation or application of the Montreal Convention and falls as a result within the terms of Article 14, paragraph 1, of that Convention. However, at the hearings, the United States also made reference, in passing, to the arguments it had advanced, in the provisional measures phase of the proceedings, as to whether the dispute that, in the opinion of Libya, exists between the Parties could be settled by negotiation, whether Libya had made a proper request for arbitration and whether it had respected the six-month period required by Article 14, paragraph 1, of the Convention.

After an examination of the history of the alleged dispute between the Parties the Court concludes that it could not be settled by negotiation or submitted to arbitration under the Montreal Convention, and the refusal of the Respondent to enter into arbitration to resolve that dispute absolved Libya from any obligation under Article 14, paragraph 1, of the Convention to observe a six-month period starting from the request for arbitration, before seizing the Court.

Existence of a legal dispute of a general nature concerning the Convention
(paras. 22-25)

In its Application and Memorial, Libya maintained that the Montreal Convention was the only instrument applicable to the destruction of the Pan Am aircraft over Lockerbie. The United States does not deny that, as such, the facts of the case could fall within the terms of the Montreal Convention. However, it emphasizes that, in the present case, from the time Libya invoked the Montreal Convention, the United States has claimed that it was not relevant because it was not a question of "bilateral differences" but one of "a threat to international peace and security resulting from State-sponsored terrorism".

The Court concludes that consequently, the Parties differ on the question whether the destruction of the Pan Am aircraft over Lockerbie is governed by the Montreal Convention. A dispute thus exists between the Parties as to the legal regime applicable to this event. Such a dispute, in the view of the Court, concerns the interpretation and application of the Montreal Convention, and, in accordance with Article 14, paragraph 1, of the Convention, falls to be decided by the Court.

Existence of a specific dispute concerning Article 7 of the Convention
(paras. 25-28)

The Court finds that in view of the positions put forward by the Parties with respect to the rights and obligations which Articles 1, 5, 6, 7 and 8 of the Convention would entail for them that there exists between them not only a dispute of a general nature, as defined above, but also a specific dispute which concerns the interpretation and application of Article 7 — read in conjunction with Article 1, Article 5, Article 6 and Article 8 — of the Convention, and which, in accordance with Article 14, paragraph 1, of the Convention, falls to be decided by the Court.

Article 7 is worded in the following terms:

"Article 7

> The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State."

Existence of a specific dispute concerning Article 11 of the Convention
(paras. 29-32)

Furthermore, having taken account of the positions of the Parties as to the duties imposed by Article 11 of the Montreal Convention, the Court concludes that there equally exists between them a dispute which concerns the interpretation and application of that provision, and which, in accordance with Article 14, paragraph 1, of the Convention, falls to be decided by the Court.

Article 11 is worded as follows:

"Article 11

> 1. Contracting States shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences. The law of the State requested shall apply in all cases.
>
> 2. The provisions of paragraph 1 of this Article shall not affect obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual assistance in criminal matters."

Lawfulness of the actions of the Respondent
(paras. 33-35)

With respect to the last submission of Libya (see above, submission (*d*) of the Memorial) the United States maintains that it is not for the Court, on the basis of Article 14, paragraph 1, of the Montreal Convention, to decide on the lawfulness of actions which are in any event in conformity with international law, and which were instituted by the Respondent to secure the surrender of the two alleged offenders. It concludes from this that the Court lacks

jurisdiction to hear the submissions presented on this point by Libya.

The Court points out that it cannot uphold the line of argument thus formulated. Indeed, it is for the Court to decide, on the basis of Article 14, paragraph 1, of the Montreal Convention, on the lawfulness of the actions criticized by Libya, insofar as those actions would be contrary to the provisions of the Montreal Convention.

Effect of the resolution of the Security Council
(paras. 36-37)

In the present case, the United States has contended, however, that even if the Montreal Convention did confer on Libya the rights it claims, those rights could not be exercised in this case because they were superseded by Security Council resolutions 748 (1992) and 883 (1993) which, by virtue of Articles 25 and 103 of the United Nations Charter, have priority over all rights and obligations arising out of the Montreal Convention. The Respondent has also argued that, because of the adoption of those resolutions, the only dispute which existed from that point on was between Libya and the Security Council; this, clearly, would not be a dispute falling within the terms of Article 14, paragraph 1, of the Montreal Convention and thus not one which the Court could entertain.

The Court finds that it cannot uphold this line of argument. Security Council resolutions 748 (1992) and 883 (1993) were in fact adopted after the filing of the Application on 3 March 1992. In accordance with its established jurisprudence, if the Court had jurisdiction on that date, it continues to do so; the subsequent coming into existence of the above-mentioned resolutions cannot affect its jurisdiction once established.

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In the light of the foregoing, the Court concludes that the objection to jurisdiction raised by the United States on the basis of the alleged absence of a dispute between the Parties concerning the interpretation or application of the Montreal Convention must be rejected, and that the Court has jurisdiction to hear the disputes between Libya and the United States as to the interpretation or application of the provisions of that Convention.

Admissibility of the Libyan Application
(paras. 39-44)

The Court will now turn to consider the objection of the United States according to which the Libyan Application is not admissible.

The United States emphasizes that the measures which Libya opposes are those taken by the Security Council under resolutions 731 (1992), 748 (1992) and 883 (1993).

According to the United States, by seizing the Court, Libya was endeavouring to "undo the Council's actions". The United States argues that, even if Libya could make valid claims under the Montreal Convention, these are "superseded" by the relevant decisions of the Security Council under Chapter VII of the Charter, which impose different obligations. The said decisions thus establish the rules governing the dispute between Libya and the United States. Those rules — and not the Montreal Convention — define the obligations of the Parties; and the claims of Libya based on the Convention are therefore inadmissible.

For its part, Libya argues that it is clear from the actual terms of resolutions 731 (1992), 748 (1992) and 883 (1993) that the Security Council has never required it to surrender its nationals to the United States or the United Kingdom; it stated at the hearing that this remained "Libya's principal argument". It added that the Court must interpret those resolutions "in accordance with the Charter, which determined their validity", and that the Charter prohibited the Council from requiring Libya to hand over its nationals to the United States or the United Kingdom. Libya concludes that its Application is admissible "as the Court can usefully rule on the interpretation and application of the Montreal Convention ... independently of the legal effects of resolutions 748 (1992) and 883 (1993)". Libya furthermore draws the Court's attention to the principle that "[t]he critical date for determining the admissibility of an application is the date on which it is filed".

In the view of the Court, this last submission of Libya must be upheld. The date, 3 March 1992, on which Libya filed its Application, is in fact the only relevant date for determining the admissibility of the Application. Security Council resolutions 748 (1992) and 883 (1993) cannot be taken into consideration in this regard, since they were adopted at a later date. As to Security Council resolution 731 (1992), adopted before the filing of the Application, it could not form a legal impediment to the admissibility of the latter because it was a mere recommendation without binding effect, as was recognized moreover by the United States. Consequently, Libya's Application cannot be held inadmissible on these grounds.

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In the light of the foregoing, the Court concludes that the objection to admissibility derived by the United States from Security Council resolutions 748 (1992) and 883 (1993) must be rejected, and that Libya's Application is admissible.

Objection that the Applicant's claims are without object
(paras. 45-50)

The Court then considers the third objection raised by the United States. According to that objection, Libya's claims have become moot because Security Council resolutions 748 (1992) and 883 (1993) have rendered them without object; any judgment which the Court might deliver on the said claims would thenceforth be devoid of practical purpose.

The Court notes that it already acknowledged, on several occasions in the past, that events subsequent to the filing of an application may "render an application without object" and "therefore the Court is not called upon to give a

decision thereon". Thus formulated, the Respondent's objection is that there is no ground for proceeding to judgment on the merits, which objection must be examined within the framework of this jurisprudence.

The Court must satisfy itself that such an objection does indeed fall within the provisions of Article 79 of the Rules, relied upon by the Respondent. In paragraph 1, this Article refers to "Any objection ... to the jurisdiction of the Court or to the admissibility of the application, or *other objection*" (emphasis added); its field of application *ratione materiae* is thus not limited solely to objections regarding jurisdiction and admissibility. However, if it is to be covered by Article 79, an objection must also possess a "preliminary" character. Paragraph 1 of Article 79 of the Rules of Court characterizes as "preliminary" an objection "the decision upon which is requested before any further proceedings". The Court considers in this respect that insofar as the purpose of the objection raised by the United States that there is no ground for proceeding to judgment on the merits is, effectively, to prevent, *in limine*, any consideration of the case on the merits, so that its "effect [would] be, if the objection is upheld, to interrupt further proceedings in the case", and "it [would] therefore be appropriate for the Court to deal with [it] before enquiring into the merits", this objection possesses a preliminary character and does indeed fall within the provisions of Article 79 of the Rules of Court.

Libya does not dispute any of these points. What Libya contends is that this objection — like the objection of inadmissibility raised by the United States, and for the same reasons — falls within the category of those which Article 79, paragraph 7, of the Rules of Court characterizes as objections "not possess[ing], in the circumstances of the case, an exclusively preliminary character".

On the contrary, the United States considers that the objection concerned possesses an "exclusively preliminary character" within the meaning of that provision. It contends, in particular, in support of this argument, that this objection does not require "the resolution of disputed facts or the consideration of evidence".

The Court finds that thus it is solely on the question of the "exclusively" or "non-exclusively" preliminary character of the objection under consideration that the Parties are divided and on which the Court must now make a determination; and it concludes that it must therefore ascertain whether, in the present case, the United States objection considered here contains "both preliminary aspects and other aspects relating to the merits" or not.

The Court observes that that objection relates to many aspects of the dispute. By maintaining that Security Council resolutions 748 (1992) and 883 (1993) have rendered the Libyan claims without object, the United States seeks to obtain from the Court a decision not to proceed to judgment on the merits, which would immediately terminate the proceedings. However, by requesting such a decision, the United States is requesting, in reality, at least two others which the decision not to proceed to judgment on the merits would necessarily postulate: on the one hand a decision establishing that the rights claimed by Libya under the Montreal Convention are incompatible with its obligations under the Security Council resolutions; and, on the other hand, a decision that those obligations prevail over those rights by virtue of Articles 25 and 103 of the Charter.

The Court therefore has no doubt that Libya's rights on the merits would not only be affected by a decision not to proceed to judgment on the merits, at this stage in the proceedings, but would constitute, in many respects, the very subject matter of that decision. The objection raised by the United States on that point has the character of a defence on the merits.

The Court notes furthermore that the United States itself broached many substantive problems in its written and oral pleadings in this phase, and pointed out that those problems had been the subject of exhaustive exchanges before the Court; the United States Government thus implicitly acknowledged that the objection raised and the merits of the case were "closely interconnected".

The Court concludes that if it were to rule on that objection, it would therefore inevitably be ruling on the merits; in relying on the provisions of Article 79 of the Rules of Court, the Respondent has set in motion a procedure the precise aim of which is to prevent the Court from so doing.

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The Court concludes from the foregoing that the objection of the United States according to which the Libyan claims have become moot as having been rendered without object does not have "an exclusively preliminary character" within the meaning of that Article.

Having established its jurisdiction and concluded that the Application is admissible, the Court will be able to consider this objection when it reaches the merits of the case.

* *

Lastly, the United States requested the Court, in the alternative, in the event that, notwithstanding the United States' objections, it should declare that it has jurisdiction and deem the Application admissible, to "resolve the case in substance now" by deciding, as a preliminary matter, that the relief sought by Libya is precluded.

As the Court has already indicated, it is the Respondent which sought to rely, in this case, on the provisions of Article 79 of the Rules. By raising preliminary objections, it has made a procedural choice the effect of which, according to the express terms of Article 79, paragraph 3, is to suspend the proceedings on the merits. The Court cannot therefore uphold the claim of the United States.

* *

The Court finally specifies that in accordance with Article 79, paragraph 7, of the Rules of Court, time limits for the further proceedings shall be fixed subsequently by it.

Joint declaration of Judges Bedjaoui, Ranjeva and Koroma

Judges Bedjaoui, Ranjeva and Koroma consider that to qualify the United States objection of mootness as *not exclusively preliminary* and to refer it back to be considered at the merits stage means that it is not sufficient to invoke the provisions of Chapter VII of the Charter so as to bring to an end ipso facto and with immediate effect all argument on the Security Council's decisions.

Joint declaration of Judges Guillaume and Fleischhauer

In a joint declaration, Judges Guillaume and Fleischhauer have stated their views as to how the Court should have dealt with the objection of the United States according to which "Libya's claims have become moot because Security Council resolutions 748 (1992) and 883 (1993) have rendered them without object".

Judges Guillaume and Fleischhauer think that the Court could have decided on that objection without pronouncing on the merits of the rights and obligations of the Parties under the Montreal Convention. They reach the conclusion that the objection had an exclusively preliminary character and that the Court could and should have taken a decision as of now. They regret that the decision on the objection has been put off and underline that the solution arrived at by the Court runs counter to the objective of the revision in 1972 of Article 79 of the Rules of Court, i.e., the simplification of procedure and the sound administration of justice.

Declaration of Judge Herczegh

In his declaration, Judge Herczegh summarizes the reasons why he voted against paragraph 2 (*a*) and (*b*), and against paragraph 3 of the operative part. He considers that the Libyan claims are governed by the binding Security Council resolutions which rendered the Libyan Application without object. The objection raised by the Respondent in that connection has an exclusively preliminary character. The objection should therefore have been upheld and the Libyan claim rejected.

Separate opinion of Judge Kooijmans

In his separate opinion, Judge Kooijmans expresses his support for the conclusions of the Court. He wishes to place on record, however, his views with regard to a number of arguments brought forward by the Parties. In his opinion the motives which the Applicant may have had when filing its Application, are irrelevant to the Court whose only function is to determine whether there is a justiciable dispute. The fact that a situation has been brought to the attention of the Security Council and that the Council has taken action with regard to that situation can in no way detract from the Court's own competence and responsibility to objectively determine the existence or non-existence of a dispute.

With regard to the objection that the Libyan claims have been rendered without object or moot by Security Council resolutions 748 (1992) and 883 (1993), Judge Kooijmans shares the Court's view that this objection has not an exclusively preliminary character. He is, however, also of the opinion that these resolutions, although authoritative, have no final and definitive character, and therefore cannot render the case moot in the preliminary phase.

Separate opinion of Judge Rezek

Judge Rezek deems that the Judgment would more fully convey the line of argument advanced by the Parties were it to devote a few lines to the subject of the jurisdiction of the Court in relation to that of the political organs of the Organization.

He is of the opinion that the Court has full jurisdiction to interpret and apply the law in a contentious case, even when the exercise of such jurisdiction may entail the critical scrutiny of a decision of another organ of the United Nations. It does not directly represent the member States of the Organization but it is precisely because it is impermeable to political injunctions that the Court is the interpreter par excellence of the law and the natural place for reviewing the acts of political organs in the name of the law, as is the rule in democratic regimes.

Dissenting opinion of President Schwebel

In Judge Schwebel's view, the Court's Judgment does not show (as contrasted with concluding) that the Respondent can be in violation of provisions of the Montreal Convention; with the possible exception of Article 11 of the Convention, the Court does not show that there is a dispute between the Parties over such alleged violations. There is dispute over the meaning, legality and effectiveness of the pertinent resolutions of the Security Council. That dispute may not be equated with a dispute under the Convention, the sole basis of the Court's jurisdiction in the case.

The fact the Security Council resolutions 748 (1992) and 883 (1993) were adopted after the filing of Libya's Application is not determinative. While jurisdiction is normally determined as of the date of application, it need not invariably be so. The cases on which the Court relies are not in point.

The Court rejects the Respondent's contention that Libya's case is inadmissible on the sole ground that the critical date for determining admissibility of an application is the date on which it is filed. But the single case on which the Court relies is distinguishable. Moreover, that case, as others, recognizes that events subsequent to the filing of an application may render an application without object.

In this case, Security Council resolutions 748 (1992) and 883 (1993) supervene any rights of Libya under the Montreal Convention, and thus render reliance upon it without object and moot. By virtue of Article 103 of the United Nations Charter, decisions of the Security Council prevail over any rights and obligations Libya and the Respondent may have under the Montreal Convention.

The Court finds that it cannot uphold the mootness claim because it is not exclusively preliminary in character under the Court's Rules. But since jurisdiction in this case flows only from the Montreal Convention, a plea citing resolutions of the Security Council in bar of reliance upon that Convention is of an exclusively preliminary character.

The Court's Judgment may be seen as prejudicing the efforts of the Security Council to combat terrorism and as appearing to offer recalcitrant States a means to parry and frustrate its decisions by appeal to the Court. That raises the question of whether the Court possesses a power of judicial review over Council decisions.

In Judge Schwebel's view, the Court is not generally so empowered, and it is particularly without power to overrule or undercut decisions of the Security Council determining whether there is a threat to the peace and what measures shall be taken to deal with the threat. The Court more than once has disclaimed a power of judicial review. The terms of the Charter furnish no shred of support for such a power. In fact, they import the contrary, since, if the Court could overrule the Council, it would be it and not the Council which would exercise dispositive and hence primary authority in a sphere in which the Charter accords primary authority to the Council.

The terms and drafting history of the Charter demonstrate that the Security Council is subject to the rule of law, and at the same time is empowered to derogate from international law if the maintenance of international peace requires. It does not follow from the fact that the Council is so subject, and that the Court is the United Nations principal judicial organ, that the Court is authorized to ensure that the Council's decisions do accord with law. In many legal systems, the subjection of the acts of an organ to law by no means entails the subjection of the legality of its actions to judicial review. The tenor of the discussions at San Francisco indicate the intention of the Charter's drafters not to accord the Court a power of judicial review.

To engraft upon the Charter regime a power of judicial review would not be a development but a departure justified neither by Charter terms nor by customary international law nor by the general principles of law. It would entail the Court giving judgment over an absentee, the Security Council, contrary to fundamental judicial principles. It could give rise to the question, is a holding by the Court that the Council has acted *ultra vires* a holding which of itself is *ultra vires*?

Dissenting opinion of Judge Oda

In his dissenting opinion, Judge Oda began by stating that the crux of the case before the International Court of Justice is simply the different positions adopted by both Parties concerning the surrender of the two Libyans, presently located in Libya, who are accused of the destruction of Pan Am flight 103 over Lockerbie in United Kingdom territory.

What, in fact, occurred between the United States and Libya was simply a demand by the United States that the suspects located in Libya be surrendered to it and a refusal by Libya to comply with that demand. No dispute has existed between Libya and the United States "concerning the interpretation or application of the [Montreal] Convention" as far as the demand for the surrender of the suspects and the refusal to accede to that demand — the main issue in the present case — are concerned. In Judge Oda's view, the Application by which Libya instituted proceedings against the United States pursuant to Article 14, paragraph 1, of the Montreal Convention should be dismissed on this sole ground.

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If the Court's jurisdiction is denied, as Judge Oda believes it should be, the issue of whether the Application is or is not admissible does not arise. He considers it meaningless to discuss the question of admissibility. However, after finding that it has jurisdiction, the Court continues to deal with the question of admissibility by rejecting the objection to admissibility derived by the United States from Security Council resolutions 748 and 883. Judge Oda then commented on the impact of those Security Council resolutions in the present case. In his view, if the adoption of Security Council resolutions 748 and 883 is to be dealt with in connection with the question of admissibility of the Application, it should be dealt with at the present (preliminary) stage irrespective of whether this question possesses or not an *exclusively* preliminary character. The question of whether Libya's 3 March 1992 Application has become without object after the adoption of these two Security Council resolutions, is totally irrelevant to the present case. The Security Council manifestly passed those resolutions because it believed that Libya's refusal to surrender the accused constituted "threats to the peace" or "breaches of the peace". Judge Oda expressed his view that these Security Council resolutions, having a political connotation, have nothing to do with the present case, since the case must cover only legal matters existing between the United States and Libya before the resolutions were adopted.

If there is any dispute in this respect, it could be a dispute between Libya and the Security Council or between Libya and the United Nations, or both, but *not* between Libya and the United States. The effect of the Security Council resolutions upon member States is a matter quite irrelevant to this case and the question of whether the Application has become without object after the adoption of those resolutions hardly arises.

110. CASE CONCERNING THE VIENNA CONVENTION ON CONSULAR RELATIONS (PARAGUAY *v.* UNITED STATES OF AMERICA) (PROVISIONAL MEASURES)

Order of 9 April 1998

In an order adopted unanimously in the case concerning the Vienna Convention on Consular Relations (Paraguay *v.* United States of America), the Court called on the United States to "take all measures at its disposal" to prevent the execution of Mr. Angel Francisco Breard, pending a final decision of the Court in the proceedings instituted by Paraguay. Mr. Breard was a Paraguayan national convicted of murder in Virginia (United States) whose execution was scheduled for 14 April 1998. In its Order, the Court also requested the United States to inform it of all the measures taken in implementation of it.

The Court was composed as follows: Vice-president Weeramantry, Acting President; President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek; Registrar Valencia-Ospina.

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

"41. For these reasons,

THE COURT

Unanimously,

Indicates the following provisional measures:

I. The United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order;

II. *Decides*, that, until the Court has given its final decision, it shall remain seized of the matters which form the subject matter of this Order."

*

* *

President Schwebel and Judges Oda and Koroma appended declarations to the Order of the Court.

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* *

History of the case and submissions
(paras. 1-22)

The Court begins by recalling that on 3 April 1998 Paraguay instituted proceedings against the United States of America for "violations of the Vienna Convention on Consular Relations [of 24 April 1963]" (hereinafter the "Vienna Convention") allegedly committed by the United States. Paraguay bases the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes, which accompanies the Vienna Convention on Consular Relations ("the Optional Protocol").

In Paraguay's Application, it is stated that in 1992 the authorities of Virginia arrested a Paraguayan national, Mr. Angel Francisco Breard, who was charged, tried, convicted of culpable homicide and sentenced to death by a Virginia court in 1993, without having been informed of his rights under Article 36, subparagraph 1 (*b*), of the Vienna Convention; it is specified that among these rights are the right to request that the relevant consular office of the State of which he is national be advised of his arrest and detention, and the right to communicate with that office; it is further alleged that the authorities of the Commonwealth of Virginia also did not advise the Paraguayan consular officers of Mr. Breard's detention, and that those officers were only able to render assistance to him from 1996, when the Paraguayan Government learnt by its own means that Mr. Breard was imprisoned in the United States.

Paraguay states that federal courts denied Mr. Breard the right to invoke the Vienna Convention; that the Virginia court that sentenced Mr. Breard to the death penalty set an execution date of 14 April 1998; that Mr. Breard, having exhausted all means of legal recourse available to him as of right, petitioned the United States Supreme Court for a writ of *certiorari*, requesting it to exercise its discretionary power to review the decision given by the lower federal courts and to grant a stay of his execution pending that review; and that, while this request is still pending before the Supreme Court, it is however rare for that Court to accede to such requests. Paraguay stated, moreover, that, having brought proceedings itself before the federal courts of the United States without success, it also filed such a petition in the Supreme Court, which is also still pending; and that Paraguay furthermore engaged in diplomatic efforts with the Government of the United States and sought the good offices of the Department of State.

Paraguay maintains that by violating its obligations under Article 36, subparagraph 1 (*b*), of the Vienna Convention, the United States prevented Paraguay from exercising the consular functions provided for in Articles 5 and 36 of the Convention and specifically for ensuring the protection of its interests and of those of its nationals in the United States; that it was not able to contact Mr. Breard nor to offer him the necessary assistance, and that accordingly Mr. Breard "made a number of objectively unreasonable decisions during the criminal proceedings against him,

which were conducted without translation" and that he "did not comprehend the fundamental differences between the criminal justice systems of the United States and Paraguay"; Paraguay concludes from this that it is entitled to *restitutio in integrum*, that is to say "the re-establishment of the situation that existed before the United States failed to provide the notifications ... required by the Convention";

Paraguay requests the Court to adjudge and declare as follows:

"(1) that the United States, in arresting, detaining, trying, convicting, and sentencing Angel Francisco Breard, as described in the preceding statement of facts, violated its international legal obligations to Paraguay, in its own right and in the exercise of its right of diplomatic protection of its national, as provided by Articles 5 and 36 of the Vienna Convention;

(2) that Paraguay is therefore entitled to *restitutio in integrum*;

(3) that the United States is under an international legal obligation not to apply the doctrine of 'procedural default', or any other doctrine of its internal law, so as to preclude the exercise of the rights accorded under Article 36 of the Vienna Convention; and

(4) that the United States is under an international legal obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against Angel Francisco Breard or any other Paraguayan national in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or a subordinate position in the organization of the United States, and whether that power's functions are of an international or internal character;

and that, pursuant to the foregoing international legal obligations,

(1) any criminal liability imposed on Angel Francisco Breard in violation of international legal obligations is void, and should be recognized as void by the legal authorities of the United States;

(2) the United States should restore the *status quo ante*, that is, re-establish the situation that existed before the detention of, proceedings against, and conviction and sentencing of Paraguay's national in violation of the United States' international legal obligations took place; and

(3) the United States should provide Paraguay a guarantee of the non-repetition of the illegal acts."

On 3 April 1998 Paraguay also submitted an urgent request for the indication of provisional measures in order to protect its rights. It states in the following terms the grounds for its request and the possible consequences of its dismissal:

"Under the grave and exceptional circumstances of this case, and given the paramount interest of Paraguay in the life and liberty of its nationals, provisional measures are urgently needed to protect the life of Paraguay's national and the ability of this Court to order the relief to which Paraguay is entitled: restitution in kind. Without the provisional measures requested, the United States will execute Mr. Breard before this Court can consider the merits of Paraguay's claims, and Paraguay will be forever deprived of the opportunity to have the *status quo ante* restored in the event of a judgment in its favour."

Paraguay requests that, pending final judgment in this case, the Court indicate:

"(*a*) That the Government of the United States take the measures necessary to ensure that Mr. Breard not be executed pending the disposition of this case;

(*b*) That the Government of the United States report to the Court the actions it has taken in pursuance of subparagraph (*a*) immediately above and the results of those actions; and

(*c*) That the Government of the United States ensure that no action is taken that might prejudice the rights of the Republic of Paraguay with respect to any decision this Court may render on the merits of the case."

It asks the Court moreover to consider its request as a matter of the greatest urgency "in view of the extreme gravity and immediacy of the threat that the authorities ... will execute a Paraguayan citizen".

By identical letters dated 3 April 1998, the Vice-President of the Court addressed both Parties in the following terms:

"Exercising the functions of the presidency in terms of Articles 13 and 32 of the Rules of Court, and acting in conformity with Article 74, paragraph 4, of the said Rules, I hereby draw the attention of both Parties to the need to act in such a way as to enable any Order the Court will make on the request for provisional measures to have its appropriate effects."

At public hearings held on 7 April 1998, oral statements on the request for the indication of provisional measures were presented by both Parties.

The Court's reasoning
(paras. 23-41)

The Court begins by pointing out that on a request for the indication of provisional measures it need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, but that it may not indicate them unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded.

It notes that Article I of the Optional Protocol, which Paraguay invokes as the basis of jurisdiction of the Court in this case, is worded as follows:

"Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol";

and that both Paraguay and the United States are parties to the Vienna Convention and to the Optional Protocol, in each case without reservation.

The Court observes that Paraguay, in its Application and at the hearings, stated that the issues in dispute between itself and the United States concern Articles 5 and 36 of the Vienna Convention and fall within the compulsory jurisdiction of the Court under Article I of the Optional Protocol.

At the hearing the United States contended that Paraguay had not established that the Court had jurisdiction in these proceedings, even prima facie; it argued that there is no dispute between the Parties as to the interpretation of Article 36, subparagraph 1 (*b*), of the Vienna Convention nor is there a dispute as to its application, since the United States recognizes that the notification provided for was not carried out; the United States maintained that the objections raised by Paraguay to the proceedings brought against its national do not constitute a dispute concerning the interpretation or application of the Vienna Convention; and it added that there was no entitlement to *restitutio in integrum* under the terms of that Convention.

The Court finds that there exists a dispute as to whether the relief sought by Paraguay is a remedy available under the Vienna Convention, in particular in relation to Articles 5 and 36 thereof, which is a dispute arising out of the application of the Convention within the meaning of Article I of the Optional Protocol; and that prima facie it has jurisdiction under Article I of the aforesaid Optional Protocol to determine the dispute between Paraguay and the United States.

The Court then indicates that the purpose of the power to indicate provisional measures is 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 a 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 then refers to the fact that the execution of Mr. Breard is ordered for 14 April 1998; and finds that such an execution would render it impossible for the Court to order the relief that Paraguay seeks and thus cause irreparable harm to the rights it claims.

In doing so the Court observes that the issues before it do not concern the entitlement of the federal states within the United States to resort to the death penalty for the most heinous crimes, and that, further, the function of the Court is to resolve international legal disputes between States, inter alia when they arise out of the interpretation or application of international conventions, and not to act as a court of criminal appeal.

In the light of the above considerations, the Court finds that the circumstances require it to indicate, as a matter of urgency, provisional measures as provided by Article 41 of its Statute.

Declaration of President Schwebel

I have voted for the Order, but with disquiet. The sensitive issues it poses have been hastily, if ably, argued. The evidence introduced is bare. The Court's consideration of the issues of law and fact, in the circumstances imposed upon it, has been summary. The United States maintains that no State has ever before claimed as Paraguay now does that, because of lack of consular access under the Vienna Convention on Consular Relations, the results of a trial, conviction, and appeal should be voided. Not only has the United States apologized to Paraguay for the unintentional failure of notification to Paraguay's consul of the arrest and trial of the accused, but it has taken substantial steps to strengthen what appears to be a practice in the United States of variable compliance with the obligations imposed upon it by the Vienna Convention.

All this said, I have voted for the Order indicating provisional measures suggested pursuant to Article 41 of the Statute of the Court. Those measures ought to be taken to preserve the rights of Paraguay in a situation of incontestable urgency.

I have so voted essentially for these reasons. There is an admitted failure by the Commonwealth of Virginia to have afforded Paraguay timely consular access, that is to say, there is an admitted breach of treaty. An apology and Federal provision for avoidance of future such lapses does not assist the accused, who Paraguay alleges was or may have been prejudiced by lack of consular access, a question which is for the merits. It is of obvious importance to the maintenance and development of a rule of law among States that the obligations imposed by treaties be complied with and that, where they are not, reparation be required. The mutuality of interest of States in the effective observance of the obligations of the Vienna Convention on Consular Relations is the greater in the intermixed global community of today and tomorrow (and the citizens of no State have a higher interest in the observance of those obligations than the peripatetic citizens of the United States). In my view, these considerations outweigh the serious difficulties which this Order imposes on the authorities of the United States and Virginia.

Declaration of Judge Oda

1. I voted in favour of the Court's Order with great hesitation as I believed and I still believe that the request for the indication of provisional measures of protection submitted by Paraguay to the Court should have been dismissed. However, in the limited time — one or two days — given to the Court to deal with this matter, I have found it impossible to develop my points sufficiently to persuade my colleagues to alter their position.

2. First of all, I would like to express some of my thoughts in connection with this request.

I can, on humanitarian grounds, understand the plight of Mr. Breard and recognize that owing to the fact that Paraguay filed this request on 3 April 1998, his fate now, albeit unreasonably, lies in the hands of the Court.

I would like to add, however, that, if Mr. Breard's rights as they relate to humanitarian issues are to be respected then, in parallel, the matter of the rights of victims of violent crime (a point which has often been overlooked) should be taken into consideration. It should also be noted that since his arrest, Mr. Breard has been treated fairly in all legal proceedings within the American judicial system governed by the rule of law.

The Court cannot act as a court of criminal appeal and cannot be petitioned for writs of *habeas corpus*. The Court does not have jurisdiction to decide matters relating to capital punishment and its execution, and should not intervene in such matters.

* *

3. As stated earlier, Paraguay's request was presented to the Court on 3 April 1998 in connection with and at the same time as its Application instituting proceedings against the United States for violations of the 1963 Vienna Convention on Consular Relations. Paraguay's Application was unilaterally submitted to the Court on the basis of the Optional Protocol. I very much doubt that, on the date of filing of the Application and the request, there was any "dispute[s] arising out of the interpretation or application of the [Vienna] Convention" (Optional Protocol, Article I).

If there was any dispute between Paraguay and the United States concerning the interpretation or application of the Vienna Convention, it could have been that the United States was presumed to have violated the Convention at the time of the arrest of Mr. Breard in 1992, as the United States did not inform the Paraguayan consul of that event.

This issue was raised by Paraguay when it became aware of Mr. Breard's situation. In 1996, negotiations took place between Paraguay and the United States concerning the consular function provided for under the Convention. In July 1997, the United States proceeded to remedy the violation by sending a letter to the Government of Paraguay apologizing for its failure to inform the consul of the events concerning Mr. Breard and giving an assurance that this failure would not be repeated in future. In my view, the United States was thus released from its responsibility for violation of the Vienna Convention.

From that time, the question of violation of the Vienna Convention, which may have led to a dispute concerning its application and interpretation, no longer existed. However, this question was raised once more on 3 April 1998, the date on which Paraguay's Application was filed.

4. What did Paraguay ask the Court to decide in its Application of 3 April 1998? Paraguay asked mainly for a decision relating to Mr. Breard's personal situation, namely, his pending execution by the competent authorities of the State of Virginia.

Paraguay requested *restitutio in integrum*. However, if consular contact had occurred at the time of Mr. Breard's arrest or detention, the judicial procedure in the United States domestic courts relating to his case would have been no different. This point was clarified in the course of the oral pleadings.

* *

5. I would like to turn to some general issues relating to provisional measures. First, as a general rule, provisional measures are granted in order to preserve *rights* exposed to imminent breach which is irreparable and these *rights* must be those to be considered at the merits stage of the case, and must constitute the subject matter of the Application or be directly related to it. In this case, however, there is no question of such *rights* (of States parties), as provided for by the Vienna Convention, being exposed to an imminent irreparable breach.

6. Secondly, in order that provisional measures may be granted by the Court, the Court has to have, at the very least, prima facie jurisdiction to deal with the issues concerning the *rights* of the States parties. However I believe that, as regards the present request for provisional measures, the Court does not even have prima facie jurisdiction to handle this matter.

7. Thirdly, if the request in the present case had not been granted, the Application itself would have become meaningless. If that had been the case, then I would have had no hesitation in pointing out that the request for provisional measures should not be used to ensure that the main Application continue. In addition the request for provisional measures should not be used by applicants for the purpose of obtaining interim judgments that would affirm their own rights and predetermine the main case.

8. I have thus explained why I formed the view that, given the fundamental nature of provisional measures, those measures should not have been indicated upon Paraguay's request.

I reiterate, however, that I voted in favour of the Order, for humanitarian reasons, and in view of the fact that, if the execution were to be carried out on 14 April 1998, whatever findings the Court might have reached might be without object.

Declaration of Judge Koroma

My decision to vote in favour of the Order granting the interim measures of protection in this matter was reached only after careful consideration and in the light of the urgency and exceptional circumstances of this case. Torn as I was between the need to observe the requirements for granting provisional measures of protection under Article 41 of the Statute of the Court, thereby ensuring that whatever decision the Court might reach should not be devoid of object, and the need for the Court to comply with its jurisdiction to settle disputes between States which, in my view, includes respect for the sovereignty of a State in relation to its criminal justice system.

It was, therefore, both propitious and appropriate for the Court to bear in mind its mission which is to decide disputes between States, and not to act as a universal supreme court of criminal appeal. On the other hand, it is equally true that the Court's function is to decide disputes between States which are submitted to it in accordance with international

law, applying international conventions, etc. The Order, in my judgement, complies with these requirements.

Paraguay's Application, filed on 3 April 1998 instituting proceedings against the United States for purported violations of the 1963 Vienna Convention on Consular Relations, inter alia, requested the Court to grant provisional measures of protection under Article 41 of the Statute so as to protect its rights and the right of one of its nationals who had been convicted of a capital offence committed in the United States and sentenced to death.

The purpose of a request for provisional measures is to preserve as well as to safeguard the rights of the parties that are in dispute, especially when such rights or subject matter of the dispute could be irretrievably or irreparably destroyed thereby rendering the Court's decision ineffective or without object. It is in the light of such circumstances that the Court has found it necessary to indicate interim measures of protection with the aim of preserving the respective rights of either party to the dispute. But prior to this, the applicant State has the burden of indicating that prima facie, the Court has jurisdiction.

When the facts presented were considered by the Court in the light of the Vienna Convention on Consular Relations, in particular in relation to its Articles 5 and 36, and Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes of 24 April 1963, the Court reached the correct conclusion that a dispute existed and that its jurisdiction had been established prima facie.

In my view, in granting this Order, the Court met the requirements set out in Article 41 of the Statute, whilst at the same time the Order preserves the respective rights of either Party — Paraguay and the United States. The Order called for the suspension of the sentence of execution of Mr. Breard on 14 April 1998, thereby preserving his right to life pending the final decision of the Court on this matter, and also recognized the United States' criminal sovereignty in matters such as charging, trying, convicting and sentencing suspects as appropriate, within the United States or its jurisdiction. I concur with this finding.

In reaching this decision, the Court has also acted with the necessary judicial prudence in considering a request for interim measures of protection, in that it should not deal with issues which are not immediately relevant for the protection of the respective rights of either party or which are for the merits. It also thus, once again confirmed its consistent jurisprudence that a provisional measure of protection should only be granted where it is indispensable and necessary for the preservation of the respective rights of either party and only with circumspection. It was in the light of the foregoing consideration, that I joined the Court in granting the request under Article 41 of the Statute.

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111. CASE CONCERNING LAND AND MARITIME BOUNDARY BETWEEN CAMEROON AND NIGERIA (CAMEROON *v.* NIGERIA) (PRELIMINARY OBJECTIONS)

Judgment of 11 June 1998

In its Judgment on preliminary objections filed by Nigeria in the case concerning Land and Maritime Boundary between Cameroon and Nigeria (Cameroon *v.* Nigeria), the Court found that it has jurisdiction to deal with the merits of the case brought before it by Cameroon. It also found that Cameroon's claims were admissible.

In an Application dated 29 March 1994, amended on 6 June 1994, Cameroon asked the Court to determine the question of sovereignty over the Bakassi Peninsula and over islands in Lake Chad, and to specify the course of the land and maritime boundary between itself and Nigeria. As a basis of the Court's jurisdiction, Cameroon referred to the declarations made by both States accepting its jurisdiction as compulsory (Article 36, paragraph 2, of the Statute of the Court).

On 13 December 1995 Nigeria raised eight preliminary objections challenging the jurisdiction of the Court and the admissibility of Cameroon's claims.

The Court was composed as follows: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek; Judges ad hoc Mbaye, Ajibola; Registrar Valencia-Ospina.

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

"118. For these reasons,

THE COURT,

(1) (*a*) by fourteen votes to three,

Rejects the first preliminary objection;

IN FAVOUR: President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc Mbaye;

AGAINST: Vice-President Weeramantry; Judge Koroma; Judge ad hoc Ajibola;

(*b*) by sixteen votes to one,

Rejects the second preliminary objection;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek; Judges ad hoc Mbaye, Ajibola;

AGAINST: Judge Koroma;

(*c*) by fifteen votes to two,

Rejects the third preliminary objection;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc Mbaye;

AGAINST: Judge Koroma; Judge ad hoc Ajibola;

(*d*) by thirteen votes to four,

Rejects the fourth preliminary objection;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Kooijmans, Rezek; Judge ad hoc Mbaye;

AGAINST: Judges Oda, Koroma, Parra-Aranguren; Judge ad hoc Ajibola;

(*e*) by thirteen votes to four,

Rejects the fifth preliminary objection;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Higgins, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc Mbaye;

AGAINST: Judges Oda, Koroma, Vereshchetin; Judge ad hoc Ajibola;

(*f*) by fifteen votes to two,

Rejects the sixth preliminary objection;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc Mbaye;

AGAINST: Judge Koroma; Judge ad hoc Ajibola;

(*g*) by twelve votes to five,

Rejects the seventh preliminary objection;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Parra-Aranguren, Rezek; Judge ad hoc Mbaye;

AGAINST: Judges Oda, Koroma, Higgins, Kooijmans; Judge ad hoc Ajibola;

(2) by twelve votes to five,

Declares that the eighth preliminary objection does not have, in the circumstances of the case, an exclusively preliminary character;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Parra-Aranguren, Rezek; Judge ad hoc Mbaye;

AGAINST: Judges Oda, Koroma, Higgins, Kooijmans; Judge ad hoc Ajibola;

(3) by fourteen votes to three,

Finds that, on the basis of Article 36, paragraph 2, of the Statute, it has jurisdiction to adjudicate upon the dispute;

IN FAVOUR: President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc Mbaye;

AGAINST: Vice-President Weeramantry; Judge Koroma; Judge ad hoc Ajibola;

(4) by fourteen votes to three,

Finds that the Application filed by the Republic of Cameroon on 29 March 1994, as amended by the Additional Application of 6 June 1994, is admissible;

IN FAVOUR: President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc Mbaye;

AGAINST: Vice-President Weeramantry; Judge Koroma; Judge ad hoc Ajibola."

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Judges Oda, Vereshchetin, Higgins, Parra-Aranguren and Kooijmans appended separate opinions to the Judgment of the Court. Vice-President Weeramantry, Judge Koroma and Judge ad hoc Ajibola appended dissenting opinions to the Judgment of the Court.

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* *

Review of the proceedings and submissions
(paras. 1-19)

The Court begins by recalling 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". Cameroon further stated in its Application 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". It accordingly requested 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". In order to found the jurisdiction of the Court, the Application relied on the declarations made by the two Parties accepting the jurisdiction of the Court under Article 36, paragraph 2, of the Statute of the Court.

On 6 June 1994, Cameroon filed in the Registry an Additional Application "for the purpose of extending the subject of the dispute" to a further dispute described as "relat[ing] essentially to the question of sovereignty over a

part of the territory of Cameroon in the area of Lake Chad". 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". In order to found the jurisdiction of the Court, the Additional Application referred to the "basis of ... jurisdiction ... already ... indicated" in the Application instituting proceedings of 29 March 1994.

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. By an Order dated 16 June 1994, the Court indicated that it had no objection itself to such a procedure, and fixed time limits for the filing of written pleadings.

Cameroon duly filed its Memorial. Within the time limit fixed for the filing of its Counter-Memorial, Nigeria filed preliminary objections to the jurisdiction of the Court and the admissibility of the Application. Accordingly, by an Order dated 10 January 1996, the President of the Court, noting that, under Article 79, paragraph 3, of the Rules of Court, the proceedings on the merits were suspended, fixed 15 May 1996 as the time limit within which Cameroon might present a written statement of its observations and submissions on the preliminary objections. Cameroon duly filed such a statement.

Cameroon chose Mr. Kéba Mbaye, and Nigeria Mr. Bola Ajibola to sit as judge ad hoc.

The Court had further, in response to a request made by Cameroon and after hearing the Parties, indicated certain provisional measures by an Order dated 15 March 1996.

Hearings on the preliminary objections were held between 2 and 11 March 1998.

The requests made by Cameroon in its Application and its Additional Application, as well as the submissions presented by it in its Memorial (cf. paras. 16-18 of the Judgment) have not been reproduced in this summary for the sake of brevity.

The eight objections which Nigeria raised in its Preliminary Objections and at the hearing of 9 March 1998 (cf. paras. 18 and 19 of the Judgment) have neither been reproduced. The Court's description of the subject of each preliminary objection is to be found in the relevant part of this summary. Cameroon, in its written statement on the objections and at the hearing of 11 March 1998, requested the Court to dismiss the objections or in the alternative to join them to the merits; and to declare that it had jurisdiction to deal with the case and that the Application was admissible.

First Preliminary Objection
(paras. 21-47)

Nigeria's first objection contends that the Court has no jurisdiction to entertain Cameroon's Application.

In this regard, Nigeria notes that it had accepted the Court's compulsory jurisdiction by a declaration dated 14 August 1965, deposited with the Secretary-General of the United Nations on 3 September 1965. Cameroon had also accepted the Court's compulsory jurisdiction by a declaration deposited with the Secretary-General on 3 March 1994. The Secretary-General transmitted copies of the Cameroon Declaration to the Parties to the Statute eleven-and-a-half months later. Nigeria maintains, accordingly, that it had no way of knowing, and did not actually know, on the date of the filing of the Application, i.e., 29 March 1994, that Cameroon had deposited a declaration. Cameroon consequently is alleged to have "acted prematurely". By proceeding in this way, the Applicant "is alleged to have violated its obligation to act in good faith", "abused the system instituted by Article 36, paragraph 2, of the Statute" and disregarded "the condition of reciprocity" provided for by that Article and by Nigeria's Declaration. The Court consequently does not have jurisdiction to hear the Application.

In contrast, Cameroon contends that its Application fulfils all the conditions required by the Statute. It notes that in the case concerning *Right of Passage over Indian Territory*, the Court held that

> "the Statute does not prescribe any interval between the deposit by a State of its Declaration of Acceptance and the filing of an Application by that State, and that the principle of reciprocity is not affected by any delay in the receipt of copies of the Declaration by the Parties to the Statute" (*Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 147).

Cameroon indicates that there is no reason not to follow this precedent, at the risk of undermining the system of compulsory jurisdiction provided by the Optional Clause. It adds that the Cameroonian Declaration was in force as early as 3 March 1994, as at that date it was registered in accordance with Article 102 of the United Nations Charter. Cameroon states that in any event Nigeria has acted, since the beginning of these proceedings, in such a way that it should be regarded as having accepted the jurisdiction of the Court.

Nigeria argues in reply that the "case concerning the *Right of Passage over Indian Territory*, was a first impression", that the Judgment given is outdated, and that it is an isolated one; that international law, especially as it relates to good faith, has evolved since and that in accordance with Article 59 of the Statute, that Judgment only has the force of *res judicata* as between the parties and in respect of that case. For these reasons, the solution adopted in 1957 should not be adopted here. Nigeria does not accept the reasoning of Cameroon based on Article 102 of the Charter. Nigeria also contends that there is no question of its having consented to the jurisdiction of the Court in the case and hence there is no *forum prorogatum*.

Cameroon contests each of these arguments.

Quoting the provisions of Article 36, paragraphs 2 and 4 of its Statute, the Court recalls that in the case concerning

Right of Passage over Indian Territory, it concluded, in the light of these provisions, that:

> "by the deposit of its Declaration of Acceptance with the Secretary-General, the accepting State becomes a Party to the system of the Optional Clause in relation to the other declarant States, with all the rights and obligations deriving from Article 36. The contractual relation between the Parties and the compulsory jurisdiction of the Court resulting there from are established, '*ipso facto* and without special agreement', by the fact of the making of the Declaration ... For it is on that very day that the consensual bond, which is the basis of the Optional Clause, comes into being between the States concerned.". (*Right of Passage over Indian Territory, I.C.J. Reports 1957*, p. 146)

The conclusions thus reached by the Court in 1957 reflect the very essence of the Optional Clause providing for acceptance of the Court's compulsory jurisdiction. Any State party to the Statute, in adhering to the jurisdiction of the Court in accordance with Article 36, paragraph 2, accepts jurisdiction in its relations with States previously having adhered to that clause. At the same time, it makes a standing offer to the other States party to the Statute which have not yet deposited a declaration of acceptance. The day one of those States accepts that offer by depositing in its turn its declaration of acceptance, the consensual bond is established and no further condition needs to be fulfilled.

Having recalled that its decision in the case concerning *Right of Passage over Indian Territory* has been reaffirmed in subsequent cases, the Court observes that it is true, as argued by Nigeria, that the Court's judgments, in accordance with Article 59 of the Statute, bind only the parties to and in respect of a particular case. There can be no question of holding Nigeria to decisions reached by the Court in previous cases. The real question is whether, in this case, there is cause not to follow the reasoning and conclusions of earlier cases.

After examining the legislative history of the provisions of the Vienna Convention on the Law of Treaties, which Nigeria relies on with regard to its argument that the interpretation given in 1957 to Article 36, paragraph 4, of the Statute should be reconsidered in the light of the evolution of the law of treaties which has occurred since, the Court concludes that the general rule reflected in Articles 16 and 24 of the Vienna Convention, which, the Court observes, may only be applied to declarations accepting the Court's jurisdiction as obligatory by analogy, is that: the deposit of instruments of ratification, acceptance, approval or accession to a treaty establishes the consent of a State to be bound by a treaty; and that the treaty enters into force as regards that State on the day of the deposit. Thus the rules adopted in this sphere by the Vienna Convention correspond to the solution adopted by the Court in the case concerning *Right of Passage over Indian Territory*. That solution should be maintained.

Nigeria maintains however that, in any event, Cameroon could not file an application before the Court without allowing a reasonable period to elapse "as would ... have enabled the Secretary-General to take the action required of him in relation to Cameroon's Declaration of 3 March 1994". Compliance with that time period is essential, the more so because, according to Nigeria, the Court, in its Judgment of 26 November 1984 in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, required a reasonable time for the withdrawal of declarations under the Optional Clause.

The Court considers that its conclusion in respect of the withdrawal of declarations under the Optional Clause in the Judgment of 1984 is not applicable to the deposit of those declarations. Withdrawal ends existing consensual bonds, while deposit establishes such bonds. The effect of withdrawal is therefore purely and simply to deprive other States which have already accepted the jurisdiction of the Court of the right they had to bring proceedings before it, against the withdrawing State. In contrast, the deposit of a declaration does not deprive those States of any accrued right. Accordingly no time period is required for the establishment of a consensual bond following such a deposit.

Nigeria's second argument is that Cameroon omitted to inform it that it intended to accept the jurisdiction of the Court, then that it had accepted that jurisdiction and, lastly, that it intended to file an application. Nigeria further argued that Cameroon even continued, during the first three months of 1994, to maintain bilateral contacts with it on boundary questions while preparing itself to address the Court. Such conduct, Nigeria contends, infringes upon the principle of good faith which today plays a larger role in the case-law of the Court than before, and should not be accepted.

Cameroon, for its part, argues that it had no obligation to inform Nigeria in advance of its intentions, or of its decisions. It adds that in any event "Nigeria was not at all surprised by the filing of Cameroon's Application and ... knew perfectly well what Cameroon's intentions were in that regard several weeks before the filing". The principle of good faith was not at all disregarded.

The Court observes that the principle of good faith is a well-established principle of international law. It notes, however, that although that principle is "one of the basic principles governing the creation and performance of legal obligations ... it is not in itself a source of obligation where none would otherwise exist". There is no specific obligation in international law for States to inform other States party to the Statute that they intend to subscribe or have subscribed to the Optional Clause. Consequently, Cameroon was not bound to inform Nigeria that it intended to subscribe or had subscribed to the Optional Clause. Cameroon was not bound either to inform Nigeria of its intention to bring proceedings before the Court. In the absence of any such obligations and of any infringement of Nigeria's corresponding rights, Nigeria may not justifiably rely upon the principle of good faith in support of its submissions.

On the facts of the matter, to which the Parties devoted considerable attention, and quite apart from legal considerations, the Court adds that Nigeria was not unaware of Cameroon's intentions. In that connection, the Court

refers to a communication from Nigeria to the Security Council, dated 4 March 1994; to the information contained in the *Journal of the United Nations*, issued on that same day; and to statements made at the extraordinary general meeting of the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution of the Organization of African Unity of 11 March 1994.

Nigeria recalls in the third place that, by its Declaration deposited on 3 September 1965, it had recognized

> "as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, that is to say, on the sole condition of reciprocity, the jurisdiction of the International Court of Justice in conformity with Article 36, paragraph 2, of the Statute of the Court".

Nigeria maintains that on the date on which Cameroon's Application was filed, it did not know that Cameroon had accepted the Court's compulsory jurisdiction. Accordingly it could not have brought an application against Cameroon. There was an absence of reciprocity on that date. The condition contained in the Nigerian Declaration was operative; consequently, the Court does not have jurisdiction to hear the Application. Cameroon disputes this argument in fact as well as in law. It states that, in the minds of the States party to the Optional Clause, the condition of reciprocity never possessed the meaning which Nigeria now ascribes to it.

The Court, noting that it has on numerous occasions had to consider what meaning it is appropriate to give to the condition of reciprocity in the implementation of Article 36, paragraph 2, of the Statute, observes that, in the final analysis, the notion of reciprocity is concerned with the scope and substance of the commitments entered into, including reservations, and not with the formal conditions of their creation, duration or extinction; and that, consequently, the principle of reciprocity is not affected by any delay in the receipt of copies of the Declaration by the Parties to the Statute.

The Court considers that Nigeria does not offer evidence in support of its argument that it intended to insert into its Declaration of 14 August 1965 a condition of reciprocity with a different meaning from the one which the Court had drawn from such clauses in 1957.

The additional phrase of the pertinent sentence in the Nigerian Declaration, "that is to say, on the sole condition of reciprocity" must be understood as explanatory and not adding any further condition. This interpretation is "in harmony with a natural and reasonable way of reading the text" and Nigeria's condition of reciprocity cannot be treated as a reservation *ratione temporis*.

Nigeria's first preliminary objection is accordingly rejected. The Court observes that it is therefore not called upon to examine the reasoning put forward by Cameroon under Article 102 of the Charter, nor Cameroon's alternative submissions based on *forum prorogatum*. In any event, the Court has jurisdiction to pass upon Cameroon's Application.

Second Preliminary Objection
(paras. 48-60)

Nigeria raises a second preliminary objection stating that

> "for a period of at least 24 years prior to the filing of the Application the Parties have in their regular dealings accepted a duty to settle all boundary questions through the existing bilateral machinery".

According to Nigeria, an implicit agreement is thus said to have been reached with a view to resorting exclusively to such machinery and to refraining from relying on the jurisdiction of the International Court of Justice. In the alternative, Nigeria claims that by its conduct Cameroon is estopped from turning to the Court. Finally, Nigeria invokes the principle of good faith and the rule *pacta sunt servanda* in support of this argument.

Cameroon maintains that the bilateral bodies which dealt with various boundary difficulties that had emerged between the two countries had only been temporary and that no permanent institutional machinery had been set up. It contends that no explicit or implicit agreement had been established between the Parties with a view to vesting exclusive jurisdiction in such bodies. Finally, according to Cameroon, the conditions laid down in the Court's case-law for the application of estoppel to arise were not fulfilled here. Therefore, there was no occasion to apply the principle of good faith and the rule *pacta sunt servanda*.

Reviewing the relevant facts the Court notes that the negotiations between the two States concerning the delimitation or the demarcation of the boundary were carried out in various frameworks and at various levels: Heads of State, Foreign Ministers, experts. The negotiations were active during the period 1970 to 1975 and then were interrupted until 1991.

Turning to legal considerations, the Court then considers the first branch of the Nigerian objection. It recalls that, "negotiation and judicial settlement are enumerated together in Article 33 of the Charter of the United Nations as means for the peaceful settlement of disputes". It observes that neither in the Charter nor otherwise in international law is any general rule to be found to the effect that the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to the Court and that no such precondition was embodied in the Statute of the Permanent Court of International Justice, contrary to a proposal by the Advisory Committee of Jurists in 1920. Nor is it to be found in Article 36 of the Statute of the Court. Neither was a reservation containing a precondition of this type included in the Declarations of Nigeria or Cameroon on the date of the filing of the Application. Moreover, the fact that the two States have attempted to solve some of the boundary issues dividing them during bilateral contacts, did not imply that either one had excluded the possibility of bringing any boundary dispute concerning it before other fora, and in particular the International Court of Justice. The first branch of Nigeria's objection accordingly is not accepted.

Turning to the second branch of the objection, the Court then examines whether the conditions laid down in its jurisprudence for an estoppel are present in the instant case.

It observes that an estoppel would only arise if by its acts or declarations Cameroon had consistently made it fully clear that it had agreed to settle the boundary dispute submitted to the Court by bilateral avenues alone. It would further be necessary that, by relying on such an attitude, Nigeria had changed position to its own detriment or had suffered some prejudice. These conditions are not fulfilled in this case. Indeed, Cameroon did not attribute an exclusive character to the negotiations conducted with Nigeria, nor, as far as it appears, did Nigeria. Furthermore, Nigeria does not show that it has changed its position to its detriment or that it has sustained prejudice. In bringing proceedings before the Court, Cameroon did not disregard the legal rules relied on by Nigeria in support of its second objection. Consequently, Nigeria is not justified in relying on the principle of good faith and the rule *pacta sunt servanda*, both of which relate only to the fulfilment of existing obligations. The second branch of Nigeria's objection is not accepted.

The second preliminary objection as a whole is thus rejected.

Third Preliminary Objection
(paras. 61-73)

In its third preliminary objection, Nigeria contends that "the settlement of boundary disputes within the Lake Chad region is subject to the exclusive competence of the Lake Chad Basin Commission".

In support of this argument, Nigeria invokes the treaty texts governing the Statute of the Commission as well as the practice of member States. It argues that "the procedures for settlement by the Commission are binding upon the Parties" and that Cameroon was thus barred from raising the matter before the Court on the basis of Article 36, paragraph 2, of the Statute.

For its part, Cameroon submits to the Court that "no provision of the Statute of the Lake Chad Basin Commission establishes in favour of that international organization any exclusive competence in relation to boundary delimitation". It adds that no such exclusive jurisdiction can be inferred from the conduct of member States.

It is in the light of the treaty texts and the practice that the Court then considers the positions of the Parties on this matter. For its part, Nigeria first of all contends that "the role and Statute of the Commission" must be understood "in the framework of regional agencies" referred to in Article 52 of the United Nations Charter. It accordingly concludes that "the Commission has an exclusive power in relation to issues of security and public order in the region of Lake Chad and that these issues appropriately encompass the business of boundary demarcation".

Cameroon argues, for its part, that the Commission does not constitute a regional arrangement or agency within the meaning of Article 52 of the Charter, pointing in particular to the fact that "there has never been any question of extending this category to international regional organizations of a technical nature which, like the [Commission], can include a mechanism for the peaceful settlement of disputes or for the promotion of that kind of settlement".

The Court concludes from its analysis of the treaty texts and the practice of Member States that the Lake Chad Basin Commission is an international organization exercising its powers within a specific geographical area; that it does not however have as its purpose the settlement at a regional level of matters relating to the maintenance of international peace and security and thus does not fall under Chapter VIII of the Charter.

However, even were it otherwise, Nigeria's argument to that effect should nonetheless be set aside, because the existence of procedures for regional negotiation whatever their nature, cannot prevent the Court from exercising the functions conferred upon it by the Charter and the Statute. The contention of Nigeria that the Commission should be seen as a tribunal falling under the provisions of Article 95 of the United Nations Charter must also be set aside.

The Court further concludes that the Commission has never been given jurisdiction, and *a fortiori* exclusive jurisdiction, to rule on the territorial dispute now involving Cameroon and Nigeria before the Court, a dispute which moreover did not as yet exist in 1983. It points out in addition that the conditions laid down in its case-law for an estoppel to arise, as set out above, are not fulfilled in this case. Indeed, Cameroon has not accepted that the Commission has jurisdiction to settle the boundary dispute now submitted to the Court.

In the alternative, Nigeria finally argues that, on account of the demarcation under way in the Lake Chad Basin Commission, the Court "cannot rule out the consideration of the need for judicial restraint on grounds of judicial propriety" and should decline to rule on the merits of Cameroon's Application.

It is not for the Court at this stage to rule upon the opposing arguments brought forward by the Parties in this respect. It need only note that Nigeria cannot assert both that the demarcation procedure initiated within the Lake Chad Commission was not completed and that, at the same time, that procedure rendered Cameroon's submissions moot. There is thus no reason of judicial propriety which should make the Court decline to rule on the merits of those submissions.

In the light of the above considerations, the Court rejects Nigeria's third preliminary objection.

Fourth Preliminary Objection
(paras. 74-83)

The Court then turns to the fourth preliminary objection raised by Nigeria. This objection contends that:

"The Court should not in these proceedings determine the boundary in Lake Chad to the extent that that

boundary constitutes or is constituted by the tripoint in the Lake."

Nigeria holds that the location of the tripoint within Lake Chad directly affects a third State, the Republic of Chad, and that the Court therefore cannot determine this tripoint.

The Court recalls that it has always acknowledged as one of the fundamental principles of its Statute that no dispute between States can be decided without their consent to its jurisdiction. Nevertheless, the Court has also emphasized that it is not necessarily prevented from adjudicating when the judgment it is asked to give might affect the legal interests of a State which is not a party to the case; and the Court has only declined to exercise jurisdiction when the interests of the third State constitute the very subject matter of the judgment to be rendered on the merits.

The Court observes that the submissions presented to it by Cameroon refer to the frontier between Cameroon and Nigeria and to that frontier alone. They do not refer to the frontier between Cameroon and the Republic of Chad. Certainly, the request to "specify definitively the frontier between Cameroon and the Federal Republic of Nigeria from Lake Chad to the sea" (para. 17 (*f*) of the Additional Application) may affect the tripoint, i.e., the point where the frontiers of Cameroon, Chad and Nigeria meet.

However, the request to specify the frontier between Cameroon and Nigeria from Lake Chad to the sea does not imply that the tripoint could be moved away from the line constituting the Cameroon-Chad boundary. Neither Cameroon nor Nigeria contest the current course of that boundary in the centre of Lake Chad as it is described in the "technical document on the demarcation of the ... boundaries" mentioned in paragraph 65 of the Judgment. Incidents between Nigeria and Chad in the Lake, as referred to by Nigeria, concern Nigeria and Chad but not Cameroon or its boundary with Chad. Any redefinition of the point where the frontier between Cameroon and Nigeria meets the Chad-Cameroon frontier could in the circumstances only lead to a moving of the tripoint along the line of the frontier in the Lake between Chad and Cameroon. Thus, the legal interests of Chad as a third State not party to the case do not constitute the very subject matter of the judgment to be rendered on the merits of Cameroon's Application; and therefore, the absence of Chad does not prevent the Court from proceeding to a specification of the border between Cameroon and Nigeria in the Lake.

The fourth preliminary objection is accordingly rejected.

Fifth Preliminary Objection
(paras. 84-94)

In its fifth preliminary objection Nigeria alleges that there is no dispute concerning "boundary delimitation as such" throughout the whole length of the boundary from the tripoint in Lake Chad to the sea, subject, within Lake Chad, to the question of the title over Darak and adjacent islands, and without prejudice to the title over the Bakassi Peninsula.

The Court recalls that, in the sense accepted in its jurisprudence and that of its predecessor, a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between parties; and that, in order to establish the existence of a dispute, it must be shown that the claim of one party is positively opposed by the other and further, that whether there exists an international dispute is a matter for objective determination.

On the basis of these criteria, there can be no doubt about the existence of disputes with respect to Darak and adjacent islands, the village of Tipsan, as well as the Peninsula of Bakassi. This latter dispute, as indicated by Cameroon, might have a bearing on the maritime boundary between the two Parties.

All of these disputes concern the boundary between Cameroon and Nigeria. However, given the great length of that boundary, which runs over more than 1,600 km from Lake Chad to the sea, it cannot be said that these disputes in themselves concern so large a portion of the boundary that they would necessarily constitute a dispute concerning the whole of the boundary. Even taken together with the existing boundary disputes, the incidents and incursions reported by Cameroon do not establish by themselves the existence of a dispute concerning all of the boundary between Cameroon and Nigeria.

However, the Court notes that Nigeria has constantly been reserved in the manner in which it has presented its own position on the matter. Although Nigeria knew about Cameroon's preoccupation and concerns, it has repeated, and has not gone beyond, the statement that there is no dispute concerning "boundary delimitation as such". Nigeria has shown the same caution in replying to the question asked by a Member of the Court in the oral proceedings, as to whether Nigeria's assertion that there is no dispute as regards the land boundary between the two States (subject to the existing problems in the Bakassi Peninsula and the Darak region) signifies,

> "that, these two sectors apart, there is agreement between Nigeria and Cameroon on the geographical coordinates of this boundary as they result from the texts relied on by Cameroon in its Application and its Memorial".

The Court notes that, in its reply, Nigeria does not indicate whether or not it agrees with Cameroon on the course of the boundary or on its legal basis, though clearly it does differ with Cameroon about Darak and adjacent islands, Tipsan and Bakassi. Nigeria states that the existing land boundary is not described by reference to geographical coordinates but by reference to physical features. As to the legal basis on which the boundary rests, Nigeria refers to "relevant instruments" without specifying which these instruments are apart from saying that they pre-date independence and that, since independence, no bilateral agreements "expressly confirming or otherwise describing the pre-independence boundary by reference to geographical coordinates" have been concluded between the Parties. That wording seems to suggest that the existing instruments may require confirmation. Moreover, Nigeria refers to "well-

established practice both before and after independence" as one of the legal bases of the boundary whose course, it states, "has continued to be accepted in practice"; however, it does not indicate what that practice is.

The Court points out that Nigeria is entitled not to advance arguments that it considers are for the merits at the present stage of the proceedings; in the circumstances however, the Court finds itself in a situation in which it cannot decline to examine the submission of Cameroon which aims at a definitive determination of its boundary with Nigeria from Lake Chad to the sea on the ground that there is no dispute between the two States. Because of Nigeria's position, the exact scope of this dispute cannot be determined at present; a dispute nevertheless exists between the two Parties, at least as regards the legal bases of the boundary. It is for the Court to pass upon this dispute.

The fifth preliminary objection raised by Nigeria is thus rejected.

Sixth Preliminary Objection
(paras. 95-102)

The Court then turns to Nigeria's sixth preliminary objection which is to the effect that there is no basis for a judicial determination that Nigeria bears international responsibility for alleged frontier incursions.

Nigeria contends that the submissions of Cameroon do not meet the standard required by Article 38 of the Rules of Court and general principles of law regarding the adequate presentation of facts on which Cameroon's request is based, including dates, the circumstances and precise locations of the alleged incursions and incidents into and on Cameroonian territory. Nigeria maintains that what Cameroon has presented to the Court does not give Nigeria the knowledge which it needs and to which it is entitled in order to prepare its reply. Similarly, in Nigeria's view, the material submitted is so sparse that it does not enable the Court to carry out fair and effective judicial determination of, or make determination on, the issues of State responsibility and reparation raised by Cameroon. While Nigeria acknowledges that a State has some latitude in expanding later on what it has said in its Application and in its Memorial, Cameroon is said to be essentially restricted in its elaboration to the case as presented in its Application.

Cameroon insists that it stated clearly in its pleadings that the facts referred to in order to establish Nigeria's responsibility were only of an indicative nature and that it could, where necessary, amplify those facts when it comes to the merits. Cameroon refers to the requirements established in Article 38, paragraph 2, of the Rules and which call for a "succinct" presentation of the facts. It holds that parties are free to develop the facts of the case presented in the application or to render them more precise in the course of the proceedings.

The Court observes that the decision on Nigeria's sixth preliminary objection hinges upon the question of whether the requirements which an application must meet and which are set out in Article 38, paragraph 2, of the Rules of Court are met in the present instance. The requirements set out in Article 38, paragraph 2, are that the Application shall "specify the precise nature of the claim, together with a succinct statement of the facts and grounds on which the claim is based". The Court notes that "succinct", in the ordinary meaning to be given to this term, does not mean "complete" and neither the context in which the term is used in Article 38, paragraph 2, of the Rules of Court nor the object and purpose of that provision indicate that it should be interpreted in that way. Article 38, paragraph 2, does therefore not preclude later additions to the statement of the facts and grounds on which a claim is based. Nor does it provide that the latitude of an applicant State, in developing what it has said in its application is strictly limited, as suggested by Nigeria.

As regards the meaning to be given to the term "succinct", the Court would simply note that Cameroon's Application contains a sufficiently precise statement of the facts and grounds on which the Applicant bases its claim. That statement fulfils the conditions laid down in Article 38, paragraph 2, and the Application is accordingly admissible.

Lastly, the Court cannot agree that the lack of sufficient clarity and completeness in Cameroon's Application and its inadequate character, as perceived by Nigeria, make it impossible for Nigeria to respond effectively to the allegations which have been presented or makes it impossible for the Court ultimately to make a fair and effective determination in the light of the arguments and the evidence then before it. It is the applicant which must bear the consequences of an application that gives an inadequate rendering of the facts and grounds on which the claim is based.

The Court consequently rejects the sixth preliminary objection raised by Nigeria.

Seventh Preliminary Objection
(paras. 103-111)

In its seventh preliminary objection Nigeria contends that there is no legal dispute concerning delimitation of the maritime boundary between the two Parties which is at the present time appropriate for resolution by the Court.

Nigeria says that this is so for two reasons: in the first place, no determination of a maritime boundary is possible prior to the determination of title in respect of the Bakassi Peninsula. Secondly, at the juncture when there is a determination of the question of title over the Bakassi Peninsula, the issues of maritime delimitation will not be admissible in the absence of prior sufficient action by the Parties, on a footing of equality, to effect a delimitation "by agreement on the basis of international law".

The Court initially addresses the first argument presented by Nigeria. The Court accepts that it will be difficult if not impossible to determine the delimitation of the maritime boundary between the Parties as long as the title over the Peninsula of Bakassi has not been determined. Since both questions are before the Court, it becomes a matter for the Court to arrange the order in which it

addresses the issues in such a way that it can deal substantively with each of them. That is a matter which lies within the Court's discretion and which cannot be the basis of a preliminary objection. This argument therefore has to be dismissed.

As to the second argument of Nigeria, the Court recalls that, in dealing with the cases brought before it, it must adhere to the precise request submitted to it. What is in dispute between the Parties and what the Court has to decide now is whether the alleged absence of sufficient effort at negotiation constitutes an impediment for the Court to accept Cameroon's claim as admissible or not. This matter is of a genuinely preliminary character and has to be decided under Article 79 of the Rules of Court.

In this connection, Cameroon and Nigeria refer to the United Nations Convention on the Law of the Sea, to which they are parties.

However, the Court notes that, in this case, it has not been seized on the basis of Article 36, paragraph 1, of the Statute, and, in pursuance of it, in accordance with Part XV of the United Nations Convention on the Law of the Sea relating to the settlement of disputes arising between the parties to the Convention with respect to its interpretation or application. It has been seized on the basis of declarations made under Article 36, paragraph 2, of the Statute, which declarations do not contain any condition relating to prior negotiations to be conducted within a reasonable time period. The second argument of Nigeria cannot therefore be upheld.

The Court finds in addition that, beyond point G (cf. point (3) of the submissions in Cameroon's Memorial), the dispute between the Parties has been defined with sufficient precision for the Court to be validly seized of it.

It therefore rejects the seventh preliminary objection.

Eighth Preliminary Objection
(paras. 112-117)

The Court then deals with the eighth and last of the preliminary objections presented by Nigeria. With that objection Nigeria contends, in the context of and supplementary to the seventh preliminary objection, that the question of maritime delimitation necessarily involves the rights and interests of third States and is to that extent inadmissible.

The Court notes, as do the Parties, that the problem of rights and interests of third States arises only for the prolongation, as requested by Cameroon, of the maritime boundary seawards beyond point G.

What the Court has to examine under the eighth preliminary objection is therefore whether that prolongation would involve rights and interests of third States and whether that would prevent it from proceeding to such prolongation. The Court notes that from the geographical location of the territories of the other States bordering the Gulf of Guinea, and in particular Equatorial Guinea and Sao Tome and Principe, it appears that rights and interests of third States will become involved if the Court accedes to Cameroon's request. The Court recalls that it has affirmed, that one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction. However, it has also stated that it is not necessarily prevented from adjudicating when the judgment it is asked to give might affect the legal interests of a State which is not a party to the case.

The Court cannot therefore, in the present case, give a decision on the eighth preliminary objection as a preliminary matter. In order to determine where a prolonged maritime boundary beyond point G would run, where and to what extent it would meet possible claims of other States, and how its judgment would affect the rights and interests of these States, the Court would of necessity have to deal with the merits of Cameroon's request. At the same time, the Court cannot rule out the possibility that the impact of the judgment required by Cameroon on the rights and interests of the third States could be such that the Court would be prevented from rendering it in the absence of these States, and that consequently Nigeria's eighth preliminary objection would have to be upheld at least in part. Whether such third States would choose to exercise their rights to intervene in these proceedings pursuant to the Statute remains to be seen.

The Court concludes that therefore the eighth preliminary objection of Nigeria does not possess, in the circumstances of the case, an exclusively preliminary character.

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For the above reasons the Court, in the operative paragraph of the Judgment, rejects the first preliminary objection by fourteen votes to three; the second by sixteen votes to one; the third by fifteen votes to two; the fourth and the fifth by thirteen votes to four; the sixth by fifteen votes to two; the seventh by twelve votes to five; declares, by twelve votes to five, that the eighth preliminary objection does not have, in the circumstances of the case, an exclusively preliminary character; and finds, by fourteen votes to three, that, on the basis of Article 36, paragraph 2, of the Statute, it has jurisdiction to adjudicate upon the dispute; and, by fourteen votes to three, that the Application filed by the Republic of Cameroon on 29 March 1994, as amended by the Additional Application of 6 June 1994, is admissible.

Separate opinion of Judge Oda

Judge Oda shares the view of the Court that it has jurisdiction to adjudicate on certain of the requests presented unilaterally by Cameroon. In his view, however, the presentation of Cameroon's March 1994 Application and June 1994 Application, as well as the "submissions" in the 1995 Memorial (which do not necessarily correspond to the Applications), is inadequate. This makes the present case extremely complicated and difficult to follow. However, Judge Oda finds that Cameroon's contentions are basically two in number: one being a request to specify the boundary line both on land and at sea and the other being

the judicial settlement of the matter of the trespass which took place in the border areas, namely in the Bakassi Peninsula, in Lake Chad and at certain land borders.

With regard to the indication of a boundary, Judge Oda pointed out that, apart from the question of the delimitation of the offshore areas in the mouth of the Cross River, and the prolongation of the delimitation of the exclusive economic zone and the continental shelf in the ocean area in the Gulf of Guinea — issues totally dependent on the territoriality of the Bakassi Peninsula — the delimitation of the *maritime boundary* cannot be the object of the adjudication of the Court, unless it is requested jointly by the Parties, as the simple failure of negotiations between States does not mean that a "legal dispute" has occurred under Article 36 (2) of the Statute. The simple specification of the *land* boundary also cannot be deemed as constituting a "legal dispute" which the Court can entertain, unless jointly requested to do so by the Parties under Article 36 (1) of the Statute.

Judge Oda holds the view that the real "legal dispute" in the present case involves Cameroon's claim to sovereignty over the Bakassi Peninsula, the part of Lake Chad and certain border areas — which sovereignty has, according to Cameroon, been violated by incursions of Nigerian civilians and military personnel — and Nigeria's challenge to such a claim. If the Court is in a position to entertain Cameroon's Application, it should certainly decide whether or not Cameroon's claims to sovereignty over the disputed areas are justified, but this would not be the same as a simple request to specify the boundary line, over which matter the Court does not have jurisdiction. Judge Oda further stated that, in his view, the larger part of the issues advanced by Nigeria regarding the "legal dispute" on sovereignty over the boundary areas are matters that should be dealt with at the merits phase.

Separate opinion of Judge Vereshchetin

In his separate opinion, Judge Vereshchetin states that he is unable to vote in favour of point 1 (*e*) of the Judgment, dealing with the fifth preliminary objection of Nigeria, because of his belief that the finding on which that part of the Judgment is based is not duly supported by the evidence offered by the Applicant and does not stand the test of objective determination.

For the Court to decide on the existence of a dispute between the two Parties as to the legal bases of the whole of the boundary, it must previously have been established that the Republic of Nigeria challenges the validity of the legal title to the whole of the boundary relied on by the Republic of Cameroon, or relies on a different legal title, or places a different interpretation on a given legal instrument relating to the entire boundary. None of those conclusions may be "positively" inferred from the documents or statements presented to the Court.

The repeated statements of Nigeria to the effect that there is no dispute concerning "boundary delimitation as such" and the reserved and cautious formulations in its reply given to the question of the Court may signify the disinclination of Nigeria to unfold its legal arguments on the merits. True, they may also be viewed as evidence of the probable emergence of a broader dispute. However, the real scope of such a dispute, if any, its parameters and concrete consequences can be clarified only at the merits stage when the Court has compared the maps produced by both Parties and more fully heard and assessed the substance of their interpretation of the respective legal instruments. In the view of Judge Vereshchetin, this prompts the conclusion that the fifth objection of Nigeria does not possess an exclusively preliminary character within the meaning of Article 79, paragraph 7, of the Rules of Court, and therefore cannot be dismissed at this stage of the proceedings.

Separate opinion of Judge Higgins

Judge Higgins has voted with the majority on all elements in the Court's Judgment save for paragraph (1) (*g*) of the *dispositif*.

In its seventh preliminary objection Nigeria claimed that there "is no legal dispute concerning delimitation of the maritime boundary between the two Parties which is at the present time appropriate for resolution by the Court" because, first, it was necessary initially to determine title in respect of the Bakassi Peninsula and second, there was an "absence of sufficient action by the Parties, on a footing of equality, to effect a delimitation by 'agreement on the basis of international law'".

Judge Higgins agrees with the response of the Court in rejecting each of these claims on inadmissibility. In her separate opinion she contends, however, that there was another matter which the Court should have addressed *proprio motu*, namely that no dispute appears to exist relating to the maritime boundary, at least beyond point G as designated by Cameroon. This emerges both from the way Cameroon itself formulates its Application, where it asks for a delimitation of the maritime boundary "In order to *prevent any dispute arising* ..." (emphasis added) and from the absence of any evidence offered in the written or oral pleadings as to the existence of such a dispute. There have been no claims beyond point G that have been put by one party and rejected by the other.

The fact that Nigeria and Cameroon have not been able to have detailed negotiations on the line beyond point G does not mean that a dispute exists beyond that point on Cameroon's proposed line, suggested for the first time in these proceedings before the Court.

Nor can it be the case that the existence of a territorial dispute automatically entitles an applicant State to request the delimitation of the maritime boundary, without anything further being required to be shown as to that maritime frontier.

Although it is not normally the task of the Court to suggest additional grounds of inadmissibility beyond those a respondent State chooses to advance, the existence of a dispute is a requirement of the Court's jurisdiction under Article 38 of the Statute and the Court should have addressed the matter *proprio motu*.

Separate opinion of Judge Parra-Aranguren

Judge Parra-Aranguren voted against subparagraph 1 (*d*) of the operative part of the Judgment, which rejects the fourth preliminary objection raised by Nigeria requesting the Court not to determine in these proceedings the boundary in Lake Chad, to the extent that that boundary constitutes or is determined by the tripoint Nigeria-Cameroon-Chad in the Lake, because its location directly affects a third State, the Republic of Chad. On this point the Court did not follow its decision in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility*, where it had stated that the determination of the third States "affected" by the decision is not in itself a jurisdictional problem, but a question belonging to the merits (*I.C.J. Reports 1984*, p. 425, para. 76). This is the applicable principle and in the Judge's view, at this stage of the proceedings the Court is not entitled to decide, as it has done, that the future determination on the merits of the tripoint Nigeria-Cameroon-Chad will not have any consequence for the Republic of Chad. The Court's decision unreasonably precludes any subsequent intervention by the Republic of Chad under Article 62 of the Statute of the Court. Therefore the fourth preliminary objection raised by Nigeria should not have been rejected and the Court should have declared that, in the circumstances of the case, the objection was not of an exclusively preliminary character.

Separate opinion of Judge Kooijmans

In his separate opinion Judge Kooijmans sets out why he voted against paragraphs 1 (*g*) and 2 of the *dispositif*. He voted against paragraph 1 (*g*), as in his opinion the seventh preliminary objection should have been partially upheld, since there does not exist a legal dispute between the Parties as to the continuation of the maritime boundary beyond point G. Although he agrees that the point was not raised specifically by Nigeria, he is of the opinion that the Court should have determined *proprio motu* whether there is a dispute in the sense of the Statute. In the present case Cameroon requested the Court to determine the whole of the maritime boundary without ever before having formulated a specific claim with regard to the more seaward part of that boundary. It was only in the Memorial that its submission was further substantiated. It therefore cannot be said that there is a claim of Cameroon which, at the date of the filing of the Application, was "positively opposed" by Nigeria as the Court according to its case-law requires.

Since in his view the seventh objection should have been upheld as regards the maritime boundary beyond point G and since the issue of the rights and interests of third parties (the subject of the eighth preliminary objection) only arises in respect of that part of the boundary, that objection has become without object. Judge Kooijmans consequently voted against paragraph 2. But also for other reasons he cannot agree with what the Court said with regard to the eighth objection. Although in general an objection dealing with rights and interests of third States does not possess an exclusively preliminary character, it is Judge Kooijmans' view that in the present case the Court, for reasons of judicial propriety, would have done better to uphold it in the preliminary phase. The most important third country involved is Equatorial Guinea. Both Cameroon and Nigeria agreed in 1993 that State's involvement in the delimitation of the boundary was essential and that negotiations should get started. In view of this recognition by Cameroon of the necessity of negotiations it seems not proper and reasonable to induce Equatorial Guinea to reveal its legal position by means of an intervention under Article 62 of the Statute before such negotiations have even begun.

Dissenting opinion of Vice-President Weeramantry

Vice-President Weeramantry, in his dissenting opinion, expresses disagreement with the Court's findings on Nigeria's first objection. The Vice-President expresses the view that the 1957 decision in *Right of Passage over Indian Territory* is in need of review. That decision implies that the State which is sought to be bound by the declaration of another State can be so bound without knowing of that declaration, and thus overlooks the consensual basis of the Court's jurisdiction under Article 36, paragraph 2, of the Statute. It also does not give effect to the imperative terms of Article 36, paragraph 4, requiring communication by the Secretariat of such declarations. The opinion sets out eight reasons why, in Judge Weeramantry's view, the *Right of Passage* decision needs to be reviewed.

The opinion also draws in perspectives from comparative law regarding the notion of consensus and the need for communication of acceptance if a consensual relationship is to be formed. These perspectives can be used under Article 38, paragraph 1 (*c*) of the Statute. Referring, inter alia, to Grotius' endorsement of the need for communication of acceptance if a State is to be bound by a consensual obligation, the opinion also stresses the need for ensuring that the party sought to be bound should not be taken by surprise.

Dissenting opinion of Judge Koroma

In his dissenting opinion Judge Koroma regretted that he could not share the opinion of the majority of the Court that it has jurisdiction to pass upon Cameroon's Application. In his view, for a State to be entitled to invoke the compulsory jurisdiction of the Court, the conditions stipulated in Article 36, paragraphs 2 and 4, of the Statute must have been met. In a situation where those conditions have not been satisfied, as in the present case, jurisdiction cannot be said to have been conferred on the Court, nor can the Court impose such jurisdiction on a State against its will.

The Judge further stated that this phase of the matter should have been governed by the provisions of the Statute, rather than the Court allowing its decision to have been substantively controlled by the decision in the *Right of Passage* case.

Dissenting opinion of Judge Ajibola

In my dissenting opinion I voted against the decision of the majority of the Members of the Court on the first, third, fourth, fifth, sixth, second part of the seventh and the eighth preliminary objections filed by Nigeria. I, however, voted with the majority of the Members of the Court with regard to the decision of the Court on the second preliminary objection and the first part of the seventh preliminary objection and I state my reasons for doing so therein.

The most important aspect of this dissenting opinion deals with my disagreement with the decision of the Court to follow its earlier decision in the case concerning *Right of Passage over Indian Territory*, which I now consider to be bad case-law. Fundamentally, the reason for so doing is premised on the fact that Article 36 (4) of the Statute was wrongly or inadequately interpreted in 1957 and the time has come for the same to be corrected after 41 years. Paragraph 4 of Article 36 provides that declarations under the Optional Clause "shall" be "*deposited*" with the Secretary-General of the United Nations and the same "shall" be "*transmitted*" to all the States Members and to the Registrar of the Court. While the Court rightly and properly interpreted the former in the 1957 case it failed to do so in the case of the latter requirement for the main reason that such a situation would bring "uncertainty" into the operation of the declaration vis-à-vis the "accepting State". This argument is most unconvincing and it is anything but a correct interpretation of Article 36 (4) as a whole.

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112. CASE CONCERNING THE VIENNA CONVENTION ON CONSULAR RELATIONS (PARAGUAY *v.* UNITED STATES OF AMERICA) (DISCONTINUANCE)

Order of 10 November 1998

In the case concerning the Vienna Convention on Consular Relations (Paraguay *v.* United States of America) at the request of Paraguay, on 10 November 1998, the Court made an Order recording the discontinuance of the proceedings and directing the removal of the case from the Court's List.

The dispute brought by Paraguay to the Court concerned alleged violations of the Vienna Convention on Consular Relations of 24 April 1963 with respect to the case of Mr. Angel Francisco Breard, a Paraguayan national convicted of murder in Virginia (United States), whose execution had been scheduled for 14 April 1998 and who was eventually executed on that date.

The Court was composed as follows: Vice-President Weeramantry, Acting President; President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek; Registrar Valencia-Ospina.

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The full text of the Order reads as follows:

"The International Court of Justice,

Composed as above,

Having regard to Article 48 of the Statute of the Court and to Article 89 of the Rules of Court,

Having regard to the Application filed in the Registry of the Court on 3 April 1998, whereby the Republic of Paraguay instituted proceedings against the United States of America for 'violations of the Vienna Convention on Consular Relations [of 24 April 1963]' allegedly committed by the United States,

Having regard to the request for the indication of provisional measures submitted by Paraguay on 3 April 1998 and to the Order made by the Court on 9 April 1998, by which it indicated provisional measures,

Having regard to the Orders of 9 April 1998 and 8 June 1998, by which the Vice-President of the Court, acting as President, fixed and subsequently extended the time limits for the filing of written pleadings on the merits, and having regard to the Memorial filed by Paraguay on 9 October 1998;

Whereas, by a letter of 2 November 1998, filed in the Registry that same day, the Agent of Paraguay informed the Court that his Government wished to discontinue the proceedings with prejudice, and accordingly requested that the case be removed from the List;

Whereas a copy of this letter was immediately communicated to the Government of the United States, which was informed that the senior judge, acting pursuant to Articles 13, paragraph 3, and 89, paragraphs 2 and 3, of the Rules of Court, had fixed 30 November 1998 as the time limit within which the United States could state whether it opposed the discontinuance;

Whereas, by a letter of 3 November 1998, a copy of which was filed in the Registry that same day, the Agent of the United States informed the Court that his Government concurred in Paraguay's discontinuance of the proceedings with prejudice, and in its request that the case be removed from the List,

Places on record the discontinuance by the Republic of Paraguay of the proceedings instituted by the Application filed on 3 April 1998; and

Orders that the case be removed from the List."

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113. CASE CONCERNING FISHERIES JURISDICTION (SPAIN *v.* CANADA) (JURISDICTION OF THE COURT)

Judgment of 4 December 1998

In its Judgment on jurisdiction in the case concerning Fisheries Jurisdiction (Spain *v.* Canada) the Court, by twelve votes against five, declared that it had no jurisdiction to adjudicate upon the dispute brought in 1995 by Spain.

The Court was composed as follows: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek; Judges ad hoc Lalonde, Torres Bernárdez; Registrar Valencia-Ospina.

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* *

The text of the operative paragraph of the Judgment reads as follows:

"89. For these reasons,

THE COURT

By twelve votes to five,

Finds that it has no jurisdiction to adjudicate upon the dispute brought before it by the Application filed by the Kingdom of Spain on 28 March 1995.

IN FAVOUR: President Schwebel; Judges Oda, Guillaume, Herczegh, Shi, Fleischhauer, Koroma, Higgins, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc Lalonde;

AGAINST: Vice-President Weeramantry; Judges Bedjaoui, Ranjeva, Vereshchetin; Judge ad hoc Torres Bernárdez."

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* *

President Schwebel and Judges Oda, Koroma and Kooijmans appended separate opinions to the Judgment of the Court. Vice-President Weeramantry, Judges Bedjaoui, Ranjeva and Vereshchetin, and Judge ad hoc Torres Bernárdez appended dissenting opinions to the Judgment of the Court.

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* *

Review of the proceedings and submissions of the Parties
(paras. 1-12)

The Court begins by recalling that on 28 March 1995, Spain instituted proceedings against Canada in respect of a dispute relating to the amendment, on 12 May 1994, of the Canadian Coastal Fisheries Protection Act, and the subsequent amendments to the regulations implementing that Act, as well as to specific actions taken on the basis of the amended Act and its regulations, including the pursuit, boarding and seizure on the high seas, on 9 March 1995, of a fishing vessel — the *Estai* — flying the Spanish flag. The Application invoked as the basis of the jurisdiction of the Court the declarations whereby both States have accepted its compulsory jurisdiction in accordance with Article 36, paragraph 2, of its Statute.

By letter of 21 April 1995, the Ambassador of Canada to the Netherlands informed the Court that, in his Government's opinion, the Court "manifestly lacks jurisdiction to deal with the Application filed by Spain ..., by reason of paragraph 2 (*d*) of the Declaration, dated 10 May 1994, whereby Canada accepted the compulsory jurisdiction of the Court".

At a meeting between the President of the Court and the representatives of the Parties it was agreed that the question of the jurisdiction of the Court should be separately determined before any proceedings on the merits; agreement was also reached on time limits for the filing of written pleadings on that question. A Memorial by Spain and a Counter-Memorial by Canada on the question of the jurisdiction of the Court were duly filed within the time limits prescribed by an Order of the President of 2 May 1995.

After Spain had expressed the wish to be authorized to submit a Reply and Canada had opposed that request, the Court, by an Order of 8 May 1996, decided that it was sufficiently informed, and that the presentation by the Parties of further written pleadings on the question of the Court's jurisdiction therefore did not appear necessary. Public hearings were held between 9 and 17 June 1998.

In the Application, the following requests were made by Spain:

"As for the precise nature of the complaint, the Kingdom of Spain requests:

(A) that the Court declare that the legislation of Canada, insofar as it claims to exercise a jurisdiction over ships flying a foreign flag on the high seas, outside the exclusive economic zone of Canada, is not opposable to the Kingdom of Spain;

(B) that the Court adjudge and declare that Canada is bound to refrain from any repetition of the acts complained of, and to offer to the Kingdom of Spain the reparation that is due, in the form of an indemnity the amount of which must cover all the damages and injuries occasioned; and

(C) that, consequently, the Court declare also that the boarding on the high seas, on 9 March 1995, of the ship *Estai* flying the flag of Spain and the measures of coercion and the exercise of jurisdiction over that ship and over its captain constitute a concrete violation of the

aforementioned principles and norms of international law."

In the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Spanish Government, at the sitting of 15 June 1998:

"At the end of our oral arguments, we again note that Canada has abandoned its allegation that the dispute between itself and Spain has become moot. At least, it appears to have understood that it cannot be asserted that the Spanish Application, having no further purpose for the future, merely amounted to a request for a declaratory judgment. Nor does it say — a fact of which we take note — that the agreement between the European Union and Canada has extinguished the present dispute.

Spain's final submissions are therefore as follows:

We noted at the outset that the subject matter of the dispute is Canada's lack of title to act on the high seas against vessels flying the Spanish flag, the fact that Canadian fisheries legislation cannot be invoked against Spain, and reparation for the wrongful acts perpetrated against Spanish vessels. These matters are not included in Canada's reservation to the jurisdiction of the Court.

We also noted that Canada cannot claim to subordinate the application of its reservation to the sole criterion of its national legislation and its own appraisal without disregarding your competence, under Article 36, paragraph 6, of the Statute, to determine your own jurisdiction.

Lastly, we noted that the use of force in arresting the *Estai* and in harassing other Spanish vessels on the high seas, as well as the use of force contemplated in Canadian Bills C-29 and C-8, can also not be included in the Canadian reservation, because it contravenes the provisions of the Charter.

For all the above reasons, we ask the Court to adjudge and declare that it has jurisdiction in this case."

On behalf of the Canadian Government, at the sitting of 17 June 1998:

"*May it please the Court* to adjudge and declare that the Court has no jurisdiction to adjudicate upon the Application filed by Spain on 28 March 1995."

Background to the case
(paras. 13-22)

The Court begins with an account of the background to the case.

On 10 May 1994 Canada deposited with the Secretary-General of the United Nations a new declaration of acceptance of the compulsory jurisdiction of the Court. Canada's prior declaration of 10 September 1985 had already contained the three reservations set forth in subparagraphs (*a*), (*b*) and (*c*) of paragraph 2 of the new declaration. Subparagraph (*d*) of the 1994 declaration, however, set out a new, fourth reservation, further excluding from the jurisdiction of the Court "(*d*) disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area, as defined in the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, 1978, and the enforcement of such measures."

On the same day that the Canadian Government deposited its new declaration, it submitted to Parliament Bill C-29 amending the Coastal Fisheries Protection Act by extending its area of application to include the Regulatory Area of the Northwest Atlantic Fisheries Organization (NAFO). Bill C-29 was adopted by Parliament, and received the Royal Assent on 12 May 1994. The Coastal Fisheries Protection Regulations were also amended, on 25 May 1994, and again on 3 March 1995, when Spanish and Portuguese fishing vessels were taken up in Table IV of Section 21 (the category of fishing vessels which were prohibited from fishing for Greenland halibut in the area concerned).

On 12 May 1994, following the adoption of Bill C-8, Canada also amended Section 25 of its Criminal Code relating to the use of force by police officers and other peace officers enforcing the law. This Section applied as well to fisheries protection officers.

On 9 March 1995, the *Estai*, a fishing vessel flying the Spanish flag and manned by a Spanish crew, was intercepted and boarded some 245 miles from the Canadian coast, in Division 3L of the NAFO Regulatory Area (Grand Banks area), by Canadian Government vessels. The vessel was seized and its master arrested on charges of violations of the Coastal Fisheries Protection Act and its implementing regulations. They were brought to the Canadian port of St. John's, Newfoundland, where they were charged with offences under the above legislation, and in particular illegal fishing of Greenland halibut; part of the ship's catch was confiscated. The members of the crew were released immediately. The master was released on 12 March 1995, following the payment of bail, and the vessel on 15 March 1995, following the posting of a bond.

The same day that the *Estai* was boarded, the Spanish Embassy in Canada sent two Notes Verbales to the Canadian Department of Foreign Affairs and International Trade. The second of these stated inter alia that: "the Spanish Government categorically condemn[ed] the pursuit and harassment of a Spanish vessel by vessels of the Canadian navy, in flagrant violation of the international law in force, since these acts [took] place outside the 200-mile zone".

In its turn, on 10 March 1995 the Canadian Department of Foreign Affairs and International Trade sent a Note Verbale to the Spanish Embassy in Canada, in which it was stated that "[t]he *Estai* resisted the efforts to board her made by Canadian inspectors in accordance with international practice" and that "the arrest of the *Estai* was necessary in order to put a stop to the overfishing of Greenland halibut by Spanish fishermen".

Also on 10 March 1995, the European Community and its member States sent a Note Verbale to the Canadian

Department of Foreign Affairs and International Trade which protested against the Canadian action.

On 16 April 1995, an "Agreement constituted in the form of an Agreed Minute, an Exchange of Letters, an Exchange of Notes and the Annexes thereto between the European Community and Canada on fisheries in the context of the NAFO Convention" was initialled; this Agreement was signed in Brussels on 20 April 1995. It concerned the establishment of a Protocol to strengthen the NAFO Conservation and Enforcement Measures"; the immediate implementation on a provisional basis, of certain control and enforcement measures; the total allowable catch for 1995 for Greenland halibut within the area concerned; and certain management arrangements for stocks of this fish.

The Agreed Minutes further provided as follows: "The European Community and Canada maintain their respective positions on the conformity of the amendment of 25 May 1994 to Canada's Coastal Fisheries Protection Act, and subsequent regulations, with customary international law and the NAFO Convention. Nothing in this Agreed Minute shall prejudice any multilateral convention to which the European Community and Canada, or any Member State of the European Community and Canada, are parties, or their ability to preserve and defend their rights in conformity with international law, and the views of either Party with respect to any question relating to the Law of the Sea." The European Community emphasized that the stay of prosecution against the vessel *Estai* and its master was essential for the application of the Agreed Minute.

On 18 April 1995 the proceedings against the *Estai* and its master were discontinued by order of the Attorney-General of Canada; on 19 April 1995 the bond was discharged and the bail was repaid with interest; and subsequently the confiscated portion of the catch was returned. On 1 May 1995 the Coastal Fisheries Protection Regulations were amended so as to remove Spain and Portugal from Table IV to Section 21. Finally, the Proposal for Improving Fisheries Control and Enforcement, contained in the Agreement of 20 April 1995, was adopted by NAFO at its annual meeting held in September 1995 and became measures binding on all Contracting Parties with effect from 29 November 1995.

The subject of the dispute
(paras. 23-35)

Neither of the Parties denies that there exists a dispute between them. Each Party, however, characterizes the dispute differently. Spain has characterized the dispute as one relating to Canada's lack of entitlement to exercise jurisdiction on the high seas, and the non-opposability of its amended Coastal Fisheries Protection legislation and regulations to third States, including Spain. Spain further maintains that Canada, by its conduct, has violated Spain's rights under international law and that such violation entitles it to reparation. Canada states that the dispute concerns the adoption of measures for the conservation and management of fisheries stocks with respect to vessels fishing in the NAFO Regulatory Area and their enforcement.

Spain insists that it is free, as the Applicant in this case, to characterize the dispute that it wishes the Court to resolve.

The Court begins by observing that there is no doubt that it is for the Applicant, in its Application, to present to the Court the dispute with which it wishes to seize the Court and to set out the claims which it is submitting to it. Paragraph 1 of Article 40 of the Statute of the Court requires moreover that the "subject of the dispute" be indicated in the Application; and, for its part, paragraph 2 of Article 38 of the Rules of Court requires "the precise nature of the claim" to be specified in the Application. In a number of instances in the past the Court has had occasion to refer to these provisions. It has characterized them as "essential from the point of view of legal security and the good administration of justice".

In order to identify its task in any proceedings instituted by one State against another, the Court must begin by examining the Application. However, it may happen that uncertainties or disagreements arise with regard to the real subject of the dispute with which the Court has been seized, or to the exact nature of the claims submitted to it. In such cases the Court cannot be restricted to a consideration of the terms of the Application alone nor, more generally, can it regard itself as bound by the claims of the Applicant.

It is for the Court itself, while giving particular attention to the formulation of the dispute chosen by the Applicant, to determine on an objective basis the dispute dividing the parties, by examining the position of both Parties. It will base itself not only on the Application and final submissions, but on diplomatic exchanges, public statements and other pertinent evidence.

In order to decide on the preliminary issue of jurisdiction which arises in the present case, the Court will ascertain the dispute between Spain and Canada, taking account of Spain's Application, as well as the various written and oral pleadings placed before the Court by the Parties.

The filing of the Application was occasioned by specific acts of Canada which Spain contends violated its rights under international law. These acts were carried out on the basis of certain enactments and regulations adopted by Canada, which Spain regards as contrary to international law and not opposable to it. It is in that context that the legislative enactments and regulations of Canada should be considered. The specific acts which gave rise to the present dispute are the Canadian activities on the high seas in relation to the pursuit of the *Estai*, the means used to accomplish its arrest and the fact of its arrest, and the detention of the vessel and arrest of its master, arising from Canada's amended Coastal Fisheries Protection Act and implementing regulations. The essence of the dispute between the Parties is whether these acts violated Spain's rights under international law and require reparation. The Court must now decide whether the Parties have conferred upon it jurisdiction in respect of that dispute.

The jurisdiction of the Court
(paras. 36-84)

As Spain sees it, Canada has in principle accepted the jurisdiction of the Court through its declaration under Article 36, paragraph 2, of the Statute, and it is for Canada to show that the reservation contained in paragraph 2 (*d*) thereto does exempt the dispute between the Parties from this jurisdiction. Canada, for its part, asserts that Spain must bear the burden of showing why the clear words of paragraph 2 (*d*) do not withhold this matter from the jurisdiction of the Court.

The Court points out that the establishment or otherwise of jurisdiction is not a matter for the parties but for the Court itself. Although a party seeking to assert a fact must bear the burden of proving it, this has no relevance for the establishment of the Court's jurisdiction, which is a "question of law to be resolved in the light of the relevant facts". That being so, there is no burden of proof to be discharged in the matter of jurisdiction.

Declarations of acceptance of the Court's compulsory jurisdiction and their interpretation
(paras. 39-56)

As the basis of jurisdiction, Spain founded its claim solely on the declarations made by the Parties pursuant to Article 36, paragraph 2, of the Statute. On 21 April 1995 Canada informed the Court, by letter, that in its view the Court lacked jurisdiction to entertain the Application because the dispute was within the plain terms of the reservation in paragraph 2 (*d*) of the Canadian declaration of 10 May 1994. This position was elaborated in its Counter-Memorial of February 1996, and confirmed at the hearings. From the arguments brought forward by Spain the Court concludes that Spain contends that the interpretation of paragraph 2 (*d*) of its declaration sought for by Canada would not only be an anti-statutory interpretation, but also an anti-Charter interpretation and an anti-general international law interpretation, and thus should not be accepted. The issue for the Court is consequently to determine whether the meaning to be accorded to the Canadian reservation allows the Court to declare that it has jurisdiction to adjudicate upon the dispute brought before it by Spain's Application.

Different views were proffered by the Parties as to the rules of international law applicable to the interpretation of reservations to optional declarations made under Article 36, paragraph 2, of the Statute. In Spain's view, such reservations were not to be interpreted so as to allow reserving States to undermine the system of compulsory jurisdiction. Moreover, the principle of effectiveness meant that a reservation must be interpreted by reference to the object and purpose of the declaration, which was the acceptance of the compulsory jurisdiction of the Court. Spain did not accept that it was making the argument that reservations to the compulsory jurisdiction of the Court should be interpreted restrictively; it explained its position in this respect in the following terms:

> "It is said that Spain argues for the *most restrictive scope permitted* of reservations, namely a restrictive interpretation of them ... This is not true. Spain supports the most limited scope permitted in the context of observing of the general rule of interpretation laid down in Article 31 of the Vienna Convention on the Law of Treaties."

Spain further contended that the *contra proferentem* rule, under which, when a text is ambiguous, it must be construed against the party who drafted it, applied in particular to unilateral instruments such as declarations of acceptance of the compulsory jurisdiction of the Court and the reservations which they contained. Finally, Spain emphasized that a reservation to the acceptance of the Court's jurisdiction must be interpreted so as to be in conformity with, rather than contrary to, the Statute of the Court, the Charter of the United Nations and general international law. For its part, Canada emphasized the unilateral nature of such declarations and reservations and contended that the latter were to be interpreted in a natural way, in context and with particular regard for the intention of the reserving State.

The Court recalls that the interpretation of declarations made under Article 36, paragraph 2, of the Statute, and of any reservations they contain, is directed to establishing whether mutual consent has been given to the jurisdiction of the Court. It is for each State, in formulating its declaration, to decide upon the limits it places upon its acceptance of the jurisdiction of the Court: "This jurisdiction only exists within the limits within which it has been accepted". Conditions or reservations thus do not by their terms derogate from a wider acceptance already given. Rather, they operate to define the parameters of the State's acceptance of the compulsory jurisdiction of the Court. There is thus no reason to interpret them restrictively. This is true even when, as in the present case, the relevant expression of a State's consent to the Court's jurisdiction, and the limits to that consent, represent a modification of an earlier expression of consent, given within wider limits; it is the declaration in existence that alone constitutes the unity to be interpreted, with the same rules of interpretation applicable to all its provisions, including those containing reservations.

The regime relating to the interpretation of declarations made under Article 36 of the Statute which are unilateral acts of State sovereignty, is not identical with that established for the interpretation of treaties by the Vienna Convention on the Law of Treaties. In the event, the Court has in earlier cases elaborated the appropriate rules for the interpretation of declarations and reservations.

In accordance with those rules the Court will interpret the relevant words of a declaration including a reservation contained therein in a natural and reasonable way, having due regard to the intention of the State concerned at the time when it accepted the compulsory jurisdiction of the Court. The intention of a reserving State may be deduced not only from the text of the relevant clause, but also from the context in which the clause is to be read, and an

examination of evidence regarding the circumstances of its preparation and the purposes intended to be served. In the present case the Court has such explanations in the form of Canadian ministerial statements, parliamentary debates, legislative proposals and press communiqués.

It follows from the foregoing analysis that the *contra proferentem* rule has no role to play in this case in interpreting the reservation contained in the unilateral declaration made by Canada under Article 36, paragraph 2, of the Statute.

The Court was also addressed by both Parties on the principle of effectiveness. Certainly, this principle has an important role in the law of treaties and in the jurisprudence of this Court; however, what is required in the first place for a reservation to a declaration made under Article 36, paragraph 2, of the Statute, is that it should be interpreted in a manner compatible with the effect sought by the reserving State.

Spain has contended that, in case of doubt, reservations contained in declarations are to be interpreted consistently with legality and that any interpretation which is inconsistent with the Statute of the Court, the Charter of the United Nations or with general international law is inadmissible. Spain argues that, to comply with these precepts, it is necessary to interpret the phrase "disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area ... and the enforcement of such measures" to refer only to measures which, since they relate to areas of the high seas, must come within the framework of an existing international agreement or be directed at stateless vessels. It further argues that an enforcement of such measures which involves a recourse to force on the high seas against vessels flying flags of other States could not be consistent with international law and that this factor too requires an interpretation of the reservation different from that given to it by Canada.

The Court observes that Spain's position is not in conformity with the principle of interpretation whereby a reservation to a declaration of acceptance of the compulsory jurisdiction of the Court is to be interpreted in a natural and reasonable way, with appropriate regard for the intentions of the reserving State and the purpose of the reservation. In point of fact, reservations from the Court's jurisdiction may be made by States for a variety of reasons; sometimes precisely because they feel vulnerable about the legality of their position or policy. Nowhere in the Court's case-law has it been suggested that interpretation in accordance with the legality under international law of the matters exempted from the jurisdiction of the Court is a rule that governs the interpretation of such reservations. There is a fundamental distinction between the acceptance by a State of the Court's jurisdiction and the compatibility of particular acts with international law. The former requires consent. The latter question can only be reached when the Court deals with the merits, after having established its jurisdiction and having heard full legal argument by both parties. Whether or not States accept the jurisdiction of the Court, they remain in all cases responsible for acts attributable to them that violate the rights of other States. Any resultant disputes are required to be resolved by peaceful means, the choice of which, pursuant to Article 33 of the Charter, is left to the parties.

Subparagraph (d) of paragraph 2 of Canada's declaration of 10 May 1994
(paras. 57-84)

In order to determine whether the Parties have accorded to the Court jurisdiction over the dispute brought before it, the Court must now interpret subparagraph (*d*) of paragraph 2 of Canada's declaration, having regard to the rules of interpretation which it has just set out.

Before commencing its examination of the text of the reservation itself, the Court observes that the new declaration differs from its predecessor in one respect only: the addition, to paragraph 2, of a subparagraph (*d*) containing the reservation in question. It follows that this reservation is not only an integral part of the current declaration but also an essential component of it, and hence of the acceptance by Canada of the Court's compulsory jurisdiction.

The Court further notes, in view of the facts as summarized above, the close links between Canada's new declaration and its new coastal fisheries protection legislation, as well as the fact that it is evident from the parliamentary debates and the various statements of the Canadian authorities that the purpose of the new declaration was to prevent the Court from exercising its jurisdiction over matters which might arise with regard to the international legality of the amended legislation and its implementation.

The Court recalls that subparagraph 2 (*d*) of the Canadian declaration excludes the Court's jurisdiction in the following terms:

> "disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area, as defined in the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, 1978, and the enforcement of such measures".

Canada contends that the dispute submitted to the Court is precisely of the kind envisaged by the cited text; it falls entirely within the terms of the subparagraph and the Court accordingly has no jurisdiction to entertain it. For Spain, on the other hand, whatever Canada's intentions, they were not achieved by the words of the reservation, which does not cover the dispute; thus the Court has jurisdiction. In support of this view Spain relies on four main arguments: first, the dispute which it has brought before the Court falls outside the terms of the Canadian reservation by reason of its subject matter; secondly, the amended Coastal Fisheries Protection Act and its implementing regulations cannot, in international law, constitute "conservation and management measures"; thirdly, the reservation covers only "vessels" which are stateless or flying a flag of convenience; and fourthly, the pursuit, boarding and seizure of the *Estai*

cannot be regarded in international law as "the enforcement of ..." conservation and management "measures". The Court examines each of these arguments in turn.

Meaning of the term "disputes arising out of or concerning"
(paras. 62-63)

The Court begins by pointing out that, in excluding from its jurisdiction "*disputes arising out of or concerning*" the conservation and management measures in question and their enforcement, the reservation does not reduce the criterion for exclusion to the "subject matter" of the dispute. The words of the reservation — "*disputes arising out of or concerning*" — exclude not only disputes whose immediate "subject matter" is the measures in question and their enforcement, but also those "*concerning*" such measures and, more generally, those having their "origin" in those measures ("*arising out of*") — that is to say, those disputes which, in the absence of such measures, would not have come into being.

The Court has already found, in the present case, that a dispute does exist between the Parties, and it has identified that dispute. It must now determine whether that dispute has as its subject matter the measures mentioned in the reservation or their enforcement, or both, or concerns those measures, or arises out of them. In order to do this, the fundamental question which the Court must now decide is the meaning to be given to the expression "*conservation and management measures ...*" and "*enforcement of such measures*" in the context of the reservation.

Meaning of "conservation and management measures"
(paras. 64-73)

Spain recognizes that the term "*measure*" is "an abstract word signifying an act or provision, a démarche or the course of an action, conceived with a precise aim in view" and that in consequence, in its most general sense, the expression "*conservation and management measure*" must be understood as referring to an act, step or proceeding designed for the purpose of the "conservation and management of fish". However, in Spain's view this expression, in the particular context of the Canadian reservation, must be interpreted more restrictively. Spain's main argument, on which it relied throughout the proceedings, is that the term "conservation and management measures" must be interpreted here in accordance with international law and that in consequence it must, in particular, exclude any unilateral "measure" by a State which adversely affected the rights of other States outside that State's own area of jurisdiction. Hence, in international law only two types of measures taken by a coastal State could, in practice, be regarded as "conservation and management measures": those relating to the State's exclusive economic zone; and those relating to areas outside that zone, insofar as these came within the framework of an international agreement or were directed at stateless vessels. Measures not satisfying these conditions were not conservation and management measures but unlawful acts pure and simple.

Canada, by contrast, stresses the very wide meaning of the word "measure". It takes the view that this is a "generic term", which is used in international conventions to encompass statutes, regulations and administrative action. Canada further argues that the expression "conservation and management measures" is "descriptive" and not "normative"; it covers "the whole range of measures taken by States with respect to the living resources of the sea".

The Court points out that it need not linger over the question whether a "measure" may be of a "legislative" nature. As the Parties have themselves agreed, in its ordinary sense the word is wide enough to cover any act, step or proceeding, and imposes no particular limit on their material content or on the aim pursued thereby. Numerous international conventions include "laws" among the "measures" to which they refer. The Court further points out that, in the Canadian legislative system as in that of many other countries, a statute and its implementing regulations cannot be dissociated. The statute establishes the general legal framework and the regulations permit the application of the statute to meet the variable and changing circumstances through a period of time. The regulations implementing the statute can have no legal existence independently of that statute, while conversely the statute may require implementing regulations to give it effect.

The Court shares with Spain the view that an international instrument must be interpreted by reference to international law. However, in arguing that the expression "conservation and management measures" as used in the Canadian reservation can apply only to measures "in conformity with international law", Spain would appear to mix two issues. It is one thing to seek to determine whether a concept is known to a system of law, in this case international law, whether it falls within the categories proper to that system and whether, within that system, a particular meaning attaches to it: the question of the existence and content of the concept within the system is a matter of definition. It is quite another matter to seek to determine whether a specific act falling within the scope of a concept known to a system of law violates the normative rules of that system: the question of the conformity of the act with the system is a question of legality.

According to international law, in order for a measure to be characterized as a "conservation and management measure", it is sufficient that its purpose is to conserve and manage living resources and that, to this end, it satisfies various technical requirements. It is in this sense that the terms "conservation and management measures" have long been understood by States in the treaties which they conclude. The same usage is to be found in the practice of States. Typically, in their enactments and administrative acts, States describe such measures by reference to factual and scientific criteria.

Reading the words of the reservation in a "natural and reasonable" manner, there is nothing which permits the Court to conclude that Canada intended to use the

expression "conservation and management measures" in a sense different from that generally accepted in international law and practice. Moreover, any other interpretation of that expression would deprive the reservation of its intended effect.

After an examination of the amendments made by Canada on 12 May 1994 to the Coastal Fisheries Protection Act and on 25 May 1994 and 3 March 1995 to the Coastal Fisheries Protection Regulations the Court concludes that the "measures" taken by Canada in amending its coastal fisheries protection legislation and regulations constitute "conservation and management measures" in the sense in which that expression is commonly understood in international law and practice and has been used in the Canadian reservation.

Meaning to be attributed to the word "vessels"
(paras. 74-77)

The Court goes on to observe that the conservation and management measures to which this reservation refers are measures "*taken by Canada with respect to vessels fishing in the NAFO Regulatory Area, as defined in the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, 1978*". As the NAFO "Regulatory Area" as defined in the Convention is indisputably part of the high seas, the only remaining issue posed by this part of the reservation is the meaning to be attributed to the word "vessels". Spain argues that it is clear from the parliamentary debates which preceded the adoption of Bill C-29 that the latter was intended to apply only to stateless vessels or to vessels flying a flag of convenience. It followed, according to Spain — in view of the close links between the Act and the reservation — that the latter also covered only measures taken against such vessels. Canada accepts that, when Bill C-29 was being debated, there were a number of references to stateless vessels and to vessels flying flags of convenience, for at the time such vessels posed the most immediate threat to the conservation of the stocks that it sought to protect. However, Canada denies that its intention was to restrict the scope of the Act and the reservation to these categories of vessels.

The Court observes that the Canadian reservation refers to "vessels fishing ...", that is to say all vessels fishing in the area in question, without exception. It would clearly have been simple enough for Canada, if this had been its real intention, to qualify the word "vessels" so as to restrict its meaning in the context of the reservation. In the opinion of the Court the interpretation proposed by Spain cannot be accepted, for it runs contrary to a clear text, which, moreover, appears to express the intention of its author. Neither can the Court share the conclusions drawn by Spain from the parliamentary debates cited by it.

Meaning and scope of the phrase "and the enforcement of such measures"
(paras. 78-84)

The Court then examines the phrase "*and the enforcement of such measures*", on the meaning and scope of which the Parties disagree. Spain contends that an exercise of jurisdiction by Canada over a Spanish vessel on the high seas entailing the use of force falls outside of Canada's reservation to the Court's jurisdiction.

The Court notes that, following the adoption of Bill C-29, the provisions of the Coastal Fisheries Protection Act are of a character and type to be found in legislation of various nations dealing with fisheries conservation and management, as well as in Article 22 (1) (*f*) of the United Nations Agreement on Straddling Stocks of 1995. The limitations on the use of force specified in the Coastal Fisheries Protection Regulations Amendment of May 1994 also bring the authorized use of force within the category familiar in connection with enforcement of conservation measures. The Court further notes that the purpose of other Canadian enactments referred to by Spain appears to have been to control and limit any authorized use of force, thus bringing it within the general category of measures in enforcement of fisheries conservation.

For all of these reasons the Court finds that the use of force authorized by the Canadian legislation and regulations falls within the ambit of what is commonly understood as enforcement of conservation and management measures and thus falls under the provisions of paragraph 2 (*d*) of Canada's declaration. This is so notwithstanding that the reservation does not in terms mention the use of force. Boarding, inspection, arrest and minimum use of force for those purposes are all contained within the concept of enforcement of conservation and management measures according to a "natural and reasonable" interpretation of this concept.

The Court concludes by stating that in its view, the dispute between the Parties, as it has been identified in this Judgment, had its origin in the amendments made by Canada to its coastal fisheries protection legislation and regulations and in the pursuit, boarding and seizure of the *Estai* which resulted therefrom. Equally, the Court has no doubt that the said dispute is very largely concerned with these facts. Having regard to the legal characterization placed by the Court upon those facts, it concludes that the dispute submitted to it by Spain constitutes a dispute "arising out of" and "concerning" "conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area" and "the enforcement of such measures". It follows that this dispute comes within the terms of the reservation contained in paragraph 2 (*d*) of the Canadian declaration of 10 May 1994. The Court consequently has no jurisdiction to adjudicate upon the present dispute.

Separate opinion of President Schwebel

President Schwebel, in a separate opinion, held that, contrary to Spain's argument, a reservation to a declaration under the optional clause is not ineffective insofar as it excludes actions by the declarant State that are illegal under international law. A very purpose of a reservation may be to debar the Court from passing upon legally questionable actions.

Nor does Canada's reservation embody a self-judging proviso in violation of the authority of the Court to determine its jurisdiction.

Spanish counsel argued that Canada's reservation as interpreted by Canada is "a nullity" and that it "excludes nothing, since it can apply to nothing". While not accepting this argument, President Schwebel concluded that if, *arguendo*, these contentions of Spain are correct, it follows that the nullity or ineffectiveness of the reservation entails the nullity of the declaration as a whole. The Canadian reservation is an essential element of the declaration, but for which the declaration would not have been made. When, as in this case, the reservation has been treated by the declarant as such an essential one, the Court is not free to hold the reservation invalid or ineffective while treating the remainder of the declaration to be in force. If the Spanish argument on the results to be attached to Canada's interpretation of the reservation is accepted, there is no basis whatever in this case for the jurisdiction of the Court.

Separate opinion of Judge Oda

Judge Oda fully concurs with the operative part of the Judgment.

Judge Oda nonetheless considers it appropriate, lest the real issues in the case should be buried in obscurity, to spell out what issues existed in the dispute between Canada and Spain.

He considers that the subject of the "dispute" in the present case relates to the *Estai* incident. In his view, Canada's legislative enactments in 1994/1995 are to be examined, *but only* in the context of that incident. The *Estai* incident occurred in the "Regulatory Area" of the 1979 NAFO Convention, which area lies beyond the exclusive economic zone where the coastal States exercise fisheries jurisdiction. Judge Oda makes it plain that, within the framework of the NAFO Convention, the adoption of measures of conservation and management of fishery resources in the Regulatory Area is the responsibility of the NAFO Fisheries Commission, but not of any particular coastal State. He has stressed that the whole chain of events regarding the *Estai* incident unfolded irrespective of the NAFO Convention.

Judge Oda thus suggests that the only issue in dispute was whether Canada violated the rule of international law by claiming and exercising fisheries jurisdiction on the high seas, or whether Canada was justified, irrespective of the NAFO Convention, in exercising fisheries jurisdiction in an area of the high seas on the ground of its honestly held belief that the conservation of certain fish stocks was urgently required as a result of the fishery conservation crisis in the Northwest Atlantic.

*

Judge Oda is of the opinion, however, that the sole question to be decided by the Court at the present stage of the case is whether the dispute falls within the purview of the clause whereby Canada declared its acceptance of the Court's jurisdiction on 10 May 1994.

He considers it to be clear, given the basic principle that the Court's jurisdiction is based on the consent of sovereign States, that a declaration to accept the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute, and any reservations attached thereto, must, because of the declaration's unilateral character, be interpreted not only in a natural way and in context, *but also* with particular regard for the intention of the declarant State. Any interpretation of a *respondent* State's declaration against the intention of that State will contradict the very nature of the Court's jurisdiction, because the declaration is an instrument drafted unilaterally.

He further states that the fact that Canada made its declaration containing the reservation set out in paragraph 2 (*d*) only a few days prior to enacting the amendments to its fisheries legislation clearly indicates the true intention of Canada in respect of those amendments and of any dispute which might arise as a result of their implementation.

Judge Oda is at a loss to understand why the Court should have felt it necessary to devote so much time to its interpretation of the wording of that reservation. After making an analysis of the development of the law of the sea, particularly as it concerns marine living resources, Judge Oda notes that there exists no fixed or concrete concept of "conservation and management *measures*".

It is clear to Judge Oda that Canada, having reserved from the Court's jurisdiction any "disputes arising out of or concerning conservation and management measures", had in mind — in a very broad sense and without restriction and showing great common sense — any dispute which might arise following the enactment and enforcement of legislation concerning fishing, whether for the purpose of conservation of stocks or for management of fisheries (allocation of catches), in its offshore areas, whether within its exclusive economic zone or outside it.

*

Judge Oda points out that no diplomatic negotiations took place between Spain and Canada with regard to the enactment in 1994 and 1995 of Canada's national legislation or its amendment, and that there was no further diplomatic negotiation between the two countries over the *Estai* incident. He notes that after the conclusion on 20 April 1995 of the Agreement between the EC and Canada, the dispute arising out of the *Estai* incident was practically solved. Judge Oda suggests that the dispute could have been solved if negotiations between Spain and Canada had been held.

Judge Oda refrains from entering into the debatable issue of whether a legal dispute may be submitted unilaterally to the Court only after diplomatic negotiations between the disputing parties have been exhausted or at least initiated. He submits, however, that it could have been questioned, even at this jurisdictional stage — separately from the issue of whether the Court has jurisdiction to entertain Spain's Application — whether Spain's Application of 28 March 1995 in the present case was really *admissible* to the Court at all.

Separate opinion of Judge Koroma

In his separate opinion, Judge Koroma emphasized the absolute and unfettered freedom of a State to participate or not to participate in the optional clause system. As a corollary, he confirmed that a State is entitled to attach to its declaration made under the optional clause a reservation excluding or limiting the Court's jurisdiction to apply the principles and rules of international law which the Court would have applied, had the subject matter not been excluded from the jurisdiction of the Court.

In Judge Koroma's view, flowing from first principles, once it is established that a dispute falls within the category of the subject matter defined or excluded in a reservation, then that dispute is precluded from the jurisdiction of the Court, whatever the scope of the rules which have purportedly been violated. He agreed with the Court's finding that, once it had determined that the measures of conservation and management referred to in the reservation contained in the Canadian declaration were measures of a kind which could be categorized as conservation and management of the resources of the sea, and were consistent with customary norms and well-established practice, then the Court was bound to decline to found jurisdiction on the basis of the principles which have been invoked.

Judge Koroma pointed out that it is in this sense that he understands the statement in the Judgment that "the lawfulness of the acts which a reservation to a declaration seeks to exclude from the jurisdiction of the Court has no relevance for the interpretation of the terms of that reservation".

In other words, the Court's jurisdiction to adjudicate in a dispute derives from the Statute and the consent of a State as expressed in its declaration and not from the *applicable law*.

In the judge's view, what was determinative in this matter was whether Canada had made a declaration under the optional clause, whether that declaration excluded disputes arising out of or concerning conservation and management measures and whether the acts complained of fall within the category of the excluded acts. The Court in responding affirmatively to those questions, not only reached the right decision but affirmed that its compulsory jurisdiction is based on the previous consent of the State concerned and subject to the limits of that consent.

Accordingly, and flowing from the above principles, since Canada had excluded from the jurisdiction of the Court "disputes arising out of or concerning conservation and management measures", the question whether the Court was entitled to exercise its jurisdiction must depend on the subject matter which had been excluded and not on the applicable laws or on the rules which were said to have been violated.

Finally, Judge Koroma emphasized that this Judgment should not be viewed as an abdication of the Court's judicial function to pronounce on the validity of a declaration and its reservation, but rather should be seen as a reaffirmation of the principle that the character of a declaration makes it necessary for the Court to determine the scope and content of the consent of a declarant State. The Court reserves its inherent right to decide that a reservation has been invoked in bad faith, and to reject the view of the State in question.

Separate opinion of Judge Kooijmans

Judge Kooijmans concurs with the Court's finding that it has no jurisdiction to entertain the dispute submitted by Spain. He cast his vote, however, with a heavy heart since the Court's Judgment bears testimony to the inherent weakness of the optional clause system. The making of reservations by a State to its declaration of acceptance of the compulsory jurisdiction of the Court under Article 36, paragraph 2 of the Statute has never been controversial (with the exception of reservations which are contrary to the Statute itself). The Court, therefore, has to apply the law as it stands.

In the present case Canada has submitted a new declaration in which it added a reservation in order to prevent the Court from scrutinizing the legality of an action it intended to undertake. According to present international law Canada was fully entitled to do so. Nevertheless, it seems to be a legitimate question how far a State can go in accepting the compulsory jurisdiction of the Court, thereby expressing its conviction that adjudication is the most appropriate method to settle a wide range of conceivable but not imminent legal disputes, at the same time exempting from the Court's jurisdiction an anticipated and therefore imminent dispute. According to Judge Kooijmans it would not have been beyond the Court's mandate to draw attention to the risks to which the optional clause system is exposed since this system is an integral and essential element of the Statute of which the Court is the guardian. In this context Judge Kooijmans draws attention to the fact that compulsory adjudication is more than a matter of procedure but that it also touches upon the substance of the law. States who know that they can be brought to court will inevitably be more inclined to see the law in terms of how they think a court would apply it.

Dissenting opinion of Vice-President Weeramantry

Vice-President Weeramantry, in his dissenting opinion, observes that there is no question of the invalidity of the Canadian reservation. The reservation is a valid one which Canada was well entitled to make. The Court's task is to interpret this valid reservation. Would this reservation cover certain actions that commenced as conservation measures,

but were also alleged to involve fundamental breaches of international law, including violation of the freedom of the high seas, the unilateral use of force by Canada, and infringements of Spain's sovereignty over its vessels at sea?

Vice-President Weeramantry's view is that it is a matter for the Court's discretion as to whether such matters fall within the general part of the declaration (which gives the Court jurisdiction over *all* disputes arising after the declaration), or under the reservation relating to conservation measures. Where violations of basic principles of international law, extending even to violation of Charter principles are alleged, Vice-President Weeramantry is of the view that the dispute falls within the general referral rather than the particular exception. It seems unreasonable that the mere fact that such acts originated in conservation measures should preserve them from Court scrutiny even when they have extended so far beyond the reach of the reservations clause as to enter the area of violations of basic principles of international law.

Optional clause jurisdiction represents a haven of legality within the international system and, while States have unfettered autonomy to decide whether to enter the system, once they do so they are bound by its rules and by the basic principles of international law which prevail therein. It is not possible to contract out of the applicability of the latter, once a State has opted to enter the system.

The Spanish allegations are as yet unproved, and a preliminary objection to jurisdiction can succeed only if the Court would still lack jurisdiction, even assuming that all the alleged circumstances will eventually be proved. In Vice-President Weeramantry's view, the Court cannot so hold, as some of the circumstances alleged would, if proved, give jurisdiction to the Court under the general part of the declaration. The objection raised by Canada is therefore not of an exclusively preliminary character.

Vice-President Weeramantry also examines the historical origins of the optional clause with a view to stressing the difficulty with which the limited jurisdiction of the Court was achieved. The expectation at the time of the creation of this jurisdiction was that it would develop with use. An unduly narrow interpretation of the clause, when other interpretations are reasonably available within the framework of the declaration considered as a whole, would contract rather than develop this jurisdiction.

Dissenting opinion of Judge Bedjaoui

I. *General Introduction*

Canada's twice formulated reservations would appear to reflect its hesitation, or reluctance, to submit to the sanction of the International Court issues which it regards as vital, and in relation to which it considers the applicable law to be, in the words of the Canadian Foreign Minister, "inadequate, non-existent or irrelevant". The point was that Canada was not entirely satisfied with the Montego Bay Convention of 10 December 1982 on the Law of the Sea, which for this reason it has not ratified and which, in its view, failed to settle fully the problem of overfishing, thus jeopardizing fisheries resources for future generations. Canada has frequently expressed its dissatisfaction and invoked the "emergency", or "state of necessity", which it is currently undergoing in this regard.

The Court had to rule on its jurisdiction by examining the meaning and scope of Canada's reservation, but it was not entitled to ignore the fact that, if it accepted such a reservation, it was leaving the author of that reservation free to combat foreign overfishing by unilaterally giving itself powers *over the high seas* for as long as no settlement had been reached between itself and the States concerned. This account of the background to the case was necessary, inasmuch as, where a reservation has been formulated *ratione materiae*, it cannot prime facie be understood without some minimal reference to the substantive issues involved.

The case would have been perfectly simple if the duty of the Court had merely been to ascertain the meaning of the expression "conservation and management measures" contained in the reservation, and to declare that "the enforcement of those measures" against the Spanish fishing vessel *Estai* was precisely covered by the terms of that reservation, thus preventing the Court from entertaining any claim in this regard. The emphasis has to be placed on another far more important term of the reservation, that which places Canada's action, in geographical terms, "in the NAFO Regulatory Area", that is to say *outside the 200-mile limit*. And indeed the *Estai* was boarded some 245 miles off the Canadian coast.

The purpose of the reservation is to signal *urbi et orbi* that Canada claims special jurisdiction over the high seas. The Court cannot interpret or accept this reservation in the same way as it would interpret or accept an ordinary reservation, since, without any need for a consideration of the merits, its terms prima facie disclose a violation of a basic principle of international law. This is an issue which the Court cannot simply ignore by restricting itself to an external and superficial interpretation of the reservation. It cannot be right for the Court to content itself in this case with a purely *formal* view of the reservation, disregarding its *material* content — a content which does not require investigation involving an examination of the merits, since it is abundantly clear that the reservation affects a traditionally established right. This is the real flavour of this fascinating case.

The Court cannot content itself with declaring that the boarding on the high seas of a foreign fishing vessel simply constitutes enforcement of conservation and management measures taken by Canada, and thus hold that that incident is covered by a reservation entirely depriving it of jurisdiction, for this would be to utilize the screen of "conservation and management measures", interpreted in an artificial manner, without any regard for what such measures involve in terms of their violation of a well-established principle of international law.

It follows that the only proper attitude is to interpret and assess the said "conservation and management measures" by

reference to international law. It is in this corpus of the law of nations that a definition of such measures must be sought. And two options, and two only, accordingly present themselves to the Court at this stage of the proceedings: either, at the very least, to state that it cannot readily find any well-established international definition of such measures applicable to the case before it, and that it is accordingly obliged to touch on the merits of the case by going further in its examination of the facts and of their implications in terms of the international practice of States, and in consequence to declare that Canada's objection to jurisdiction is not of an exclusively preliminary character within the meaning of Article 79, paragraph 7, of the Rules of Court; or, on the other hand, to declare that it does have available to it an undisputed international definition of conservation and management measures, which, applied to this case, obliges it to interpret the Canadian reservation as invalid and not opposable to these proceedings insofar as it purports to cover acts occurring on the high seas, and accordingly not capable of constituting a bar to the Court's jurisdiction to proceed to an examination of the merits.

Judge Bedjaoui has not dealt with all the points which appear to him disputable in the Judgment — in particular the theoretical and practical implications of the methods of interpretation employed therein, or at least the manner in which the Judgment formulates a number of these points (see in particular paragraphs 46 to 54 of the Judgment) — but has restricted himself to raising three important questions on which, to his great regret, he finds himself obliged to express his disagreement with the majority of the Court:

- the subject matter of the dispute;
- the validity of the Canadian reservation;
- the definition of conservation and management measures.

II. *The subject matter of the dispute*

What is *unique* about the present case and at the same time gives it its great interest from the legal point of view, is the persistent disagreement between the applicant State and the Respondent with regard to the actual subject matter of the dispute — a disagreement now extended by another, just as far-reaching, between the majority of the Court and the minority on the same point. This is a situation rarely encountered in the Court's jurisprudence.

It is of course the Applicant who has the initiative and who defines — at its own procedural risk — the subject of the dispute which it wishes to bring before the Court. In this regard it enjoys a clear procedural right, deriving from its *status as Applicant*, to seek and to obtain from the Court a ruling on the subject of the dispute which it has submitted to it and *on that alone*, to the exclusion of all others (subject, of course, to any incidental proceeding). Spain, as a *sovereign* State and as *applicant* State, enjoyed the undisputed right to bring before the Court — at its own clear procedural risk — any aspect of the dispute which it considered it might legitimately submit, and it had an inalienable *legal interest* in seeking and obtaining a ruling on the specific dispute whose subject matter it had clearly defined.

Spain clearly indicated the precise matter on which it was bringing Canada before the Court. In both its written and its oral pleadings, it consistently complained of "a very serious infringement of a right deriving from its sovereign status, namely exclusive jurisdiction over vessels flying its flag on the high seas".

It was an *altogether different* subject matter that Canada — notwithstanding its status as *respondent State* — raised against Spain. It invoked issues of fishing and of the conservation and management of fisheries resources within the NAFO Regulatory Area, and consequently contended that this was the true subject of the dispute, which was excluded from the jurisdiction of the Court by virtue of reservation (*d*) inserted by Canada in its new declaration notified on 10 May 1994 (two days before the adoption of Bill C-29 amending the Coastal Fisheries Protection Act).

There is of course a connection between the subject matter of the dispute, as defined by the Applicant for the purposes of the proceedings which it instituted, but regrettably cannot pursue, and the subject matter alleged by the Respondent to be the true one, now settled and emptied of substance. However, that connection in no way justified the substitution by the Court of the second subject for the first one as defined by the Applicant.

The Court cannot in any sense modify "the decor" or change the subject of the dispute. For, if it did so, it would be rendering judgment in a case altogether different from that submitted to it by the Applicant. *The Court's role is to give an appropriate legal characterization to those claims of the applicant State which properly come within the framework of the subject matter of the dispute as that State has defined it in its Application.* This does not mean that the Court has the power to alter the subject matter put before it. Still less can the respondent State propose a different subject matter to the Court. That would be *to hear a different case.*

Thus, while Spain proclaims its sovereignty on the high seas over its vessels, Canada speaks of conservation and management measures. While Spain invokes a "conflict of jurisdiction" on the high seas, Canada opposes to it a "conflict over fisheries conservation and management". In brief, *Spain talks of State sovereignty, Canada of fisheries conservation and management.*

In the present case, the Court has based itself on a jurisprudence which is either not entirely relevant or appears to have been interpreted incorrectly.

III. *The validity of the Canadian reservation*

It would of course be absurd to cast doubt, in any degree, on the sovereign power of a State to maintain or amend, whether by restricting or by extending it, a declaration of acceptance of the Court's jurisdiction, or to withdraw it whenever it wishes — always subject, of course, to compliance with the procedure (and in particular any prior notice) established by that State itself in its

declaration. Doctrine and jurisprudence are unanimous on this point.

However, a State's freedom to attach reservations or conditions to its declaration must be exercised in conformity with the Statute and Rules of Court, with the Charter of the United Nations, and more generally with international law and with what this judge would venture to call "*l'ordre public international*".

Within this optional clause "system", as currently structured within the framework of the "*international legal corpus*" — that is to stay, neither total chaos nor an absurd "bric-a-brac" (Jean Combacau) — and which we call "*international law*", a State's freedom is immense, but cannot be regarded as limitless. Any person is free to join a club or not to do so, but if they consent to join, then they must abide by the rules governing the club's activities.

A declarant State *has obligations vis-à-vis the clause "system" and its participants, current or potential, and also to the party to whom that clause is ultimately addressed, namely the International Court.* It is not entitled to cause that "system" to implode, since it also now owes it duties — the counterpart of the rights which it derives from it. The possibility of withdrawing from the system remains fully open to it, but what is not acceptable is that it should distort or pervert it, or compromise its existence or operation while remaining within it.

In the present case, I cannot but feel a certain sense of disquiet. These were events which occurred over a specific period of two days, 10 and 12 May 1994, during which almost simultaneously Canada formulated its reservation, thus precluding any review by the Court, lodged a Bill with Parliament and had it adopted. There is every reason to think that, in so acting, Canada wished to protect itself in advance against any judicial action, so as to be completely free to follow a particular line of conduct, over whose legality it had certain doubts.

This is not what one might have expected of a country like Canada, which for over 70 years has set an example of its attachment to the Court's jurisdiction and of its respect for international law. Nor is it a welcome situation for Canada's traditional NAFO partners, or for the international community, or for the optional clause "system", or for the Court itself.

The latter has, most regrettably, failed to recognize that recourse to a reservation, in circumstances where a State wishes to undertake specific acts of doubtful international legality, risks having a seriously damaging effect on the credibility of the optional clause "system".

If, for reasons of domestic or international policy, which may moreover be perfectly legitimate, a declarant State finds itself embarrassed by the terms of its declaration, *it should provisionally withdraw that declaration for the period required by the political action which it is contemplating, rather than attaching to it — I am tempted to say, encumbering and undermining it — a reservation intended to cover a purpose which might very well be regarded as unlawful.*

According to a maxim of French civil law, "*you cannot validly both give and take away*". A declarant State cannot take away with one hand what it has given with the other. It cannot do homage to international justice by submitting itself to the latter's verdict in respect of those acts where it considers that it has behaved correctly, while shunning that same justice in the case of those acts whose legality it fears may be questionable. It is not possible for a declarant State to remodel the philosophy of the clause "system" in this way, still less to bend that "system" to suit its own contradictory requirements, or to mix two incompatible aims.

IV. *The definition of "conservation and management measures"*

The question of the "applicable law" for purposes of defining the expression "conservation and management measures" has taken on great importance in this case.

Judge Bedjaoui is all the more convinced that this expression cannot be interpreted otherwise than within the framework of international law. And since, in these circumstances, the definition and content of that expression can be fully ascertained only at the merits stage, it follows that it is only at that point that the Court would be in a position to determine whether the Canadian legislation and the resultant actions taken against Spanish vessels come within the international definition of such measures and their enforcement, and hence are excluded from the jurisdiction of the Court by virtue of reservation (*d*). *In other words, this is a case where Article 79, paragraph 7, should have been applied, with the result that examination of the definition and precise content of "conservation and management measures" would have been postponed to the merits stage, these being matters not having an exclusively preliminary character.*

Canada's reservation (*d*) refers to "*conservation and management measures*", taken or enforced by it against fishing vessels within the "NAFO Regulatory Area". The Court was therefore bound to interpret that expression in order to identify the scope of the reservation.

Nor does the Judgment take sufficient account of the new approach embodied in the *international* concept of "conservation and management measures", an approach already evident at the First United Nations Conference on the Law of the Sea, which resulted in the "Convention on Fishing and Conservation of the Living Resources of the High Seas", then formalized in the Montego Bay Convention and, indeed, already described in 1974 in the Court's Judgment in the *Fisheries* case.

It is perfectly clear that this new approach could only be — and has indeed been — an international one; otherwise the chaos created by overfishing would have been replaced by a different form of chaos — that produced by each State taking, as and wherever it thought fit, whatever conservation and management measures it wished. To limit this progression to a simple harmonization of the technical aspects of fishing, as the Judgment has done, is to ignore the entire development in the law which, both now and over the

last two or three decades, has been taking place in the field of conservation and management measures, *and which gives judicial expression to a profound need on the part of States for clarification, harmonization and cooperation.* Such measures cannot therefore simply be reduced to any act taken by a State with regard to its choice of conservation techniques, whilst ignoring the fact that such measures now have to be inserted into an international network of rights and obligations which the States have created for themselves. *Here, economic logic and legal logic have to combine — and indeed do so in all international instruments — in order to avoid the chaos both of uncontrolled overfishing and of illegal regulation.* Compatibility with international law is an integral part of the international definition of conservation and management measures; it is "*built in*". It is not a matter of adjudicating on the merits or ruling in any way on responsibility. It is simply a question of stating that, on a true interpretation of the expression "conservation and management measures", the reservation cannot act as a bar to jurisdiction.

The notion of "conservation and management measures" cannot be confined, contrary to what the Judgment states, to simple "factual" or "technical" matters, but has to be taken to refer to those types of measure which the "*new legal order of the sea*" has been gradually regulating, with the result that such measures now constitute *an objective legal category* which cannot be other than part of international law.

Paragraph 70 of the Judgment sets out to give the definition to be found in "*international* law" of the concept of "conservation and management measures", since it begins with the words: "According to international law, ...". But, strangely, the paragraph ends with a paragraph in which the Judgment removes from that definition — notwithstanding that it is claimed to be the definition under "*international law*" — all references to the *legal* elements (such as the status or identity of the author of the measures or the maritime area affected by them), retaining only the *technical and scientific* aspects. *How could international law possibly supply such an incomplete definition, which, taken literally, would appear to authorize the violation of the most firmly established principle of this same international law, namely freedom of the high seas? Judge Bedjaoui cannot be persuaded that he is touching here upon an issue going to the merits, that of legality. In reality he has stopped short of doing so, confining himself to pointing out that, if the Judgment is to be followed, then international law must be bent on a course of self-destruction in supplying a definition which allows it to be so directly violated. How is it possible so flagrantly to turn international law against itself?*

It accordingly follows that the Canadian measures relating to the high seas cannot be interpreted on the basis of Canada's own internal legal order — for this in effect is what the Judgment has done — since the definition of conservation and management measures which the Judgment claims to draw from international law has ultimately been reduced to a standard technical definition — the very same that underlies the Canadian legislation and its implementing rules — without any regard for respect of the principle of freedom of the high seas. On the basis of its reservation as thus interpreted by the Judgment, Canada is protected against the sanction of review by the Court. But in reality conservation and management measures can be assessed only by reference to international law. If this is so — and it cannot be otherwise — then the Court was bound to declare itself competent at this stage and to undertake an examination of the merits in order to determine whether the measures taken against the Spanish vessels were in fact conservation and management measures (see Article 79, paragraph 7, of the Rules of Court).

Dissenting opinion of Judge Ranjeva

In a dissenting opinion appended to the Judgment, Judge Ranjeva expressed the wish that this Judgment should not be interpreted as sounding the death-knell of the optional clause system under Article 36, paragraph 2, of the Statute of the International Court of Justice. He fears a desertion from the Court as a forum for the settlement of disputes, in the absence of guarantees to ensure the integrity of the subject matter of the dispute as presented in the Application submitted by the applicant State. In Judge Ranjeva's view it was not appropriate for the Court to seek to define the subject matter of the dispute at the preliminary stage. Whether the subject matter was interpreted broadly as the Applicant wished, or narrowly, the question, at this incidental stage of the proceedings, was whether the preliminary dispute on questions of jurisdiction and admissibility came within the terms of the reservation formulated by Canada.

The case-law cited in the Judgment is not relevant to justify a restatement of the subject matter of the dispute as it was presented in the Application. In those decisions the Court restated the terms of the dispute after carrying out a detailed examination, in light of the evidence available to it, of those matters constantly and consistently claimed by the Applicant. Moreover, in the absence of claims by the Respondent on the merits, or of any counter-claim, the Court is necessarily bound by the terms of the claim as formulated in the Application.

With regard to the interpretation of the Canadian reservation contained in subparagraph 2 (*d*) of Canada's declaration of 10 May 1994, Judge Ranjeva agrees with the majority of the Members of the Court on the importance of ascertaining the intention of the author of the reservation. But, in his view, a reservation to jurisdiction, while unilateral in origin, is international in its effects, since it becomes part of the network made up of all the declarations under Article 36, paragraph 2, of the Statute. It follows that, in filing its unilateral application, the Applicant accepts all the conditions laid down by the author of the reservation, and a contractual link arises between the two parties to the litigation. It is therefore difficult to see how the reservation can be interpreted without recourse to the rules, principles and methods of interpretation of international agreements, and outside the framework of the Law of the Sea

Convention of 1982, which constitutes the lowest denominator common to the parties. Moreover, retracing the historical background to Article 1 of the 1995 Agreement on Straddling Stocks, one of the two instruments relevant to a definition of conservation and management measures, Judge Ranjeva recalls that it was on the initiative of Canada that that Agreement included a reference to the definitions contained in the Montego Bay Convention, with a view to defining more clearly what was meant by conservation and management measures. In the opinion of this Member of the Court, there is no contrary international practice of States or of international organizations which would contradict his analysis and confirm the definition given by the Court.

In Judge Ranjeva's view, Canada's objections were not of an exclusively preliminary character.

Dissenting opinion of Judge Vereshchetin

Judge Vereshchetin found himself unable to concur with the arguments and findings in the Judgment relating to two principal points:

(*a*) the subject matter of the dispute between the Parties, and

(*b*) the effects of the Canadian reservation on the Court's jurisdiction in this case.

As to the first point of his disagreement, Judge Vereshchetin takes the view that the scope of the dispute between the Parties is much broader than the pursuit and arrest of the *Estai* and the consequences thereof. Quite apart from this proximate cause of the dispute, it would appear that what underlies it are different perceptions by the Parties of the rights and obligations which a coastal State may or may not have in a certain area of the high seas; or, more generally, different perceptions of the relationship between the exigencies of the law of the sea, on the one hand, and environmental law on the other. The Court had no good reason for redefining and narrowing the subject matter of the dispute presented by the Applicant.

With regard to the effects of the Canadian reservation, Judge Vereshchetin considers that, while a State is absolutely free to join or not to join the optional clause system, its freedom to make reservations and conditions to the declaration deposited under Article 36, paragraph 2, of the Statute is not absolute. For example, it is uncontested that the Court cannot give effect to a condition imposing certain terms on the Court's procedure which run counter to the latter's Statute or Rules. Generally, reservations and conditions must not undermine the very raison d'être of the optional clause system. The Court as "an organ and guardian" of international law may not accord to a document the legal effect sought by the State from which it emanates, without having regard to the compatibility of the said document with the basic requirements of international law.

On the other hand, the Court cannot impute bad faith to a State. Therefore, it should seek to interpret declarations and reservations thereto as consistent with international law. A term of a declaration or of a reservation may have a wider or narrower meaning in common parlance or in some other discipline, but for the Court "the natural and ordinary" meaning of the term is that attributed to it in international law. The Canadian reservation would be consistent with the international law of the sea if the expression "conservation and management measures", obtaining in the text of the reservation, were to be understood in the sense accepted in recent multilateral agreements directly related to the subject covered by the reservation. In those agreements, the concept "conservation and management measures" is characterized by reference not merely to factual and scientific criteria, but also to legal ones.

In the view of Judge Vereshchetin, "due regard" given to the declarant's intention, in the circumstances of the case, has not revealed with certainty "the evident intention of the declarant" at the time material for the interpretation of the reservation. In any event, this intention cannot be controlling and conclusive for the outcome of the interpretation by the Court.

Judge Vereshchetin considers that the scope (*ratione materiae* and *ratione personae*) of the Canadian reservation, as well as its implications for the Court's jurisdiction in this case, could not be established with certainty by the Court. Therefore, the correct course of action for the Court would have been to find that in the circumstances of the case the objections of Canada did not have an exclusively preliminary character.

Dissenting opinion of Judge Torres Bernárdez

In his dissenting opinion Judge Torres Bernárdez concludes that the Court has full jurisdiction to adjudicate on the dispute brought before it by the Application filed by Spain on 28 March 1995.

He has reached this conclusion after a thorough study of:

- the subject matter of the dispute (where he was in total disagreement with the definition adopted by a majority of the Court, a definition which in his view accords with neither the applicable law nor with the relevant jurisprudence of the Court, or with that of the Permanent Court);
- the optional clause system in general, including the role within that system of the principles of good faith and mutual confidence;
- the question of the admissibility or opposability as against Spain, in the circumstances of the case, of the reservation contained in subparagraph 2 (*d*) of Canada's declaration (in relation to which, in the judge's view, the Court has declined to exercise its right of review over *abuse* of the optional clause system);
- and the interpretation of Canada's declaration of 10 May 1994, including the reservation contained in subparagraph 2 (*d*). In this regard Judge Torres Bernárdez expresses his conviction that the subject of the interpretation which the Court is called upon to undertake is Canada's declaration itself, including the reservation in subparagraph (*d*), and not, as the Judgment claims, the political or other reasons which led

Canada to make its unilateral acceptance, on 10 May 1994, of the compulsory jurisdiction of the Court together with the said reservation; Judge Torres Bernárdez rejects the extreme subjectivity displayed by the majority in the Judgment in their approach to interpretation, an approach which he considers to be contrary to current international law and to the principle of legal certainty in relations between declarant States.

The basic reasons on which his dissenting opinion are founded are three. First, the fundamental role of the principle of good faith, both in the *modus operandi* of the optional clause system and in the interpretation and application by the Court of declarations made by States under Article 36, paragraph 2, of its Statute. Secondly, the equally fundamental distinction which must always be drawn between, on the one hand, the principle of consent by the States concerned to the jurisdiction of the Court and, on the other, an interpretation, in accordance with the rules of interpretation laid down by international law, of the consent objectively demonstrated in declarations at the time of their deposit with the Secretary-General of the United Nations. Finally, the no less fundamental requirement of international procedure that, in the interest of the principle of the equality of the parties, the sovereign right of the applicant State to define the subject matter of the dispute which it is submitting to the Court must be just as fully respected as the sovereign right of the respondent State to seek to oppose the Court's jurisdiction by presenting preliminary or other objections, or by filing a counter-claim of its own.

Each of these fundamental reasons is sufficient in itself to make it impossible for Judge Torres Bernárdez to subscribe to a judgment, the effect of which will, he fears, be particularly negative, even beyond the present case, for the development of the optional clause system as a means of acceptance by States of the compulsory jurisdiction of the Court in accordance with Article 36 of the Court's Statute.

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114. REQUEST FOR INTERPRETATION OF THE JUDGMENT OF 11 JUNE 1998 IN THE CASE CONCERNING THE LAND AND MARITIME BOUNDARY BETWEEN CAMEROON AND NIGERIA (CAMEROON *v.* NIGERIA), PRELIMINARY OBJECTIONS (NIGERIA *v.* CAMEROON)

Judgment of 25 March 1999

In its Judgment, the Court by thirteen votes against three declared inadmissible Nigeria's request for interpretation of the Judgment delivered by the Court on 11 June 1998 in the case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon *v.* Nigeria), Preliminary Objections.

This was the first time that the Court had been called upon to rule on a request for interpretation of a judgment on preliminary objections.

In its Judgment, the Court further rejected unanimously Cameroon's request that Nigeria bear the additional costs caused to Cameroon by the request for interpretation.

The Court was composed as follows: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans; Judges ad hoc Mbaye, Ajibola; Registrar Valencia-Ospina.

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* *

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

"19. For these reasons,

THE COURT,

(1) by thirteen votes to three,

Declares inadmissible the request for interpretation of the Judgment of 11 June 1998 in the case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, presented by Nigeria on 28 October 1998;

IN FAVOUR: President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans; Judge ad hoc Mbaye;

AGAINST: Vice-President Weeramantry; Judge Koroma; Judge ad hoc Ajibola.

(2) Unanimously,

Rejects Cameroon's request that Nigeria bear the additional costs caused to Cameroon by the above-mentioned request for interpretation."

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Vice-President Weeramantry, Judge Koroma, and Judge ad hoc Ajibola appended dissenting opinions to the Judgment of the Court.

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* *

History of the proceedings and submissions of the Parties
(paras. 1-7)

The Court begins by recalling that, on 28 October 1998, Nigeria instituted proceedings whereby, referring to Article 98 of the Rules of Court, it requested the Court to interpret the Judgment delivered by the Court on 11 June 1998 in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon* v. *Nigeria*) (*Preliminary Objections*). Nigeria's request was communicated to Cameroon, which filed written observations on the request within the time limit fixed therefor. In the light of the dossier thus submitted to it, the Court, considering that it had sufficient information on the positions of the Parties, did not deem it necessary to invite them "to furnish further written or oral explanations", as Article 98, paragraph 4, of the Rules allows it to do.

Nigeria chose Mr. Bola Ajibola and Cameroon Mr. Kéba Mbaye to sit as judges ad hoc in the case.

The Parties presented the following submissions:

On behalf of Nigeria:

in the Application:

"On the basis of the foregoing considerations, Nigeria requests the Court to adjudge and declare that the Court's Judgment of 11 June 1998 is to be interpreted as meaning that:

so far as concerns the international responsibility which Nigeria is said to bear for certain alleged incidents:

(*a*) the dispute before the Court does not include any alleged incidents other than (at most) those specified in Cameroon's Application of 29 March 1994 and Additional Application of 6 June 1994;

(*b*) Cameroon's freedom to present additional facts and legal considerations relates (at most) only to those specified in Cameroon's Application of 29 March 1994 and Additional Application of 6 June 1994; and

(*c*) the question whether facts alleged by Cameroon are established or not relates (at most) only to those specified in Cameroon's Application of 29 March 1994 and Additional Application of 6 June 1994."

On behalf of Cameroon:

in the written observations:

"On these grounds,

Having regard to the Request for Interpretation submitted by the Federal Republic of Nigeria dated 21 October 1998, the Republic of Cameroon makes the following submissions:

1. The Republic of Cameroon leaves it to the Court to decide whether it has jurisdiction to rule on a request for interpretation of a decision handed down following incidental proceedings and, in particular, with regard to a judgment concerning the preliminary objections raised by the defending Party;

2. The Republic of Cameroon requests the Court:

– *Primarily*:

To declare the request by the Federal Republic of Nigeria inadmissible; to adjudge and declare that there is no reason to interpret the Judgment of 11 June 1998;

– *Alternatively*:

To adjudge and declare that the Republic of Cameroon is entitled to rely on all facts, irrespective of their date, that go to establish the continuing violation by Nigeria of its international obligations; that the Republic of Cameroon may also rely on such facts to enable an assessment to be made of the damage it has suffered and the adequate reparation that is due to it."

The Court's jurisdiction over Nigeria's request for interpretation
(paras. 8-11)

The Court first addresses the question of its jurisdiction over the request for interpretation submitted by Nigeria. Nigeria states that, in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon* v. *Nigeria*), Cameroon alleged that Nigeria bore international responsibility "for certain incidents said to have occurred at various places at Bakassi and Lake Chad and along the length of the frontier between those two regions". Nigeria contends that the Court's Judgment of 11 June 1998 does not specify "which of these alleged incidents are to be considered further as part of the merits of the case". Thus Nigeria maintains that the Judgment "is unclear [as to] whether Cameroon was entitled at various times, after the submission of its Amended Application, to bring before the Court new incidents". Nigeria further emphasizes "the inadmissibility of treating as part of the dispute brought before the Court by the Applications of March and June 1994 alleged incidents occurring subsequently to June 1994". The Judgment of 11 June 1998 was accordingly to be interpreted as meaning "that so far as concerns the international responsibility [of] Nigeria ... the dispute before the Court does not include any alleged incidents other than (at most) those specified in [the] Application ... and Additional Application".

Cameroon, for its part, recalls in its written observations that, in its Judgment of 11 June 1998, the Court rejected seven of Nigeria's preliminary objections and stated that the eighth objection was not of an exclusively preliminary character; the Court further recognized that it had jurisdiction to adjudicate upon the dispute and found that the Application of Cameroon of 29 March 1994, as amended by the Additional Application of 6 June 1994, was admissible. Cameroon declares that the Parties "do not have to 'apply' such a judgment; they only have to take note of it". While leaving the question to the appreciation of the Court, it states that "there are very serious doubts about the possibility of bringing a request for interpretation of a judgment concerning preliminary objections".

The Court observes that Article 60 of the Statute provides: "The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party." By virtue of the second sentence of Article 60, the Court has

jurisdiction to entertain requests for interpretation of any judgment rendered by it. This provision makes no distinction as to the type of judgment concerned. It follows, therefore, that a judgment on preliminary objections, just as well as a judgment on the merits, can be the object of a request for interpretation. However, "the second sentence of Article 60 was inserted in order, if necessary, to enable the Court to make quite clear the points which had been settled with binding force in a judgment, ... a request which has not that object does not come within the terms of this provision" (*Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No.13*, p. 11). In consequence any request for interpretation must relate to the operative part of the judgment and cannot concern the reasons for the judgment except insofar as these are inseparable from the operative part.

The Court then recalls that in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*, Nigeria had put forward a sixth preliminary objection "to the effect that there is no basis for a judicial determination that Nigeria bears international responsibility for alleged frontier incursions"; and that in the operative part of its Judgment of 11 June 1998, the Court [r]ejects the sixth preliminary objection. The reasons for this are set out in paragraphs 98 to 101 of the Judgment. These deal in detail with Cameroon's rights as regards the presentation of "facts and legal considerations" that it might wish to put forward in support of its submissions seeking a ruling against Nigeria. These reasons are inseparable from the operative part of the Judgment and in this regard the request therefore meets the conditions laid down by Article 60 of the Statute in order for the Court to have jurisdiction to entertain a request for interpretation of a judgment.

The admissibility of Nigeria's request
(paras. 12-16)

The Court then examines the admissibility of Nigeria's request. It observes that the question of the admissibility of requests for interpretation of the Court's judgments needs particular attention because of the need to avoid impairing the finality, and delaying the implementation, of these judgments. It is not without reason that Article 60 of the Statute lays down, in the first place, that judgments are "final and without appeal". The language and structure of Article 60 reflect the primacy of the principle of *res judicata*. That principle must be maintained.

The Court then recalls that in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*, Cameroon, in its Application as amended by its Additional Application, complained in 1994 "of grave and repeated incursions of Nigerian groups and armed forces into Cameroonian territory all along the frontier between the two countries". It further requested the Court to adjudge that the "internationally unlawful acts" alleged to have occurred in the Bakassi and Lake Chad regions involve the responsibility of Nigeria. Cameroon developed these submissions in its Memorial of 1995 and its observations of 1996, mentioning some incidents having occurred in other frontier areas or after the date of the Additional Application. To these submissions, Nigeria raised its sixth objection to admissibility. It considered that Cameroon must "essentially confine itself to the facts ... presented in its Application"; and concluded that any subsequent attempt to enlarge the scope of the case was inadmissible and that "additions" presented subsequently with a view to establishing Nigeria's responsibility must be disregarded.

The Court points out that by its Judgment of 11 June 1998, it rejected Nigeria's sixth preliminary objection, and explained that "[t]he decision on Nigeria's sixth preliminary objection hinges upon the question of whether the requirements which an application must meet and which are set out in Article 38, paragraph 2, of the Rules of Court are met", adding that the term "succinct" used in Article 38, paragraph 2, of the Rules does not mean "complete" and does not preclude later additions to the statement of the facts and grounds on which the claim is based. The Court reiterates that the question of the conditions for the admissibility of an application at the time of its introduction, and the question of the admissibility of the presentation of additional facts and legal grounds, are two different things. In its Judgment of 11 June 1998, the Court indicated that the limit of the freedom to present additional facts and legal considerations is that there must be no transformation of the dispute brought before the Court by the application into another dispute which is different in character. With regard to Nigeria's sixth preliminary objection, the Judgment of 11 June 1998 has concluded that "[i]n this case, Cameroon has not so transformed the dispute" and that Cameroon's Application met the requirements of Article 38 of the Rules (ibid., p. 319, para. 100). Thus, the Court made no distinction between "incidents" and "facts"; it found that additional incidents constitute additional facts, and that their introduction in proceedings before the Court is governed by the same rules. In this respect there is no need for the Court to stress that it has and will strictly apply the principle of *audi alteram partem*. It follows from the foregoing that the Court has already clearly dealt with and rejected, in its Judgment of 11 June 1998, the first of the three submissions [submission (*a*)] presented by Nigeria at the end of its request for interpretation.

The Court would therefore be unable to entertain this first submission without calling into question the effect of the Judgment concerned as *res judicata*. The two other submissions, [(*b*) and (*c*)] endeavour to remove from the Court's consideration elements of law and fact which it has, in its Judgment of 11 June 1998, already authorized Cameroon to present, or which Cameroon has not yet put forward. In either case, the Court would be unable to entertain these submissions. It follows from the foregoing that Nigeria's request for interpretation is inadmissible.

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The Court, in view of the conclusions reached above, finds that there is no need for it to examine whether there is, between the Parties, a "dispute as to the meaning or scope of

the judgment" of 11 June 1998, as contemplated by Article 60 of the Statute.

Cost of the proceedings
(para. 18)

With regard to Cameroon's request that Nigeria be charged with the additional costs caused to Cameroon by Nigeria's request, the Court sees no reason to depart in the present case from the general rule set forth in Article 64 of the Statute, which confirms the "basic principle regarding the question of costs in contentious proceedings before international tribunals, to the effect that each party shall bear its own" (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 212, para. 98).

Dissenting opinion of Vice-President Weeramantry

Vice-President Weeramantry expressed agreement with the Court that the Application of Nigeria met the conditions laid down in Article 60 of the Statute giving the Court jurisdiction to entertain Nigeria's request for interpretation of the Court's Judgment of 11 June 1998. However, he stated that he disagreed with the Court's conclusion that Nigeria's request for interpretation was inadmissible.

He points out that there is a distinction between subsequent facts and subsequent incidents. Subsequent facts relating to an incident already pleaded would be admissible, but not subsequent facts in the sense of subsequent incidents. Nigeria was therefore entitled to seek a clarification of this aspect.

The critical date for determining what incidents may be pleaded is the date of filing of the application. If later incidents could be brought in, this would pose major obstacles to the proper presentation and conduct of the case.

Dissenting opinion of Judge Koroma

In his dissenting opinion, Judge Koroma regretted that he could not support the Judgment, as in his view the Court should have acceded to the request and found it admissible since it met all the criteria and conditions necessary for the interpretation of a judgment.

He maintained that the Court's Judgment of 11 June 1998 had laid itself open to possible misconstruction by the Parties leading to confusion, which, if not clarified, could be at variance with the provisions of the Statute and Rules of Court.

In his view, the real purpose of an interpretation is for the Court to give *precision and clarification* of the meaning and scope of the Judgment in question and when the Court stated that it had not distinguished between "incidents" and "facts" in its Judgment of 11 June 1998 and had found that "*additional* incidents" constituted "*additional* facts", there was room for clarification.

Judge Koroma also stated that the request should have been declared admissible, as the Applicant had *established* its interests, both in law and in fact, which were worthy of legal protection and would ensure that the other Party observed the obligations imposed by the Statute and Rules of Court.

Dissenting opinion of Judge Ajibola

Judge Ajibola, in his dissenting opinion, first explained why he is of the opinion that the Court, in view of the clearly contentious nature of Nigeria's Application, should have allowed for a second round of pleadings.

He then stated that he agreed with the Court's Judgment insofar as the questions of jurisdiction and of costs were concerned; but that he was of the view that the Court should have considered the Nigerian Application admissible.

The Court should have interpreted its Judgment of 11 June 1998 because in the two paragraphs that Nigeria is requesting the Court to interpret, the Court has decided on the issue of the procedural right of Cameroon to: (*a*) develop what is "said" in its "Application" and (*b*) present "additional facts". But quite clearly the Court has not determined the issue of *additional incidents* or *new incidents*.

The Court should therefore, in Judge Ajibola's view, have clarified the category of incidents alleged by Cameroon to be relevant: are they pre-1994 incidents only, or pre- and post-1994 incidents? The issue of what additional facts are required from Cameroon should equally have been spelt out very clearly by the Court: are these additional facts in relation to the incidents before the Applications of Cameroon in 1994 or do they include additional facts concerning incidents subsequent to the year 1994? If the Court agrees that Cameroon may file *additional facts*, is the Court also saying that Cameroon can file particulars of *additional incidents* after 1994?

Judge Ajibola finally pointed out that, in his view, the word "dispute" in Article 36, paragraph 2, of the Court's Statute relates only to pre-existing disputes or incidents that occurred before the filing of an application, but definitely not to a future dispute.

115. DIFFERENCE RELATING TO IMMUNITY FROM LEGAL PROCESS OF A SPECIAL RAPPORTEUR OF THE COMMISSION ON HUMAN RIGHTS

Advisory opinion of 29 April 1999

The Court handed down its advisory opinion on the request of the Economic and Social Council (ECOSOC), one of the six principal organs of the United Nations, in the case concerning the Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights.

The Court was of the opinion, by fourteen votes to one, that Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations was "applicable" in the case of Dato' Param Cumaraswamy, a Malaysian jurist who was appointed Special Rapporteur on the Independence of Judges and Lawyers by the United Nations Commission on Human Rights in 1994, and that he was "entitled to immunity from legal process of every kind for the words spoken by him during an interview as published in an article in the November 1995 issue of *International Commercial Litigation*".

In its Advisory Opinion, the Court held that the Government of Malaysia should have informed the Malaysian courts of the finding of the Secretary-General and that these courts should have dealt with the question of immunity as a preliminary issue to be expeditiously decided. It unanimously stated that Mr. Cumaraswamy should be "held financially harmless for any costs imposed upon him by the Malaysian courts, in particular taxed costs".

The Court also found, by thirteen votes to two, that the Government of Malaysia now had "the obligation to communicate [the] advisory opinion to the Malaysian courts, in order that Malaysia's international obligations be given effect and [Mr.] Cumaraswamy's immunity be respected".

The Court was composed as follows: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek; Registrar Valencia-Ospina.

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The full text of the final paragraph of the opinion reads as follows:

"67. For these reasons,

The Court

Is of the opinion:

(1) (*a*) By fourteen votes to one,

That Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations is applicable in the case of Dato' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek;

AGAINST: Judge Koroma;

(*b*) By fourteen votes to one,

That Dato' Param Cumaraswamy is entitled to immunity from legal process of every kind for the words spoken by him during an interview as published in an article in the November 1995 issue of *International Commercial Litigation*;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek;

AGAINST: Judge Koroma;

(2) (*a*) By thirteen votes to two,

That the Government of Malaysia had the obligation to inform the Malaysian courts of the finding of the Secretary-General that Dato' Param Cumaraswamy was entitled to immunity from legal process;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek;

AGAINST: Judges Oda, Koroma;

(*b*) By fourteen votes to one,

That the Malaysian courts had the obligation to deal with the question of immunity from legal process as a preliminary issue to be expeditiously decided *in limine litis*;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek;

AGAINST: Judge Koroma;

(3) Unanimously,

That Dato' Param Cumaraswamy shall be held financially harmless for any costs imposed upon him by the Malaysian courts, in particular taxed costs;

(4) By thirteen votes to two,

That the Government of Malaysia has the obligation to communicate this advisory opinion to the Malaysian courts, in order that Malaysia's international obligations be given effect and Dato' Param Cumaraswamy's immunity be respected;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek;

AGAINST: Judges Oda, Koroma."

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Vice-President Weeramantry and Judges Oda and Rezek appended separate opinions to the Advisory Opinion of the Court. Judge Koroma appended a dissenting opinion.

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

The Court begins by recalling that the question on which it has been requested to give an advisory opinion is set forth in decision 1998/297 adopted by the United Nations Economic and Social Council (hereinafter called the "Council") on 5 August 1998. Decision 1998/297 reads as follows:

"*The Economic and Social Council,*

Having considered the note by the Secretary-General on the privileges and immunities of the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers,[1]

Considering that a difference has arisen between the United Nations and the Government of Malaysia, within the meaning of Section 30 of the Convention on the Privileges and Immunities of the United Nations, with respect to the immunity from legal process of Dato' Param Cumaraswamy, the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers,

Recalling General Assembly resolution 89 (I) of 11 December 1946,

1. *Requests* on a priority basis, pursuant to Article 96, paragraph 2, of the Charter of the United Nations and in accordance with General Assembly resolution 89 (I), an advisory opinion from the International Court of Justice on the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations in the case of Dato' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, taking into account the circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General[1], and on the legal obligations of Malaysia in this case;

2. *Calls upon* the Government of Malaysia to ensure that all judgements and proceedings in this matter in the Malaysian courts are stayed pending receipt of the advisory opinion of the International Court of Justice, which shall be accepted as decisive by the parties."

Enclosed with the letter of transmittal of the Secretary-General was a note by him dated 28 July 1998 and entitled "Privileges and Immunities of the Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers" (E/1998/94) and an addendum to that note.

After outlining the successive stages of the proceedings (paras. 2-9), the Court observes that in its decision 1998/297, the Council asked the Court to take into account, for purposes of the advisory opinion requested, the "circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General" (E/1998/94). The text of those paragraphs is then reproduced. They set out the following:

In 1946, the General Assembly adopted, pursuant to Article 105 (3) of the Charter, the Convention on the Privileges and Immunities of the United Nations (the Convention), to which 137 member States have become parties and provisions of which have been incorporated by reference into many hundreds of agreements relating to the United Nations and its activities. The Convention is, inter alia, designed to protect various categories of persons, including "Experts on Mission for the United Nations", from all types of interference by national authorities. In particular, Section 22 (*b*) of Article VI of the Convention provides:

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

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

In its Advisory Opinion of 14 December 1989 (in the so-called "*Mazilu*" case), the International Court of Justice held that a Special Rapporteur of the Subcommission on the Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights was an "expert on mission" within the meaning of Article VI of the Convention.

The Commission on Human Rights in 1994 appointed Dato' Param Cumaraswamy, a Malaysian jurist, as the Commission's Special Rapporteur on the Independence of Judges and Lawyers. His mandate consists of tasks including, inter alia, to enquire into substantial allegations concerning, and to identify and record attacks on, the independence of the judiciary, lawyers and court officials. Mr. Cumaraswamy has submitted four reports to the Commission on the execution of his mandate. After the third report containing a section on the litigation pending against

[1] E/1998/94.

him in the Malaysian civil courts, the Commission, in April 1997, renewed his mandate for an additional three years.

As a result of an article published on the basis of an interview which the Special Rapporteur gave to a magazine (International Commercial Litigation) in November 1995, two commercial companies in Malaysia asserted that the said article contained defamatory words that had "brought them into public scandal, odium and contempt". Each company filed a suit against him for damages amounting to M$ 30 million (approximately US$ 12 million each), "including exemplary damages for slander".

Acting on behalf of the Secretary-General, the Legal Counsel of the United Nations considered the circumstances of the interview and of the controverted passages of the article and determined that Dato' Param Cumaraswamy was interviewed in his official capacity as Special Rapporteur on the Independence of Judges and Lawyers, that the article clearly referred to his United Nations capacity and to the Special Rapporteur's global mandate to investigate allegations concerning the independence of the judiciary and that the quoted passages related to such allegations. On 15 January 1997, the Legal Counsel, in a note verbale, "requested the competent Malaysian authorities to promptly advise the Malaysian courts of the Special Rapporteur's immunity from legal process" with respect to that particular complaint. On 20 January 1997, the Special Rapporteur filed an application in the High Court of Kuala Lumpur (the trial court in which the suit had been filed) to set aside and/or strike out the plaintiffs' writ, on the ground that the words that were the subject of the suits had been spoken by him in the course of performing his mission for the United Nations as Special Rapporteur on the Independence of Judges and Lawyers. The Secretary-General issued a note on 7 March 1997 confirming that "the words which constitute the basis of plaintiffs' complaint in this case were spoken by the Special Rapporteur in the course of his mission" and that the Secretary-General "therefore maintains that Dato' Param Cumaraswamy is immune from legal process with respect thereto". The Special Rapporteur filed this note in support of his above-mentioned application.

In spite of representations that had been made by the Office of Legal Affairs, a certificate filed by the Malaysian Minister for Foreign Affairs with the trial court failed to refer in any way to the note that the Secretary-General had issued a few days earlier and that had in the meantime been filed with the court, nor did it indicate that in this respect, i.e., in deciding whether particular words or acts of an expert fell within the scope of his mission, the determination could exclusively be made by the Secretary-General, and that such determination had conclusive effect and therefore had to be accepted as such by the court. In spite of repeated requests by the Legal Counsel, the Minister for Foreign Affairs refused to amend his certificate or to supplement it in the manner urged by the United Nations.

On 28 June 1997, the competent judge of the Malaysian High Court for Kuala Lumpur concluded that she was "unable to hold that the Defendant is absolutely protected by the immunity he claims", in part because she considered that the Secretary-General's note was merely "an opinion" with scant probative value and no binding force upon the court and that the Minister for Foreign Affairs' certificate "would appear to be no more than a bland statement as to a state of fact pertaining to the Defendant's status and mandate as a Special Rapporteur and appears to have room for interpretation". The Court ordered that the Special Rapporteur's motion be dismissed with costs, that costs be taxed and paid forthwith by him and that he file and serve his defence within 14 days. On 8 July, the Court of Appeal dismissed Mr. Cumaraswamy's motion for a stay of execution.

In July 1997, the Legal Counsel called on the Malaysian Government to intervene in the current proceedings so that the burden of any further defence, including any expenses and taxed costs resulting therefrom, could be assumed by the Government; to hold Mr. Cumaraswamy harmless in respect of the expenses he had already incurred or that were being taxed to him in respect of the proceedings so far; and, so as to prevent the accumulation of additional expenses and costs and the further need to submit a defence until the matter of his immunity was definitively resolved between the United Nations and the Government, to support a motion to have the High Court proceedings stayed until such resolution. The Legal Counsel referred to the provisions for the settlement of differences arising out of the interpretation and application of the 1946 Convention that might arise between the Organization and a member State, which are set out in Section 30 of the Convention, and indicated that if the Government decided that it could not or did not wish to protect and to hold harmless the Special Rapporteur in the indicated manner, a difference within the meaning of those provisions might be considered to have arisen between the Organization and the Government of Malaysia.

Section 30 of the Convention provides as follows:

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

On 10 July, yet another lawsuit was filed against the Special Rapporteur. On 11 July, the Secretary-General issued a note corresponding to the one of 7 March 1997 and also communicated a note verbale with essentially the same text to the Permanent Representative of Malaysia with the request that it be presented formally to the competent Malaysian court by the Government. On 23 October and 21 November 1997, new plaintiffs filed third and fourth lawsuits against the Special Rapporteur. On 27 October and 22 November 1997, the Secretary-General issued identical certificates of the Special Rapporteur's immunity.

On 7 November 1997, the Secretary-General advised the Prime Minister of Malaysia that a difference might have arisen between the United Nations and the Government of Malaysia and about the possibility of resorting to the International Court of Justice pursuant to Section 30 of the Convention. Nonetheless on 19 February 1998, the Federal Court of Malaysia denied Mr. Cumaraswamy's application for leave to appeal stating that he was neither a sovereign nor a full-fledged diplomat but merely "an unpaid, part-time provider of information".

The Secretary-General then appointed a Special Envoy, Maître Yves Fortier of Canada, who, after two official visits to Kuala Lumpur, and after negotiations to reach an out-of-court settlement had failed, advised that the matter should be referred to the Council to request an advisory opinion from the International Court of Justice. The United Nations had exhausted all efforts to reach either a negotiated settlement or a joint submission through the Council to the International Court of Justice. In this connection, the Government of Malaysia had acknowledged the Organization's right to refer the matter to the Council to request an advisory opinion in accordance with Section 30 of the Convention, advised the Secretary-General's Special Envoy that the United Nations should proceed to do so, and indicated that, while it would make its own presentations to the International Court of Justice, it did not oppose the submission of the matter to that Court through the Council.

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After reproducing paragraphs 1-15 of the Secretary-General's note, the Court then refers to the dossier of documents submitted to it by the Secretary-General, which contains additional information that bears on an understanding of the request to the Court, concerning the context in which Mr. Cumaraswamy was asked to give his comments; concerning the proceedings against Mr. Cumaraswamy in the High Court of Kuala Lumpur, which did not pass upon Mr. Cumaraswamy's immunity *in limine litis*, but held that it had jurisdiction to hear the case before it on the merits, including making a determination of whether Mr. Cumaraswamy was entitled to any immunity, a decision upheld by both the Court of Appeal and the Federal Court of Malaysia; and concerning the regular reports, which the Special Rapporteur made to the Commission on Human Rights and in which he reported on the lawsuits initiated against him. The Court further refers to the consideration and adoption without a vote by the Council of the draft decision requesting the Court to give an advisory opinion on the question formulated therein, and the fact that at that meeting, the Observer for Malaysia confirmed his previous criticism of the Secretary-General's note, but made no comment on the terms of the question to be put to the Court as now formulated by the Council. Finally, Malaysia's information on the status of proceedings in the Malaysian courts is referred to.

The Court's power to give an advisory opinion
(paras. 22-27)

The Court begins by observing that this is the first time that the Court has received a request for an advisory opinion that refers to Article VIII, Section 30, of the General Convention, quoted above.

This section provides for the exercise of the Court's advisory function in the event of a difference between the United Nations and one of its Members. The existence of such a difference does not change the advisory nature of the Court's function, which is governed by the terms of Article 96 of the Charter and Article 65 of the Statute. A distinction should thus be drawn between the advisory nature of the Court's task and the particular effects that parties to an existing dispute may wish to attribute, in their mutual relations, to an advisory opinion of the Court, which, "as such, ... has no binding force". These particular effects, extraneous to the Charter and the Statute which regulate the functioning of the Court, are derived from separate agreements; in the present case Article VIII, Section 30, of the General Convention provides that "[t]he opinion given by the Court shall be accepted as decisive by the parties". That consequence has been expressly acknowledged by the United Nations and by Malaysia.

The power of the Court to give an advisory opinion is derived from Article 96, paragraph 2, of the Charter and from Article 65 of the Statute. Both provisions require that the question forming the subject matter of the request should be a "legal question". This condition is satisfied in the present case, as all participants in the proceedings have acknowledged, because the advisory opinion requested relates to the interpretation of the General Convention, and to its application to the circumstances of the case of the Special Rapporteur, Dato' Param Cumaraswamy.

Article 96, paragraph 2, of the Charter also requires that the legal questions forming the subject matter of advisory opinions requested by authorized organs of the United Nations and specialized agencies shall arise "within the scope of their activities". The fulfilment of this condition has not been questioned by any of the participants in the present proceedings. The Court finds that the legal questions submitted by the Council in its request concern the activities of the Commission since they relate to the mandate of its Special Rapporteur appointed "to inquire into substantial allegations concerning, and to identify and record attacks on, the independence of the judiciary, lawyers and court officials".

Discretionary power of the Court
(paras. 28-30)

As the Court held in its Advisory Opinion of 30 March 1950, the permissive character of Article 65 of the Statute "gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 72). In the

present case, the Court, having established its jurisdiction, finds no compelling reasons not to give the advisory opinion requested by the Council. Moreover, no participant in these proceedings questioned the need for the Court to exercise its advisory function in this case.

The question on which the opinion is requested
(paras. 31-37)

As the Council indicated in the preamble to its decision 1998/297, that decision was adopted by the Council on the basis of the note submitted by the Secretary-General on "Privileges and Immunities of the Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers". Paragraph 1 of the operative part of the decision refers expressly to paragraphs 1 to 15 of that note but not to paragraph 21, containing two questions that the Secretary-General proposed submitting to the Court. The Court would point out that the wording of the question submitted by the Council is quite different from that proposed by the Secretary-General.

Participants in these proceedings, including Malaysia and other States, have advanced differing views as to what is the legal question to be answered by the Court. The Court observes that it is for the Council — and not for a member State or the Secretary-General — to formulate the terms of a question that the Council wishes to ask. Accordingly, the Court will now answer the question as formulated by the Council.

Applicability of Article VI, Section 22, of the General Convention to Special Rapporteurs of the Human Rights Commission
(paras. 38-46)

The Court initially examines the first part of the question laid before the Court by the Council, which is:

> "the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations in the case of Dato' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, taking into account the circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General ...".

From the deliberations which took place in the Council it is clear that the request of the Council does not only pertain to the threshold question whether Mr. Cumaraswamy was and is an expert on mission in the sense of Article VI, Section 22, of the General Convention but, in the event of an affirmative answer to this question, to the consequences of that finding in the circumstances of the case. The Court notes that Malaysia became a party to the General Convention, without reservation, on 28 October 1957. [Part of Section 22 of Article VI of that Convention is quoted above, on p. 2.]

The Court then recalls that in its Advisory Opinion of 14 December 1989 (in the so-called "*Mazilu*" case) it stated:

> "The purpose of Section 22 is ... evident, namely, to enable the United Nations to entrust missions to persons who do not have the status of an official of the Organization, and to guarantee them 'such privileges and immunities as are necessary for the independent exercise of their functions'. ... The essence of the matter lies not in their administrative position but in the nature of their mission." (*I.C.J. Reports 1989*, p. 194, para. 47)

In that same Advisory Opinion, it concluded that a Special Rapporteur who is appointed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities and is entrusted with a research mission must be regarded as an expert on mission within the meaning of Article VI, Section 22, of the General Convention.

The Court finds that the same conclusion must be drawn with regard to Special Rapporteurs appointed by the Human Rights Commission, of which the Sub-Commission is a subsidiary organ. It observes that Special Rapporteurs of the Commission usually are entrusted not only with a research mission but also with the task of monitoring human rights violations and reporting on them. But what is decisive is that they have been entrusted with a mission by the United Nations and are therefore entitled to the privileges and immunities provided for in Article VI, Section 22, that safeguard the independent exercise of their functions. After examining Mr. Cumaraswamy's mandate, the Court finds that he must be regarded as an expert on mission within the meaning of Article VI, Section 22, as from 21 April 1994, that by virtue of this capacity the provisions of this Section were applicable to him at the time of his statements at issue, and that they continue to be applicable.

The Court finally observes that Malaysia has acknowledged that Mr. Cumaraswamy, as Special Rapporteur of the Commission, is an expert on mission and that such experts enjoy the privileges and immunities provided for under the General Convention in their relations with States parties, including those of which they are nationals or on the territory of which they reside. Malaysia and the United Nations are in full agreement on these points, as are the other States participating in the proceedings.

Applicability of Article VI, Section 22, of the General Convention in the specific circumstances of the case
(paras. 47-56)

The Court then considers the question whether the immunity provided for in Section 22 (*b*) applies to Mr. Cumaraswamy in the specific circumstances of the case; namely, whether the words used by him in the interview, as published in the article in *International Commercial Litigation* (November 1995 issue), were spoken in the course of the performance of his mission, and whether he was therefore immune from legal process with respect to these words.

In the process of determining whether a particular expert on mission is entitled, in the prevailing circumstances, to the immunity provided for in Section 22 (*b*), the Secretary-General of the United Nations has a pivotal role to play. The Secretary-General, as the chief administrative officer of the

Organization, has the authority and the responsibility to exercise the necessary protection where required. Article VI, Section 23, of the General Convention provides that "[p]rivileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves". In exercising protection of United Nations experts, the Secretary-General is therefore protecting the mission with which the expert is entrusted. In that respect, the Secretary-General has the primary responsibility and authority to protect the interests of the Organization and its agents, including experts on mission.

The determination whether an agent of the Organization has acted in the course of the performance of his mission depends upon the facts of a particular case. In the present case, the Secretary-General, or the Legal Counsel of the United Nations on his behalf, has on numerous occasions informed the Government of Malaysia of his finding that Mr. Cumaraswamy had spoken the words quoted in the article in *International Commercial Litigation* in his capacity as Special Rapporteur of the Commission and that he consequently was entitled to immunity from "every kind" of legal process. The Secretary-General was reinforced in this view by the fact that it has become standard practice of Special Rapporteurs of the Commission to have contact with the media.

The Court notes that Mr. Cumaraswamy was explicitly referred to several times in the article "Malaysian Justice on Trial" in *International Commercial Litigation* in his capacity as United Nations Special Rapporteur on the Independence of Judges and Lawyers, and further that in its various resolutions the Commission took note of the Special Rapporteur's reports and of his methods of work. In 1997, it extended his mandate for another three years. The Commission presumably would not have so acted if it had been of the opinion that Mr. Cumaraswamy had gone beyond his mandate and had given the interview to *International Commercial Litigation* outside the course of his functions. Thus the Secretary-General was able to find support for his findings in the Commission's position.

The Court concludes that it is not called upon in the present case to pass upon the aptness of the terms used by the Special Rapporteur or his assessment of the situation. In any event, in view of all the circumstances of this case, elements of which are set out in paragraphs 1 to 15 of the note by the Secretary-General, the Court is of the opinion that the Secretary-General correctly found that Mr. Cumaraswamy, in speaking the words quoted in the article in *International Commercial Litigation*, was acting in the course of the performance of his mission as Special Rapporteur of the Commission. Consequently, Article VI, Section 22 (*b*), of the General Convention is applicable to him in the present case and affords Mr. Cumaraswamy immunity from legal process of every kind.

Legal obligations of Malaysia in the case
(paras. 57-65)

The Court then deals with the second part of the Council's question, namely, "the legal obligations of Malaysia in this case". Rejecting Malaysia's argument that it is premature to deal with that question, the Court points out that the difference which has arisen between the United Nations and Malaysia originated in the failure of the Government of Malaysia to inform the competent Malaysian judicial authorities of the Secretary-General's finding that Mr. Cumaraswamy had spoken the words at issue in the course of the performance of his mission and was, therefore, entitled to immunity from legal process. It is as from the time of this omission that the question before the Court must be answered.

As the Court has observed, the Secretary-General, as the chief administrative officer of the Organization, has the primary responsibility to safeguard the interests of the Organization; to that end, it is up to him to assess whether its agents acted within the scope of their functions and, where he so concludes, to protect these agents, including experts on mission, by asserting their immunity. This means that the Secretary-General has the authority and responsibility to inform the government of a member State of his finding and, where appropriate, to request it to act accordingly and, in particular, to request it to bring his finding to the knowledge of the local courts if acts of an agent have given or may give rise to court proceedings. That finding, and its documentary expression, creates a presumption of immunity which can only be set aside for the most compelling reasons and is thus to be given the greatest weight by national courts. The governmental authorities of a party to the General Convention are therefore under an obligation to convey such information to the national courts concerned, since a proper application of the Convention by them is dependent on such information. Failure to comply with this obligation, among others, could give rise to the institution of proceedings under Article VIII, Section 30, of the General Convention.

The Court concludes that the Government of Malaysia had an obligation, under Article 105 of the Charter and under the General Convention, to inform its courts of the position taken by the Secretary-General. According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. Because the Government did not transmit the Secretary-General's finding to the competent courts, and the Minister for Foreign Affairs did not refer to it in his own certificate, Malaysia did not comply with the above-mentioned obligation.

Section 22 (*b*) of the General Convention explicitly states that experts on mission shall be accorded immunity from legal process of every kind in respect of words spoken or written and acts done by them in the course of the performance of their mission. By necessary implication, questions of immunity are therefore preliminary issues which must be expeditiously decided *in limine litis*. This is a generally recognized principle of law, and Malaysia was

under an obligation to respect it. The Malaysian courts did not rule *in limine litis* on the immunity of the Special Rapporteur, thereby nullifying the essence of the immunity rule contained in Section 22 (*b*). Moreover, costs were taxed to Mr. Cumaraswamy while the question of immunity was still unresolved. As indicated above, the conduct of an organ of a State — even an organ independent of the executive power — must be regarded as an act of that State. Consequently, Malaysia did not act in accordance with its obligations under international law.

The Court adds that the immunity from legal process to which it finds Mr. Cumaraswamy entitled entails holding Mr. Cumaraswamy financially harmless for any costs imposed upon him by the Malaysian courts, in particular taxed costs.

It further observes that, according to Article VIII, Section 30, of the General Convention, the opinion given by the Court shall be accepted as decisive by the parties to the dispute. Malaysia has acknowledged its obligations under Section 30. Since the Court holds that Mr. Cumaraswamy is an expert on mission who under Section 22 (*b*) is entitled to immunity from legal process, the Government of Malaysia is obligated to communicate this advisory opinion to the competent Malaysian courts, in order that Malaysia's international obligations be given effect and Mr. Cumaraswamy's immunity be respected.

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Finally, the Court points out that the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity. The United Nations may be required to bear responsibility for the damage arising from such acts. However, as is clear from Article VIII, Section 29, of the General Convention, such compensation claims against the United Nations shall not be dealt with by national courts but shall be settled in accordance with the appropriate modes of settlement that the "United Nations shall make provisions for" pursuant to Section 29. The Court furthermore considers that it need hardly be said that all agents of the United Nations, in whatever official capacity they act, must take care not to exceed the scope of their functions, and should so comport themselves as to avoid claims against the United Nations.

Separate opinion of Vice-President Weeramantry

Vice-President Weeramantry, in his separate opinion, stresses his agreement with the principles set out in the Court's Opinion that national courts should immediately be notified of any finding by the Secretary-General concerning the immunity of a United Nations agent, and that the Secretary-General's finding carries a presumption of immunity which can only be set aside for the most compelling reasons.

This Opinion draws attention to the differences between claims to immunity of State functionaries and such claims by United Nations functionaries, for the latter function in the interests of the community of nations as represented by the United Nations, and not on behalf of any particular State. The jurisprudence that has grown up regarding the rights of domestic courts to determine questions relating to the immunities of the representatives or officials of one State for their actions in another State is therefore not necessarily applicable in its entirety where United Nations personnel are involved. If a domestic court is free to disregard the determination of the Secretary-General on their immunities, many problems would arise in relation to United Nations activity in a number of areas.

There is also a need for uniformity in the jurisprudence relating to this matter, irrespective of where a particular rapporteur functions. It is not conducive to the evolution of a uniform system of international administrative law if rapporteurs could have different privileges depending on where they function. This underlines the importance of the conclusiveness of the Secretary-General's determination.

It need scarcely be stressed that rapporteurs, in making statements to the media, will always be expected to ensure that they act within the limits of the performance of their mission.

Separate opinion of Judge Oda

Judge Oda points out that, while the Court was requested by ECOSOC to reply on the issue relating to the legal immunity to be granted to Mr. Cumaraswamy, the Special Rapporteur of the United Nations Commission on Human Rights, with regard to the words he spoke during an interview with a business journal, the question had, however, originally been formulated differently, the issue then being whether the United Nations Secretary-General had the exclusive authority to determine whether Mr. Cumaraswamy would be entitled to legal immunity. Judge Oda expresses his apprehension that the Court's Advisory Opinion seems to be more concerned with the Secretary-General's competence, rather than with the legal immunity to be granted to Mr. Cumaraswamy.

Judge Oda considers that the issue to be decided is whether Mr. Cumaraswamy should be immune from legal process of the Malaysian courts in respect of what he stated in the interview with a business journal on account of which defamation suits were brought against him in the Malaysian courts by certain private companies. The essential issue, according to Judge Oda, is related *not to the words* spoken by Mr. Cumaraswamy *but to* whether he spoke the words *in the course of the performance of his mission* as a Special Rapporteur of the Commission on Human Rights. Judge Oda takes the view that the contact the Special Rapporteur maintained with the media in connection with his mandate falls in general within the mission of a special rapporteur. In this respect, Judge Oda supports the conclusion of the Court as set out in paragraphs (1) (*a*), (1) (*b*) and paragraph (3) of the operative part.

Judge Oda is in full agreement with the Court when it states in paragraph (2) (*b*) of the operative part that the Malaysian courts had the obligation to deal with the

question of immunity from legal process as a preliminary issue to be expeditiously decided *in limine litis*.

Judge Oda cannot, however, agree with the Court's findings in paragraph (2) (*a*) and paragraph (4) of the operative part, which relate to the legal obligations of Malaysia, as put to the Court in the second question contained in the request for advisory opinion. In his view, Malaysia, as a State, is responsible for not having ensured that Mr. Cumaraswamy enjoyed legal immunity. However, whether the Government of Malaysia should have informed its national courts of the view of the United Nations Secretary-General is not a relevant matter in this respect. Furthermore, Judge Oda cannot see any such obligation of the Government of Malaysia to communicate this Advisory Opinion to the Malaysian national courts, as it is obvious that Malaysia, as a State, is bound to accept this Advisory Opinion, under Article VIII, Section 30, of the Convention on the Privileges and Immunities of the United Nations, as decisive.

Separate opinion of Judge Rezek

Judge Rezek, while sharing the views of the majority, wishes to emphasize that the obligation incumbent upon Malaysia is not merely to notify the Malaysian courts of the finding of the Secretary-General, but to ensure that the immunity is respected. In his view, a government will ensure respect for immunity if it uses all the means at its disposal in relation to the judiciary in order to have that immunity applied, in exactly the same way as it defends its own interests and positions before the courts. Membership of an international organization requires that every State, in its relations with the organization and its agents, display an attitude at least as constructive as that which characterizes diplomatic relations.

Dissenting opinion of Judge Koroma

In his dissenting opinion Judge Koroma stated that, much as he would have liked to vote in favour of the Advisory Opinion if it would help to settle differences between the United Nations Organization and the Government of Malaysia, however, he was unable to do so in the face of the Convention, the general principles of justice and his own legal conscience.

Judge Koroma emphasized that the dispute was not about the human rights of the Special Rapporteur or whether the Government of Malaysia was in breach of its obligations under the Human Rights Conventions to which it is a party. Rather the dispute was about whether the Special Rapporteur was immune from legal process for words spoken by him and whether such words were spoken in the performance of his mission, and hence the applicability of the Convention.

Judge Koroma pointed to the differences in the question proposed by the Secretary-General to the Economic and Social Council (ECOSOC) for submission to the Court for an advisory opinion and the Council's subsequent reformulation of the question without explanation. While he recognized the right of ECOSOC to formulate the question, he maintained that the Court in exercising its judicial discretion need not answer the question if it was tendentious and left the Court with no option but to give its judicial imprimatur to a particular viewpoint. On the other hand, in his view, if the Court was disposed to answer the question, it should have answered the "real question". Moreover, in order to determine whether the Convention was applicable, the Court should have enquired into the facts of the case and not relied on the finding of another organ.

He stressed that whether the Convention was applicable to the Special Rapporteur was not an abstract question and that the answer should have been predicated on whether the words spoken were spoken in the performance of his mission — a matter of mixed law and fact — to be determined on its merits, that it would be only after such a determination that the Court would be in a position to say whether the Convention was applicable. In his opinion, the criteria taken into consideration by the Court — such as the Special Rapporteur's appointment by the Human Rights Commission and the finding by the Secretary-General that Mr. Cumaraswamy had acted in the performance of his mission — while they were to be given recognition and treated with respect, were not conclusive, and judicially insufficient to conclude that the Convention was applicable.

He noted that the observation by the Court that "[i]t need hardly be said that all agents of the United Nations, in whatever official capacity they act, must take care not to exceed the scope of their functions, and should so comport themselves as to avoid claims against the United Nations", is not without particular importance and significance in this case.

In Judge Koroma's view, the Government of Malaysia's obligation under the Convention is one of result not one of means and the Convention does not stipulate any particular method or means of implementation. Once the Court had responded that the Convention was applicable, the Government of Malaysia would assume its obligations, including holding the Special Rapporteur harmless for any taxed costs imposed upon him, which was unnecessary to reflect in the operative paragraphs of the Opinion.

Finally, while he shared the Court's position that the rendering of an advisory opinion should be seen as its participation in the work of the Organization to achieve its aims and objectives and that only compelling reasons should restrain it from answering a request, he considered it equally important that, even in giving an advisory opinion, the Court cannot and should not depart from the essential rules guiding its activity as a court.

116. CASE CONCERNING LEGALITY OF USE OF FORCE (YUGOSLAVIA *v.* BELGIUM) (PROVISIONAL MEASURES)

Order of 2 June 1999

In an Order issued in the case concerning Legality of Use of Force (Yugoslavia v. Belgium), the Court rejected by twelve votes to four the request for the indication of provisional measures submitted by the Federal Republic of Yugoslavia (FRY). The Court also stated that it remained seized of the case. It reserved the subsequent procedure for further decision by fifteen votes to one.

The Court was composed as follows: Vice-President Weeramantry, Acting President; President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans; Judges ad hoc Kreca, Duinslaeger; Registrar Valencia-Ospina.

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

"51. For these reasons,

THE COURT,

(1) By twelve votes to four,

Rejects the request for the indication of provisional measures submitted by the Federal Republic of Yugoslavia on 29 April 1999;

IN FAVOUR: President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Fleischhauer, Koroma, Higgins, Parra-Aranguren, Kooijmans; Judge ad hoc Duinslaeger;

AGAINST: Vice-President Weeramantry, Acting President; Judges Shi, Vereshchetin; Judge ad hoc Kreca;

(2) By fifteen votes to one,

Reserves the subsequent procedure for further decision.

IN FAVOUR: Vice-President Weeramantry, Acting President; President Schwebel; Judges Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans; Judges ad hoc Kreca, Duinslaeger;

AGAINST: Judge Oda."

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Judge Koroma appended a declaration to the Court's Order. Judges Oda, Higgins, Parra-Aranguren and Kooijmans appended separate opinions. Vice-President Weeramantry, Acting President, Judges Shi and Vereshchetin, and Judge ad hoc Kreca appended dissenting opinions.

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Background information

On 29 April 1999 Yugoslavia filed an Application instituting proceedings against Belgium "for violation of the obligation not to use force", accusing that State of bombing Yugoslav territory "together with other Member States of NATO". On the same day, it submitted a request for the indication of provisional measures, asking the Court to order Belgium to "cease immediately its acts of use of force" and to "refrain from any act of threat or use of force" against the FRY.

As a basis for the jurisdiction of the Court, Yugoslavia invoked the declarations by which both States had accepted the compulsory jurisdiction of the Court in relation to any other State accepting the same obligation (Article 36, paragraph 2, of the Statute of the Court), and Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on 9 December 1948. Article IX of the Genocide Convention provides that disputes between the contracting parties relating to the interpretation, application or fulfilment of the Convention shall be submitted to the International Court of Justice. In a supplement to its Application submitted to the Court on 12 May 1999, Yugoslavia invoked, as an additional ground of jurisdiction, Article 4 of the Convention of Conciliation, Judicial Settlement and Arbitration between Belgium and the Kingdom of Yugoslavia, signed at Belgrade on 25 March 1930.

Reasoning of the Court

In its Order, the Court first emphasizes that it is "deeply concerned with the human tragedy, the loss of life, and the enormous suffering in Kosovo which form the background" of the dispute and "with the continuing loss of life and human suffering in all parts of Yugoslavia". It declares itself "profoundly concerned with the use of force in Yugoslavia", which "under the present circumstances ... raises very serious issues of international law". While being "mindful of the purposes and principles of the United Nations Charter and of its own responsibilities in the maintenance of peace and security under the Charter and [its] Statute", the Court "deems it necessary to emphasize that all parties before it must act in conformity with their obligations under the United Nations Charter and other rules of international law, including humanitarian law".

The Court then points out that it "does not automatically have jurisdiction over legal disputes between States" and that "one of the fundamental principles of its Statute is that

it cannot decide a dispute between States without the consent of those States to its jurisdiction". It cannot indicate provisional measures without its jurisdiction in the case being established prima facie.

Concerning the first basis of jurisdiction invoked, the Court observes that under the terms of its declaration, Yugoslavia limits its acceptance of the Court's compulsory jurisdiction to "disputes arising or which may arise after the signature of the present Declaration, with regard to the situations or facts subsequent to this signature". It emphasizes that although Belgium did not base any argument on this provision, the Court must consider what effects it might have prima facie upon its jurisdiction. In this regard, the Court states, it is sufficient to decide whether the dispute brought to the Court "arose" before or after 25 April 1999, the date on which the declaration was signed. It finds that the bombings began on 24 March 1999 and have been conducted continuously over a period extending beyond 25 April 1999. The Court has thus no doubt that a "legal dispute ... 'arose' between Yugoslavia and [Belgium], as it did also with the other NATO member States, well before 25 April 1999". The Court concludes that the declarations made by the Parties do not constitute a basis on which the jurisdiction of the Court could prima facie be founded in the case.

As to Belgium's argument that Yugoslavia is not a member State of the United Nations in view of United Nations General Assembly resolution 47/1 (1992), nor in consequence a party to the Statute of the Court, so that Yugoslavia cannot subscribe to the optional clause of compulsory jurisdiction, the Court maintains that it need not consider this question, taking into account its finding that the declarations do not constitute a basis of jurisdiction.

Concerning Article IX of the Genocide Convention, the Court states that it is not disputed that both Yugoslavia and Belgium are parties to that Convention, without reservation, and that Article IX accordingly appears to constitute a basis on which the jurisdiction of the Court might be founded. The Court however finds that it must ascertain whether the breaches of the Convention alleged by Yugoslavia are capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one over which the Court might have jurisdiction *ratione materiae*. In its Application, Yugoslavia contends that the subject of the dispute concerns inter alia "acts of the Kingdom of Belgium by which it has violated its international obligation ... not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group". It contends that the sustained and intensive bombing of the whole of its territory, including the most heavily populated areas, constitutes "a serious violation of Article II of the Genocide Convention", that it is the Yugoslav nation as a whole and as such that is targeted and that the use of certain weapons whose long-term hazards to health and the environment are already known, and the destruction of the largest part of the country's power supply system, with catastrophic consequences of which the Respondent must be aware, "impl[y] the intent to destroy, in whole or in part", the Yugoslav national group as such. For its part, Belgium, referring to the definition of genocide contained in the Convention, emphasizes the importance of "the intentional element, the intent to destroy all or part of an ethnic, racial or religious [group]". It asserts that Yugoslavia cannot "produce the slightest evidence of such intention" on the part of Belgium in this case. It appears to the Court that, according to the Convention, the essential characteristic of genocide is the intended destruction of a national, ethnical, racial or religious group; the Court further states that "the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of Article II of the Genocide Convention". It adds that in its opinion, it does not appear at the present stage of the proceedings that the bombings which form the subject of the Yugoslav Application "indeed entail the element of intent, towards a group as such, required by the provision" mentioned above. The Court considers therefore that it is not in a position to find, at this stage of the proceedings, that the acts imputed by Yugoslavia to Belgium are capable of coming within the provisions of the Genocide Convention; and Article IX cannot accordingly constitute a basis on which the jurisdiction of the Court could prima facie be founded in the case.

As to Article 4 of the Convention of Conciliation, Judicial Settlement and Arbitration between Belgium and the Kingdom of Yugoslavia, the Court observes that "the invocation by a party of a new basis of jurisdiction in the second round of oral argument on a request for the indication of provisional measures has never before occurred in the Court's practice", that "such action at this late stage, when not accepted by the other party, seriously jeopardizes the principle of procedural fairness and the sound administration of justice" and that in consequence the Court cannot take into consideration this new title of jurisdiction.

The Court having found that it has "no prima facie jurisdiction to entertain Yugoslavia's Application, either on the basis of Article 36, paragraph 2, of the Statute or of Article IX of the Genocide Convention" and having "taken the view that it cannot, at this stage of the proceedings, take account of the additional basis of jurisdiction invoked by Yugoslavia", it follows that the Court "cannot indicate any provisional measure whatsoever". However, the findings reached by the Court "in no way prejudge the question of the jurisdiction of the Court to deal with the merits of the case" and they "leave unaffected the right of the Governments of Yugoslavia and Belgium to submit arguments in respect of those questions".

The Court finally observes that "there is a fundamental distinction between the question of the acceptance by a State of the Court's jurisdiction and the compatibility of particular acts with international law". "The former requires consent; the latter question can only be reached when the Court deals with the merits after having established its jurisdiction and having heard full legal arguments by both parties." It emphasizes that "whether or not States accept the jurisdiction of the Court, they remain in any event

responsible for acts attributable to them that violate international law, including humanitarian law" and that "any disputes relating to the legality of such acts are required to be resolved by peaceful means, the choice of which, pursuant to Article 33 of the Charter, is left to the parties". In this context, "the parties should take care not to aggravate or extend the dispute". The Court reaffirms that "when such a dispute gives rise to a threat to the peace, breach of the peace or act of aggression, the Security Council has special responsibilities under Chapter VII of the Charter".

Declaration of Judge Koroma

In his declaration Judge Koroma observed that these were perhaps the most serious cases that have ever come before the Court for provisional measures. He stated that jurisprudentially such measures were designed to prevent violence, the use of force, to safeguard international peace and security as well as serving as an important part of the dispute settlement process under the Charter of the United Nations. In his view the indication of such measures therefore represents one of the most important functions of the Court.

But the granting of such a relief, he stressed, could only be done in accordance with the Statute of the Court. In this regard, and in the light of the jurisprudence of the Court, where prima facie jurisdiction is absent or other circumstances predominate, the Court will not grant the request for provisional measures.

Nevertheless, he considered the Court, being the principal judicial organ of the United Nations, whose primary raison d'être remains the preservation of international peace and security, to be under a positive obligation to contribute to the maintenance of international peace and security and to provide a judicial framework for the resolution of a legal conflict, especially one which not only threatens international peace and security but also involves enormous human suffering and continuing loss of life. He had therefore joined with the other Members of the Court in calling for the peaceful resolution of this conflict pursuant to Article 33 of the Charter, and in urging the Parties not to aggravate or extend the dispute and to respect international law, including humanitarian law and the human rights of all the citizens of Yugoslavia.

Separate opinion of Judge Oda

Judge Oda supports the decision of the Court in dismissing the requests for the indication of provisional measures by the Federal Republic of Yugoslavia against ten respondent States. While favouring the decision of the Court to remove the case from the General List of the Court in the cases of Spain and the United States, Judge Oda voted against the decision in the other eight cases in which the Court ordered that it "[r]eserves the subsequent procedure for further decision", because he believes that those eight cases should also be removed at this stage from the General List of the Court.

Judge Oda considers that the Federal Republic of Yugoslavia is not a Member of the United Nations and thus not a party to the Statute of the International Court of Justice. The Applications presented by the Federal Republic of Yugoslavia should therefore be declared inadmissible for this reason alone and should be removed from the General List of the Court.

He nevertheless then goes on to discuss whether, if the Federal Republic of Yugoslavia were to be considered a party to the Statute, it could have brought the present Applications on the basis of certain legal instruments. After having examined the meaning of (i) the optional clause of the Court's Statute, (ii) the background to the 1930 and 1931 instruments with Belgium and the Netherlands, respectively, and (iii) the 1948 Genocide Convention, he reaches the conclusion that none of these instruments grant the Court jurisdiction in any of the ten Applications.

Judge Oda agrees with the Court that, as it has no basis of jurisdiction, it must reject the requests for the indication of provisional measures in all ten cases. However, he considers that, the Court having decided that it has no jurisdiction to entertain the cases, not *even* prima facie, that this can only mean that it has no jurisdiction whatsoever in any of the cases. It follows, in Judge Oda's view, that not only in the cases of Spain and the United States, in which the Court states that it manifestly lacks jurisdiction, but in all the other cases, the Applications should be dismissed at this stage, given that the Court has found that there is not even a prima facie basis of jurisdiction.

Judge Oda also points out that, while the Court makes a distinction between the Applications, even though they deal virtually with the same subject matter, this distinction, which came about simply because of the different positions which individual States happened to take towards the various instruments that are to be applied concerning the Court's jurisdiction, will lead to differing results concerning the future proceedings in each of the cases. In Judge Oda's view this is an illogical situation, which supports his contention that all ten cases should be dismissed in their entirety at this stage.

Separate opinion of Judge Higgins

Judge Higgins in her separate opinions addresses two issues that arise in relation to those cases where the Federal Republic of Yugoslavia claims jurisdiction on the basis of Article 36, paragraph 2, of the Statute. The first issue concerns temporal limitations to so-called "optional clauses", and in particular the question of when a dispute arises and when the relevant events have occurred. These concepts are analysed in connection with Yugoslavia's own declaration. The second issue addresses the question of exactly what has to be shown for the Court to be satisfied it has prima facie jurisdiction when it is considering the indication of provisional measures. It is suggested that some jurisdictional issues are so complex that they cannot be addressed at all at this phase; their holding over for a later phase does not stand in the way of the Court determining

whether or not it has prima facie jurisdiction for the purposes of Article 41.

Separate opinion of Judge Parra-Aranguren

Judge Parra-Aranguren recalls that Yugoslavia maintains that "the bombing of Yugoslav populated areas constitute a breach of Article II of the Genocide Convention", a contention denied by the Respondent; that a legal dispute exists between the Parties because of the existence of "a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations", as the Court stated in its decision of 11 July 1996 (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), I.C.J. Reports 1996 (II)*, pp. 614-615, para. 29); and that according to Article IX of the Genocide Convention, "disputes between the Contracting Parties relating to the interpretation or fulfilment of the present Convention" shall be submitted to the International Court of Justice. Therefore, in his opinion the Court has prima facie jurisdiction to decide upon the provisional measures requested by Yugoslavia.

Yugoslavia requested the Court to indicate that the Respondent "shall cease immediately the acts of use of force and shall refrain from any act of threat or use of force against the Federal Republic of Yugoslavia". However, the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of the Genocide Convention. Consequently, Yugoslavia is requesting the indication of provisional measures that do not aim to guarantee its rights under the Genocide Convention, i.e., the right not to suffer acts which may be characterized as genocide crimes by the Convention. Therefore, in the opinion of Judge Parra-Aranguren, the measures requested by Yugoslavia should not be indicated.

Separate opinion of Judge Kooijmans

1. Judge Kooijmans joined a separate opinion to the Order of the Court in the cases of Yugoslavia versus Belgium, Canada, the Netherlands, Portugal, Spain and the United Kingdom, respectively.

He does not agree with the Court's view that Yugoslavia's declaration of acceptance of the compulsory jurisdiction of the Court of 25 April 1999 cannot provide a basis of jurisdiction in the present case, even prima facie, because of the reservations incorporated in the declarations of Spain and the United Kingdom, cq. because of the temporal limitation contained in Yugoslavia's declaration (cases against Belgium, Canada, the Netherlands and Portugal). He is of the view that the Court lacks prima facie jurisdiction because of the controversial validity of Yugoslavia's declaration. This validity issue constitutes a preliminary issue and should, therefore, have been dealt with by the Court as a threshold question.

Since this issue is of no relevance in the four other cases (against France, Germany, Italy and the United States) as these States themselves do not recognize the compulsory jurisdiction of the Court, there is no need for a separate opinion in those cases.

2. Article 36, paragraph 2, of the Statute explicitly states that only States which are party to the Statute can recognize the compulsory jurisdiction of the Court by depositing a declaration of acceptance with the Secretary-General of the United Nations. Member States of that organization are *eo ipso* party to the Statute. All six Respondents contended, that since the Federal Republic of Yugoslavia is not a Member of the United Nations, its declaration of acceptance has not been validly made.

3. On 22 September 1992 the General Assembly, on the recommendation of the Security Council, decided that the Federal Republic of Yugoslavia cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia and therefore that it should apply for membership in the United Nations. Until that time it shall not participate in the work of the General Assembly (res. 47/1). The Federal Republic of Yugoslavia never applied for membership.

4. In its present Orders the Court avoids the question of the contested validity of Yugoslavia's declaration. It takes the position that it need not consider this issue since the declaration cannot provide the Court with a basis for prima facie jurisdiction on other grounds.

5. Judge Kooijmans is of the view that the Court's reasoning in this respect is inconsistent. Such other grounds only become relevant if the validity of the declaration — at least for the present stage of the proceedings — is accepted. The Court's reasoning is based on a presumption of validity and the Court should have said so and have given its arguments for it.

6. According to Judge Kooijmans there certainly was no need for the Court to take a definitive stand on Yugoslavia's membership of the United Nations. He is fully aware that resolution 47/1 is unprecedented and raises a number of highly complex legal questions, which require a thorough analysis and careful evaluation by the Court at a later stage of the proceedings.

Difficult though the question may be, the relevant decisions have been taken by the organs of the United Nations which have exclusive authority in matters of membership (Security Council and General Assembly) and they cannot be overlooked or ignored.

7. According to Judge Kooijmans the doubts, raised by the decisions of the competent United Nations bodies with regard to Yugoslavia's membership and the ensuing validity of its declaration, are, however, so serious that the Court should have concluded that this declaration cannot provide it with a basis for prima facie jurisdiction. The Court should not indicate provisional measures unless its competence to entertain the dispute appears to be *reasonably probable* and this test of reasonable probability cannot be passed because of the doubtful validity of the declaration.

8. If that is the case, issues like reservations and temporal limitations on which the cases were decided by the Court, become irrelevant since they are wholly conditioned by the preliminary question of the declaration's validity.

Dissenting opinion of Vice-President Weeramantry

Vice-President Weeramantry in his dissenting opinion takes the view that the Court has prima facie jurisdiction in this case and that provisional measures should have been issued against both Parties. Lives are being lost daily and vast numbers of people including women, children, the aged and the infirm are continuously exposed to physical danger and suffering, and important issues of law are involved, which go to the fundamentals of the international rule of law, the peaceful resolution of disputes and the Charter provisions relating to the prohibition of the use of force.

If the Court has prima facie jurisdiction it is eminently a case in which provisional measures should have been issued on both Parties.

He disagreed with the Court's reasoning that the acts complained of relate back to 24 March the date when the bombing commenced and that therefore there was a lack of prima facie jurisdiction as the operative date specified in Yugoslavia's declaration was 25 April. In his view the claims of Yugoslavia became legal claims only when the acts complained of were performed and not when the entire bombing campaign was planned. He bases this view on the principles usually applied in determining when a legal claim arises. The claims of Yugoslavia thus arose after the date specified in Yugoslavia's declaration (25 April) and not on the date when the bombing commenced (24 March). The Court therefore does have prima facie jurisdiction over the case.

He disagreed with the contention that the involvement of a political element rendered the matter unsuitable for the issue of provisional measures.

The Court performs a role complementary to that of other United Nations organs in the maintenance of peace and the peaceful settlement of disputes. It is also the role of the Court to facilitate negotiations between the Parties and to assist them towards the peaceful settlement of disputes. Interim measures containing such provisions would have served a useful purpose. There is ample support for such an approach in the jurisprudence of the Court as well as in the inherent powers of the Court.

A precondition to the issue of interim measures would be that the Applicant should immediately cease from any violence towards the people of Kosovo and that the return of refugees and other displaced persons should be facilitated under international safeguards. The provisional measures should also have called for the immediate cessation of the use of force against Yugoslavia. These requirements are interlinked.

The Court is heir to the judicial traditions of the principal forms of civilization and the peaceful settlement of disputes is a strong tradition in the civilizations of the East. For example the peaceful settlement of disputes is deeply embedded in the Buddhist tradition. The Court's jurisprudence could be enriched by this perspective, which would also have given it support in the issue of provisional measures with a view to restraining the use of force on both sides, and assisting in promoting negotiation and settlement between the Parties.

Dissenting opinion of Judge Shi

In the four cases of Yugoslavia against Belgium, Canada, the Netherlands and Portugal, Judge Shi disagrees with the Court's findings that, given the limitation *ratione temporis* contained in Yugoslavia's declaration of acceptance of compulsory jurisdiction, the Court lacked prima facie jurisdiction under Article 36, paragraph 2, of the Statute for the indication of provisional measures requested by Yugoslavia.

By that declaration, signed on 25 April 1999, Yugoslavia recognized compulsory jurisdiction "in all disputes arising or which may arise after the signature of the present Declaration, with regard to the situations or facts subsequent to this signature ...". In cases where the Court is confronted with such a "double exclusion formula", it has to ascertain both the date of the dispute and the situations or facts with regard to which the dispute has arisen.

As to the first aspect of the time condition, the Court has to determine what is the subject matter of the dispute, which in the present cases consists of a number of constituent elements. The section "Subject of the Dispute" in each of Yugoslavia's Applications indicates that subject matter to be acts of the Respondent by which it has violated its international obligations not to use force against another State, not to intervene in the internal affairs of another State, not to violate the sovereignty of another State, to protect the civilian population and civilian objects in wartime, to protect the environment, etc.

Prior to the coming into existence of all the constituent elements, the dispute cannot be said to arise. Though the aerial bombing of the territory of Yugoslavia began some weeks before the critical date of signature of the declaration, aerial bombing and its effects as such do not constitute a dispute. It is true that prior to the critical date, Yugoslavia had accused NATO of illegal use of force against it. This complaint constitutes at the most one of the many constituent elements of the dispute. Besides, NATO cannot be identified with, nor be the Respondent in the present cases *ratione personae*. The dispute only arose at the date subsequent to the signature of the declaration.

Regarding the second aspect of the time condition, the dispute relates to the alleged breach of various international obligations by acts of force, in the form of aerial bombing of the territories of Yugoslavia, which are attributed by the Applicant to the respondent State. It is obvious that the alleged breach of obligations by such a "continuing" act first occurred at the moment when the act began, weeks before the critical date. Given that the acts of aerial bombing continued well beyond the critical date and still continue, the time of commission of the breach extends over the whole period during which the acts continue and ends only when the acts of the respondent State cease.

The conclusion may be drawn that the limitation *ratione temporis* contained in Yugoslavia's declaration in no way

constitutes a bar to founding prima facie jurisdiction upon Article 36, paragraph 2, of the Statute for the purpose of indicating provisional measures in the present case.

Moreover, for reasons similar to those expressed in the declarations relating to the other six cases, Judge Shi regrets that the Court, being confronted with a situation of great urgency, failed to make a general statement appealing to the Parties to act in compliance with their obligations under the United Nations Charter and all the rules of international law relevant to the situation, and at least not to aggravate or extend their disputes immediately upon receipt of Yugoslavia's request and regardless of what might be the Court's conclusion on prima facie jurisdiction pending its final decision. The Court also failed to make use of Article 75, paragraph 1, of the Rules of Court to decide the requests *proprio motu*, despite Yugoslavia having so asked.

For these reasons, Judge Shi felt compelled to vote against operative paragraph (1) of the four Orders.

Dissenting opinion of Judge Vereshchetin

Judge Vereshchetin begins his dissenting opinion with a general statement, attached to all the Orders of the Court, in which he holds that the extraordinary and unprecedented circumstances of the cases before the Court imposed on it a need to act promptly and, if necessary, *proprio motu*. After that, he proceeds to explain why he has no doubt that prima facie jurisdiction under Article 36, paragraph 2, of the Statute of the Court exists with regard to the Applications instituted against Belgium, Canada, the Netherlands and Portugal. As far as Belgium and the Netherlands are concerned, the Court also has prima facie jurisdiction under the Agreements signed between Belgium and Yugoslavia on 25 March 1930 and between the Netherlands and Yugoslavia on 11 March 1931.

Judge Vereshchetin disagrees with two cornerstone propositions on which, in his opinion, rest the arguments to the contrary upheld in the Orders of the Court. The first proposition is that the text of the Yugoslav declaration accepting the jurisdiction of the Court, and in particular the wording of the reservation contained therein, does not grant prima facie jurisdiction to the Court. The second proposition is that the timing of the presentation by Yugoslavia of the additional bases for jurisdiction does not allow the Court to conclude that it has prima facie jurisdiction in respect of the cases instituted against Belgium and the Netherlands.

As concerns the first proposition, Judge Vereshchetin takes the view that the Court, by refusing to take into account the clear intention of Yugoslavia, reads its declaration in a way that could lead to the absurd conclusion that Yugoslavia intended by its declaration of acceptance of the Court's jurisdiction to exclude the jurisdiction of the Court over its Applications instituting proceedings against the Respondents.

As to the second proposition connected with the invocation of additional grounds of jurisdiction in relation to Belgium and the Netherlands, in the opinion of Judge Vereshchetin, the legitimate concern of the Court over the observance of "the principle of procedural fairness and the sound administration of justice" cannot be stretched to such an extent as to exclude a priori the additional basis of jurisdiction from its considcration, solely bccause the respondent States have not been given adequate time to prepare their counter-arguments. Admittedly, it cannot be considered normal for a new basis of jurisdiction to be invoked in the second round of the hearings. However, the respondent States were given the possibility of presenting their counter-arguments to the Court, and they used this possibility to make various observations and objections to the new basis of jurisdiction. If necessary, they could have asked for the prolongation of the hearings. In turn, the Applicant may reasonably claim that the belated invocation of the new titles of jurisdiction was caused by the extraordinary situation in Yugoslavia, in which the preparation of the Applications had been carried out under conditions of daily aerial bombardment by the Respondents.

The refusal of the majority to take into consideration the new bases of jurisdiction is clearly contrary to Article 38 of the Rules of Court and to the Court's jurisprudence. The refusal to have due regard to the intention of a State making a declaration of acceptance of the Court's jurisdiction is also incompatible with the Court's case-law and with the customary rules for interpreting legal instruments. In the view of Judge Vereshchetin, all the requirements for the indication of provisional measures, flowing from Article 41 of the Court's Statute and from its well-established jurisprudence, have been met, and the Court should undoubtedly have indicated such measures so far as the above four States are concerned.

Dissenting opinion of Judge Kreca

In his dissenting opinion Judge Kreca points out the following relevant issues:

Judge Kreca finds that none of the equalization functions of the institution of judge ad hoc have been met in this particular case. The letter and spirit of Article 31, paragraph 2, of the Statute of the Court, applied to this particular case, imply the right of Yugoslavia, as the applicant State, to choose as many judges ad hoc to sit on the Bench as is necessary to equalize the position of applicant State and that of the respondent States which have judges of their nationality on the Bench and which share the same interest. *In concreto*, the inherent right to equalization in the composition of the Bench, as an expression of a fundamental rule of equality of parties, means that the Federal Republic of Yugoslavia should have the right to choose five judges ad hoc, since even five out of ten respondent States (United States, the United Kingdom, France, Germany, and the Netherlands) have their national judges sitting on the Bench.

At the same time, according to coherent jurisprudence of the Court, none of the respondent States were entitled to appoint a judge ad hoc (*Territorial Jurisdiction of the International Commission of the River Oder*; *Customs Régime between Germany and Austria*).

There is no need to say that the above-mentioned issues are of upmost specific weight in view of the fact that obviously the meaning of such issues is not restricted to the procedure, but that it may have a far-reaching concrete meaning.

Judge Kreca finds that in the recent practice of the Court, in particular that in which individuals were directly affected, a high standard of humanitarian concern in the proceedings for the indication of interim measures has been formed, a standard which commanded sufficient inherent strength to brush aside some relevant, both procedural and material, rules governing the institution of provisional measures (*exampli causa*, the *LaGrand* case). Thus, humanitarian considerations, independently from the norms of international law regulating human rights and liberties, have, in a way, gained autonomous legal significance; they have transcended the moral and philanthropic sphere, and entered the sphere of law.

In the case at hand, it seems that "humanitarian concern" has lost the acquired autonomous legal position. The fact needs to be stressed in view of the special circumstances of this case. Unlike the recent practice of the Court, "humanitarian concern" has as its object the fate of an entire nation, in the literal sense. The Federal Republic of Yugoslavia and its national and ethnic groups have been subjected for more than two months now to continued attacks of a very strong, highly organized air armada of the most powerful States of the world. At the same time, the arsenal used in the attacks on Yugoslavia contains also weapons whose effects have no limitations either in space or in time such as depleted uranium which cause far-reaching and irreparable damage to the health of the whole population.

Judge Kreca finds that, as regards the membership of Yugoslavia in the United Nations, the Court remained consistent with its "avoidance" position, persisting in its statement that it "need not consider this question for the purpose of deciding whether or not it can indicate provisional measures in the present case". But it is the profound conviction of Judge Kreca that the Court should have answered the question whether the Federal Republic of Yugoslavia can or cannot, in the light of the content of General Assembly resolution 47/1 and of the practice of the world Organization, be considered to be a Member of the United Nations and especially party to the Statute of the Court; namely the text of resolution 47/1 makes no mention of the status of the Federal Republic of Yugoslavia as a party to the Statute of the International Court of Justice. Judge Kreca is equally convinced that, especially because the Court should have answered that question, both the content of the resolution which represents *contradictio in adiecto* and in particular the practice of the world Organization after its adoption over a period of nearly seven years, offered ample arguments for it to pronounce itself on this matter.

Judge Kreca is of the opinion that the extensive use of armed force, in particular if it is used against objects and means constituting conditions of normal life, can be conducive to "inflicting on the group conditions of life" bringing about "its physical destruction" (Genocide Convention, Article II).

Judge Kreca goes on to say that it can be argued that such acts are in the function of degrading the military capacity of the Federal Republic of Yugoslavia. But such an explanation can hardly be regarded as a serious argument. For the spiral of such a line of thinking may easily come to a point when, having in mind that military power is after all comprised of people, even mass killing of civilians can be claimed to constitute some sort of precautionary measure that should prevent the maintenance or, in case of mobilization, the increase of military power of a State.

Judge Kreca also points out that, in the incidental proceedings the Court cannot and should not concern itself with the definitive qualification of the intent to impose upon the group conditions in which the survival of the group is threatened. Having in mind the purpose of provisional measures, it can be said that at this stage of the proceedings it is sufficient to establish that, in the conditions of extensive bombing, there is an objective risk of bringing about conditions in which the survival of the group is threatened.

Judge Kreca finds that the stance of the Court as regards jurisdiction of the Court *ratione temporis* is highly questionable for two basic reasons. Firstly, for reasons of a general nature to do with the jurisprudence of the Court in this particular matter, on the one hand, and with the nature of the proceedings for the indication of provisional measures, on the other and, secondly, for reasons of a specific nature deriving from circumstances of the case in hand. As far as jurisdiction of the Court is concerned, it seems incontestable that a liberal approach towards the temporal element of the Court's jurisdiction in the indication of provisional measures has become apparent. It is understandable that the proceeding for the indication of provisional measures is surely not designed for the purpose of the final and definitive establishment of the jurisdiction of the Court. The determinant "prima facie" itself implies that what is involved is not definitely established jurisdiction, but the jurisdiction deriving or supposed to be normally deriving from a relevant legal fact which is defined as the "title of jurisdiction". It could be said that the "title of jurisdiction" is sufficient per se to constitute prima facie jurisdiction except in the case of the absence of jurisdiction on the merits is manifest (*Fisheries Jurisdiction* cases).

Judge Kreca disagrees with the stance of the Court regarding the additional ground of jurisdiction (Article 4 of the 1930 Treaty), since he finds that three essential conditions necessary to qualify the additional ground as admissible are met in this particular case:

(*a*) that the Applicant makes it clear that it intends to proceed upon that basis;

(*b*) that the result of invoking additional grounds is not to transform the dispute brought before the Court by the Application into another dispute which is different in character; and

(*c*) that additional grounds afford a basis on which the jurisdiction of the Court to entertain the Application might be prima facie established.

At the same time he points out that even if the document in which the Applicant pointed to the Treaty of 1930 as additional grounds of jurisdiction were declared "inadmissible", the Court could not have ignored the fact that the Treaty exists. In that case, the Court could have differentiated between the document as such and the Treaty of 1930, per se, as a basis of jurisdiction.

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117. CASE CONCERNING LEGALITY OF USE OF FORCE (YUGOSLAVIA *v.* CANADA) (PROVISIONAL MEASURES)

Order of 2 June 1999

In an Order issued in the case concerning Legality of Use of Force (Yugoslavia v. Canada), the Court rejected by twelve votes to four the request for the indication of provisional measures submitted by the Federal Republic of Yugoslavia (FRY). The Court also stated that it remained seized of the case. It reserved the subsequent procedure for further decision by fifteen votes to one.

The Court was composed as follows: Vice-President Weeramantry, Acting President; President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans; Judges ad hoc Lalonde, Kreca; Registrar Valencia-Ospina.

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

"47. For these reasons,

THE COURT,

(1) By twelve votes to four,

Rejects the request for the indication of provisional measures submitted by the Federal Republic of Yugoslavia on 29 April 1999;

IN FAVOUR: President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Fleischhauer, Koroma, Higgins, Parra-Aranguren, Kooijmans; Judge ad hoc Lalonde;

AGAINST: Vice-President Weeramantry, Acting President; Judges Shi, Vereshchetin; Judge ad hoc Kreca;

(2) By fifteen votes to one,

Reserves the subsequent procedure for further decision.

IN FAVOUR: Vice-President Weeramantry, Acting President; President Schwebel; Judges Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans; Judges ad hoc Lalonde, Kreca;

AGAINST: Judge Oda."

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Judge Koroma appended a declaration to the Order of the Court. Judges Oda, Higgins, Parra-Aranguren and Kooijmans appended separate opinions to the Order of the Court. Vice-President Weeramantry, Acting President, Judges Shi and Vereshchetin, and Judge ad hoc Kreca appended dissenting opinions to the Order of the Court.

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Background information

On 29 April 1999 Yugoslavia filed an Application instituting proceedings against Canada "for violation of the obligation not to use force", accusing that State of bombing Yugoslav territory "together with other Member States of NATO". On the same day, it submitted a request for the indication of provisional measures, asking the Court to order Canada to "cease immediately its acts of use of force" and to "refrain from any act of threat or use of force" against the FRY.

As a basis for the jurisdiction of the Court, Yugoslavia invoked the declarations by which both States had accepted the compulsory jurisdiction of the Court in relation to any other State accepting the same obligation (Article 36, paragraph 2, of the Statute of the Court), and Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on 9 December 1948.

Article IX of the Genocide Convention provides that disputes between the contracting parties relating to the interpretation, application or fulfilment of the Convention shall be submitted to the International Court of Justice.

Reasoning of the Court

In its Order, the Court first emphasizes that it is "deeply concerned with the human tragedy, the loss of life, and the enormous suffering in Kosovo which form the background" of the dispute and "with the continuing loss of life and human suffering in all parts of Yugoslavia". It declares itself "profoundly concerned with the use of force in Yugoslavia", which "under the present circumstances ... raises very

serious issues of international law". While being "mindful of the purposes and principles of the United Nations Charter and of its own responsibilities in the maintenance of peace and security under the Charter and [its] Statute", the Court "deems it necessary to emphasize that all parties before it must act in conformity with their obligations under the United Nations Charter and other rules of international law, including humanitarian law".

The Court then points out that it "does not automatically have jurisdiction over legal disputes between States" and that "one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction". It cannot indicate provisional measures without its jurisdiction in the case being established prima facie.

Concerning the first basis of jurisdiction invoked, the Court observes that under the terms of its declaration, Yugoslavia limits its acceptance of the Court's compulsory jurisdiction to "disputes arising or which may arise after the signature of the present Declaration, with regard to the situations or facts subsequent to this signature". It states that in order to assess whether it has jurisdiction in the case, it is sufficient to decide whether the dispute brought to the Court "arose" before or after 25 April 1999, the date on which the declaration was signed. It finds that the bombings began on 24 March 1999 and have been conducted continuously over a period extending beyond 25 April 1999.

The Court has thus no doubt that a "legal dispute ... 'arose' between Yugoslavia and [Canada], as it did also with the other NATO member States, well before 25 April 1999". The Court concludes that the declarations made by the Parties do not constitute a basis on which the jurisdiction of the Court could prima facie be founded in the case.

As to Canada's arguments that Yugoslavia's declaration accepting the compulsory jurisdiction of the Court "is a transparent nullity" and that Yugoslavia is not a member State of the United Nations in view of United Nations Security Council resolution 777 (1992) and United Nations General Assembly resolution 47/1 (1992), nor a party to the Statute of the Court, the Court maintains that it need not consider this question, taking into account its finding that the declarations do not constitute a basis of jurisdiction.

Concerning Article IX of the Genocide Convention, the Court states that it is not disputed that both Yugoslavia and Canada are parties to that Convention, without reservation, and that Article IX accordingly appears to constitute a basis on which the jurisdiction of the Court might be founded. The Court however finds that it must ascertain whether the breaches of the Convention alleged by Yugoslavia are capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one over which the Court might have jurisdiction *ratione materiae*. In its Application, Yugoslavia contends that the subject of the dispute concerns inter alia "acts of Canada by which it has violated its international obligation ... not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group". It contends that the sustained and intensive bombing of the whole of its territory, including the most heavily populated areas, constitutes "a serious violation of Article II of the Genocide Convention", that it is the Yugoslav nation as a whole and as such that is targeted and that the use of certain weapons whose long-term hazards to health and the environment are already known, and the destruction of the largest part of the country's power supply system, with catastrophic consequences of which the Respondent must be aware, "impl[y] the intent to destroy, in whole or in part", the Yugoslav national group as such. For its part, Canada contends that "the essence of genocide is *intention* and *destruction* — the destruction of entire populations", that the Applicant "did not even attempt to address the question of intent" and that the concept of genocide cannot be equated with the use of force or even aggression. It appears to the Court that, according to the Convention, the essential characteristic of genocide is the intended destruction of a national, ethnical, racial or religious group; the Court further states that "the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of Article II of the Genocide Convention". It adds that in its opinion, it does not appear at the present stage of the proceedings that the bombings which form the subject of the Yugoslav Application "indeed entail the element of intent, towards a group as such, required by the provision" mentioned above. The Court considers therefore that it is not in a position to find, at this stage of the proceedings, that the acts imputed by Yugoslavia to Canada are capable of coming within the provisions of the Genocide Convention; and Article IX cannot accordingly constitute a basis on which the jurisdiction of the Court could prima facie be founded in the case.

The Court concludes that it "lacks prima facie jurisdiction to entertain Yugoslavia's Application" and that it "cannot therefore indicate any provisional measure whatsoever". However, the findings reached by the Court "in no way prejudge the question of the jurisdiction of the Court to deal with the merits of the case" and they "leave unaffected the right of the Governments of Yugoslavia and Canada to submit arguments in respect of those questions".

The Court finally observes that "there is a fundamental distinction between the question of the acceptance by a State of the Court's jurisdiction and the compatibility of particular acts with international law". "The former requires consent; the latter question can only be reached when the Court deals with the merits after having established its jurisdiction and having heard full legal arguments by both parties". It emphasizes that "whether or not States accept the jurisdiction of the Court, they remain in any event responsible for acts attributable to them that violate international law, including humanitarian law" and that "any disputes relating to the legality of such acts are required to be resolved by peaceful means, the choice of which, pursuant to Article 33 of the Charter, is left to the parties". In this context, "the parties should take care not to aggravate or extend the dispute". The Court reaffirms that "when such a dispute gives rise to a threat to the peace, breach of the peace or act of aggression, the Security Council has special responsibilities under Chapter VII of the Charter".

Declaration of Judge Koroma

In his declaration Judge Koroma observed that these were perhaps the most serious cases that have ever come before the Court for provisional measures. He stated that jurisprudentially such measures were designed to prevent violence, the use of force, to safeguard international peace and security as well as serving as an important part of the dispute settlement process under the Charter of the United Nations. In his view the indication of such measures therefore represents one of the most important functions of the Court.

But the granting of such a relief, he stressed, could only be done in accordance with the Statute of the Court. In this regard, and in the light of the jurisprudence of the Court, where prima facie jurisdiction is absent or other circumstances predominate, the Court will not grant the request for provisional measures.

Nevertheless, he considered the Court, being the principal judicial organ of the United Nations, whose primary raison d'être remains the preservation of international peace and security, to be under a positive obligation to contribute to the maintenance of international peace and security and to provide a judicial framework for the resolution of a legal conflict, especially one which not only threatens international peace and security but also involves enormous human suffering and continuing loss of life. He had therefore joined with the other Members of the Court in calling for the peaceful resolution of this conflict pursuant to Article 33 of the Charter, and in urging the Parties not to aggravate or extend the dispute and to respect international law, including humanitarian law and the human rights of all the citizens of Yugoslavia.

Separate opinion of Judge Oda

Judge Oda supports the decision of the Court in dismissing the requests for the indication of provisional measures by the Federal Republic of Yugoslavia against ten respondent States. While favouring the decision of the Court to remove the case from the General List of the Court in the cases of Spain and the United States, Judge Oda voted against the decision in the other eight cases in which the Court ordered that it "[r]eserves the subsequent procedure for further decision", because he believes that those eight cases should also be removed at this stage from the General List of the Court.

Judge Oda considers that the Federal Republic of Yugoslavia is not a Member of the United Nations and thus not a party to the Statute of the International Court of Justice. The Applications presented by the Federal Republic of Yugoslavia should therefore be declared inadmissible for this reason alone and should be removed from the General List of the Court.

He nevertheless then goes on to discuss whether, if the Federal Republic of Yugoslavia were to be considered a party to the Statute, it could have brought the present Applications on the basis of certain legal instruments. After having examined the meaning of (i) the optional clause of the Court's Statute, (ii) the background to the 1930 and 1931 instruments with Belgium and the Netherlands, respectively, and (iii) the 1948 Genocide Convention, he reaches the conclusion that none of these instruments grant the Court jurisdiction in any of the ten Applications.

Judge Oda agrees with the Court that, as it has no basis of jurisdiction, it must reject the requests for the indication of provisional measures in all ten cases. However, he considers that, the Court having decided that it has no jurisdiction to entertain the cases, not *even* prima facie, that this can only mean that it has no jurisdiction whatsoever in any of the cases. It follows, in Judge Oda's view, that not only in the cases of Spain and the United States, in which the Court states that it manifestly lacks jurisdiction, but in all the other cases, the Applications should be dismissed at this stage, given that the Court has found that there is not even a prima facie basis of jurisdiction.

Judge Oda also points out that, while the Court makes a distinction between the Applications, even though they deal virtually with the same subject matter, this distinction, which came about simply because of the different positions which individual States happened to take towards the various instruments that are to be applied concerning the Court's jurisdiction, will lead to differing results concerning the future proceedings in each of the cases. In Judge Oda's view this is an illogical situation, which supports his contention that all ten cases should be dismissed in their entirety at this stage.

Separate opinion of Judge Higgins

Judge Higgins in her separate opinions addresses two issues that arise in relation to those cases where the Federal Republic of Yugoslavia claims jurisdiction on the basis of Article 36, paragraph 2, of the Statute. The first issue concerns temporal limitations to so-called "optional clauses", and in particular the question of when a dispute arises and when the relevant events have occurred. These concepts are analysed in connection with Yugoslavia's own declaration. The second issue addresses the question of exactly what has to be shown for the Court to be satisfied it has prima facie jurisdiction when it is considering the indication of provisional measures. It is suggested that some jurisdictional issues are so complex that they cannot be addressed at all at this phase; their holding over for a later phase does not stand in the way of the Court determining whether or not it has prima facie jurisdiction for the purposes of Article 41.

Separate opinion of Judge Parra-Aranguren

Judge Parra-Aranguren recalls that Yugoslavia maintains that "the bombing of Yugoslav populated areas constitute a breach of Article II of the Genocide Convention", a contention denied by the Respondent; that a legal dispute exists between the Parties because of the existence of "a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations", as the Court

stated in its decision of 11 July 1996 (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), I.C.J. Reports 1996 (II)*, pp. 614-615, para. 29); and that according to Article IX of the Genocide Convention, "disputes between the Contracting Parties relating to the interpretation or fulfilment of the present Convention" shall be submitted to the International Court of Justice. Therefore, in his opinion the Court has prima facie jurisdiction to decide upon the provisional measures requested by Yugoslavia.

Yugoslavia requested the Court to indicate that the Respondent "shall cease immediately the acts of use of force and shall refrain from any act of threat or use of force against the Federal Republic of Yugoslavia". However, the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of the Genocide Convention. Consequently, Yugoslavia is requesting the indication of provisional measures that do not aim to guarantee its rights under the Genocide Convention, i.e., the right not to suffer acts which may be characterized as genocide crimes by the Convention. Therefore, in the opinion of Judge Parra-Aranguren, the measures requested by Yugoslavia should not be indicated.

Separate opinion of Judge Kooijmans

1. Judge Kooijmans joined a separate opinion to the Order of the Court in the cases of Yugoslavia versus Belgium, Canada, the Netherlands, Portugal, Spain and the United Kingdom, respectively.

He does not agree with the Court's view that Yugoslavia's declaration of acceptance of the compulsory jurisdiction of the Court of 25 April 1999 cannot provide a basis of jurisdiction in the present case, even prima facie, because of the reservations incorporated in the declarations of Spain and the United Kingdom, cq. because of the temporal limitation contained in Yugoslavia's declaration (cases against Belgium, Canada, the Netherlands and Portugal). He is of the view that the Court lacks prima facie jurisdiction because of the controversial validity of Yugoslavia's declaration. This validity issue constitutes a preliminary issue and should, therefore, have been dealt with by the Court as a threshold question.

Since this issue is of no relevance in the four other cases (against France, Germany, Italy and the United States) as these States themselves do not recognize the compulsory jurisdiction of the Court, there is no need for a separate opinion in those cases.

2. Article 36, paragraph 2, of the Statute explicitly states that only States which are party to the Statute can recognize the compulsory jurisdiction of the Court by depositing a declaration of acceptance with the Secretary-General of the United Nations. Member States of that Organization are *eo ipso* party to the Statute. All six Respondents contended, that since the Federal Republic of Yugoslavia is not a Member of the United Nations, its declaration of acceptance has not been validly made.

3. On 22 September 1992 the General Assembly, on the recommendation of the Security Council, decided that the Federal Republic of Yugoslavia cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia and therefore that it should apply for membership in the United Nations. Until that time it shall not participate in the work of the General Assembly (res. 47/1). The Federal Republic of Yugoslavia never applied for membership.

4. In its present Orders the Court avoids the question of the contested validity of Yugoslavia's declaration. It takes the position that it need not consider this issue since the declaration cannot provide the Court with a basis for prima facie jurisdiction on other grounds.

5. Judge Kooijmans is of the view that the Court's reasoning in this respect is inconsistent. Such other grounds only become relevant if the validity of the declaration — at least for the present stage of the proceedings — is accepted. The Court's reasoning is based on a presumption of validity and the Court should have said so and have given its arguments for it.

6. According to Judge Kooijmans there certainly was no need for the Court to take a definitive stand on Yugoslavia's membership of the United Nations. He is fully aware that resolution 47/1 is unprecedented and raises a number of highly complex legal questions, which require a thorough analysis and careful evaluation by the Court at a later stage of the proceedings.

Difficult though the question may be, the relevant decisions have been taken by the organs of the United Nations which have exclusive authority in matters of membership (Security Council and General Assembly) and they cannot be overlooked or ignored.

7. According to Judge Kooijmans the doubts, raised by the decisions of the competent United Nations bodies with regard to Yugoslavia's membership and the ensuing validity of its declaration, are, however, so serious that the Court should have concluded that this declaration cannot provide it with a basis for prima facie jurisdiction. The Court should not indicate provisional measures unless its competence to entertain the dispute appears to be *reasonably probable* and this test of reasonable probability cannot be passed because of the doubtful validity of the declaration.

8. If that is the case, issues like reservations and temporal limitations on which the cases were decided by the Court, become irrelevant since they are wholly conditioned by the preliminary question of the declaration's validity.

Dissenting opinion of Vice-President Weeramantry

Judge Weeramantry has filed a dissenting opinion in this case on the same grounds as in *Yugoslavia* v. *Belgium*.

Dissenting opinion of Judge Shi

In the four cases of Yugoslavia against Belgium, Canada, the Netherlands and Portugal, Judge Shi disagrees with the Court's findings that, given the limitation *ratione*

temporis contained in Yugoslavia's declaration of acceptance of compulsory jurisdiction, the Court lacked prima facie jurisdiction under Article 36, paragraph 2, of the Statute for the indication of provisional measures requested by Yugoslavia.

By that declaration, signed on 25 April 1999, Yugoslavia recognized compulsory jurisdiction "in all disputes arising or which may arise after the signature of the present Declaration, with regard to the situations or facts subsequent to this signature ...". In cases where the Court is confronted with such a "double exclusion formula", it has to ascertain both the date of the dispute and the situations or facts with regard to which the dispute has arisen.

As to the first aspect of the time condition, the Court has to determine what is the subject matter of the dispute, which in the present cases consists of a number of constituent elements. The section "Subject of the Dispute" in each of Yugoslavia's Applications indicates that subject matter to be acts of the Respondent by which it has violated its international obligations not to use force against another State, not to intervene in the internal affairs of another State, not to violate the sovereignty of another State, to protect the civilian population and civilian objects in wartime, to protect the environment, etc.

Prior to the coming into existence of all the constituent elements, the dispute cannot be said to arise. Though the aerial bombing of the territory of Yugoslavia began some weeks before the critical date of signature of the declaration, aerial bombing and its effects as such do not constitute a dispute. It is true that prior to the critical date, Yugoslavia had accused NATO of illegal use of force against it. This complaint constitutes at the most one of the many constituent elements of the dispute. Besides, NATO cannot be identified with, nor be the Respondent in the present cases *ratione personae*. The dispute only arose at the date subsequent to the signature of the declaration.

Regarding the second aspect of the time condition, the dispute relates to the alleged breach of various international obligations by acts of force, in the form of aerial bombing of the territories of Yugoslavia, which are attributed by the Applicant to the respondent State. It is obvious that the alleged breach of obligations by such a "continuing" act first occurred at the moment when the act began, weeks before the critical date. Given that the acts of aerial bombing continued well beyond the critical date and still continue, the time of commission of the breach extends over the whole period during which the acts continue and ends only when the acts of the respondent State cease.

The conclusion may be drawn that the limitation *ratione temporis* contained in Yugoslavia's declaration in no way constitutes a bar to founding prima facie jurisdiction upon Article 36, paragraph 2, of the Statute for the purpose of indicating provisional measures in the present case.

Moreover, for reasons similar to those expressed in the declarations relating to the other six cases, Judge Shi regrets that the Court, being confronted with a situation of great urgency, failed to make a general statement appealing to the Parties to act in compliance with their obligations under the United Nations Charter and all the rules of international law relevant to the situation, and at least not to aggravate or extend their disputes immediately upon receipt of Yugoslavia's request and regardless of what might be the Court's conclusion on prima facie jurisdiction pending its final decision. The Court also failed to make use of Article 75, paragraph 1, of the Rules of Court to decide the requests *proprio motu*, despite Yugoslavia having so asked.

For these reasons, Judge Shi felt compelled to vote against operative paragraph (1) of the four Orders.

Dissenting opinion of Judge Vereshchetin

Judge Vereshchetin begins his dissenting opinion with a general statement, attached to all the Orders of the Court, in which he holds that the extraordinary and unprecedented circumstances of the cases before the Court imposed on it a need to act promptly and, if necessary, *proprio motu*. After that, he proceeds to explain why he has no doubt that prima facie jurisdiction under Article 36, paragraph 2, of the Statute of the Court exists with regard to the Applications instituted against Belgium, Canada, the Netherlands and Portugal. As far as Belgium and the Netherlands are concerned, the Court also has prima facie jurisdiction under the Agreements signed between Belgium and Yugoslavia on 25 March 1930 and between the Netherlands and Yugoslavia on 11 March 1931.

Judge Vereshchetin disagrees with two cornerstone propositions on which, in his opinion, rest the arguments to the contrary upheld in the Orders of the Court. The first proposition is that the text of the Yugoslav declaration accepting the jurisdiction of the Court, and in particular the wording of the reservation contained therein, does not grant prima facie jurisdiction to the Court. The second proposition is that the timing of the presentation by Yugoslavia of the additional bases for jurisdiction does not allow the Court to conclude that it has prima facie jurisdiction in respect of the cases instituted against Belgium and the Netherlands.

As concerns the first proposition, Judge Vereshchetin takes the view that the Court, by refusing to take into account the clear intention of Yugoslavia, reads its declaration in a way that could lead to the absurd conclusion that Yugoslavia intended by its declaration of acceptance of the Court's jurisdiction to exclude the jurisdiction of the Court over its Applications instituting proceedings against the Respondents.

As to the second proposition connected with the invocation of additional grounds of jurisdiction in relation to Belgium and the Netherlands, in the opinion of Judge Vereshchetin, the legitimate concern of the Court over the observance of "the principle of procedural fairness and the sound administration of justice" cannot be stretched to such an extent as to exclude a priori the additional basis of jurisdiction from its consideration, solely because the respondent States have not been given adequate time to prepare their counter-arguments. Admittedly, it cannot be considered normal for a new basis of jurisdiction to be invoked in the second round of the hearings. However, the respondent States were given the possibility of presenting

their counter-arguments to the Court, and they used this possibility to make various observations and objections to the new basis of jurisdiction. If necessary, they could have asked for the prolongation of the hearings. In turn, the Applicant may reasonably claim that the belated invocation of the new titles of jurisdiction was caused by the extraordinary situation in Yugoslavia, in which the preparation of the Applications had been carried out under conditions of daily aerial bombardment by the Respondents.

The refusal of the majority to take into consideration the new bases of jurisdiction is clearly contrary to Article 38 of the Rules of Court and to the Court's jurisprudence. The refusal to have due regard to the intention of a State making a declaration of acceptance of the Court's jurisdiction is also incompatible with the Court's case-law and with the customary rules for interpreting legal instruments. In the view of Judge Vereshchetin, all the requirements for the indication of provisional measures, flowing from Article 41 of the Court's Statute and from its well-established jurisprudence, have been met, and the Court should undoubtedly have indicated such measures so far as the above four States are concerned.

Dissenting opinion of Judge Kreca

In his dissenting opinion Judge Kreca points out the following relevant issues:

Judge Kreca finds that none of the equalization functions of the institution of judge ad hoc have been met in this particular case. The letter and spirit of Article 31, paragraph 2, of the Statute of the Court, applied to this particular case, imply the right of Yugoslavia, as the applicant State, to choose as many judges ad hoc to sit on the Bench as is necessary to equalize the position of applicant State and that of the respondent States which have judges of their nationality on the Bench and which share the same interest. *In concreto*, the inherent right to equalization in the composition of the Bench, as an expression of a fundamental rule of equality of parties, means that the Federal Republic of Yugoslavia should have the right to choose five judges ad hoc, since even five out of ten respondent States (United States, the United Kingdom, France, Germany, and the Netherlands) have their national judges sitting on the Bench.

At the same time, according to coherent jurisprudence of the Court, none of the respondent States were entitled to appoint a judge ad hoc (*Territorial Jurisdiction of the International Commission of the River Oder; Customs Régime between Germany and Austria*).

There is no need to say that the above-mentioned issues are of upmost specific weight in view of the fact that obviously the meaning of such issues is not restricted to the procedure, but that it may have a far-reaching concrete meaning.

Judge Kreca finds that in the recent practice of the Court, in particular that in which individuals were directly affected, a high standard of humanitarian concern in the proceedings for the indication of interim measures has been formed, a standard which commanded sufficient inherent strength to brush aside some relevant, both procedural and material, rules governing the institution of provisional measures (*exampli causa*, the *LaGrand* case). Thus, humanitarian considerations, independently from the norms of international law regulating human rights and liberties, have, in a way, gained autonomous legal significance; they have transcended the moral and philanthropic sphere, and entered the sphere of law.

In the case at hand, it seems that "humanitarian concern" has lost the acquired autonomous legal position. The fact needs to be stressed in view of the special circumstances of this case. Unlike the recent practice of the Court, "humanitarian concern" has as its object the fate of an entire nation, in the literal sense. The Federal Republic of Yugoslavia and its national and ethnic groups have been subjected for more than two months now to continued attacks of a very strong, highly organized air armada of the most powerful States of the world. At the same time, the arsenal used in the attacks on Yugoslavia contains also weapons whose effects have no limitations either in space or in time such as depleted uranium which cause far-reaching and irreparable damage to the health of the whole population.

Judge Kreca finds that, as regards the membership of Yugoslavia in the United Nations, the Court remained consistent with its "avoidance" position, persisting in its statement that it "need not consider this question for the purpose of deciding whether or not it can indicate provisional measures in the present case". But it is the profound conviction of Judge Kreca that the Court should have answered the question whether the Federal Republic of Yugoslavia can or cannot, in the light of the content of General Assembly resolution 47/1 and of the practice of the world Organization, be considered to be a Member of the United Nations and especially party to the Statute of the Court; namely the text of resolution 47/1 makes no mention of the status of the Federal Republic of Yugoslavia as a party to the Statute of the International Court of Justice. Judge Kreca is equally convinced that, especially because the Court should have answered that question, both the content of the resolution which represents *contradictio in adiecto* and in particular the practice of the world Organization after its adoption over a period of nearly seven years, offered ample arguments for it to pronounce itself on this matter.

Judge Kreca is of the opinion that the extensive use of armed force, in particular if it is used against objects and means constituting conditions of normal life, can be conducive to "inflicting on the group conditions of life" bringing about "its physical destruction" (Genocide Convention, Article II).

Judge Kreca goes on to say that it can be argued that such acts are in the function of degrading the military capacity of the Federal Republic of Yugoslavia. But such an explanation can hardly be regarded as a serious argument. For the spiral of such a line of thinking may easily come to a point when, having in mind that military power is after all

comprised of people, even mass killing of civilians can be claimed to constitute some sort of precautionary measure that should prevent the maintenance or, in case of mobilization, the increase of military power of a State.

Judge Kreca also points out that, in the incidental proceedings the Court cannot and should not concern itself with the definitive qualification of the intent to impose upon the group conditions in which the survival of the group is threatened. Having in mind the purpose of provisional measures, it can be said that at this stage of the proceedings it is sufficient to establish that, in the conditions of extensive bombing, there is an objective risk of bringing about conditions in which the survival of the group is threatened.

Judge Kreca finds that the stance of the Court as regards jurisdiction of the Court *ratione temporis* is highly questionable for two basic reasons. Firstly, for reasons of a general nature to do with the jurisprudence of the Court in this particular matter, on the one hand, and with the nature of the proceedings for the indication of provisional measures, on the other and, secondly, for reasons of a specific nature deriving from circumstances of the case in hand. As far as jurisdiction of the Court is concerned, it seems incontestable that a liberal approach towards the temporal element of the Court's jurisdiction in the indication of provisional measures has become apparent. It is understandable that the proceeding for the indication of provisional measures is surely not designed for the purpose of the final and definitive establishment of the jurisdiction of the Court. The determinant "prima facie" itself implies that what is involved is not definitely established jurisdiction, but the jurisdiction deriving or supposed to be normally deriving from a relevant legal fact which is defined as the "title of jurisdiction". It could be said that the "title of jurisdiction" is sufficient per se to constitute prima facie jurisdiction except in the case of the absence of jurisdiction on the merits is manifest (*Fisheries Jurisdiction* cases).

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118. CASE CONCERNING LEGALITY OF USE OF FORCE (YUGOSLAVIA *v.* FRANCE) (PROVISIONAL MEASURES)

Order of 2 June 1999

In an Order issued in the case concerning Legality of Use of Force (Yugoslavia *v.* France), the Court rejected by twelve votes to three the request for the indication of provisional measures submitted by the Federal Republic of Yugoslavia (FRY). The Court also stated that it could not at that stage of proceedings, accede to France's request that the case be removed from the List. It thus remained seized of the case and the subsequent procedure had been reserved for further decision by fourteen votes to one.

The Court was composed as follows: Vice-President Weeramantry, Acting President; President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans; Judge ad hoc Kreca; Registrar Valencia-Ospina.

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

"39. For these reasons,

THE COURT,

(1) By twelve votes to three,

Rejects the request for the indication of provisional measures submitted by the Federal Republic of Yugoslavia on 29 April 1999;

IN FAVOUR: Vice-President Weeramantry, Acting President; President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Fleischhauer, Koroma, Higgins, Parra-Aranguren, Kooijmans;

AGAINST: Judges Shi, Vereshchetin; Judge ad hoc Kreca;

(2) By fourteen votes to one,

Reserves the subsequent proccdure for further decision.

IN FAVOUR: Vice-President Weeramantry, Acting President; President Schwebel; Judges Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans; Judge ad hoc Kreca;

AGAINST: Judge Oda."

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Vice-President Weeramantry, Acting President, and Judges Shi, Koroma and Vereshchetin appended declarations to the Order of the Court. Judges Oda and Parra-Aranguren appended separate opinions to the Order of the Court. Judge ad hoc Kreca appended a dissenting opinion to the Order of the Court.

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Background information

On 29 April 1999 Yugoslavia filed an application instituting proceedings against France "for violation of the obligation not to use force", accusing that State of bombing Yugoslav territory "together with other Member States of NATO" (see Press Communiqué 99/17). On the same day, it submitted a request for the indication of provisional measures, asking the Court to order France to "cease immediately its acts of use of force" and to "refrain from any act of threat or use of force" against the FRY.

As a basis for the jurisdiction of the Court, Yugoslavia invoked Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on 9 December 1948, as well as Article 38, paragraph 5, of the Rules of Court. Article IX of the Genocide Convention provides that disputes between the contracting parties relating to the interpretation, application or fulfilment of the Convention shall be submitted to the International Court of Justice. As to Article 38, paragraph 5, of the Rules of Court, it provides that when a State files an application against another State which has not accepted the jurisdiction of the Court, the application is transmitted to that other State, but no action is taken in the proceedings unless and until that State has accepted the Court's jurisdiction for the purposes of the case.

Reasoning of the Court

In its Order, the Court first emphasizes that it is "deeply concerned with the human tragedy, the loss of life, and the enormous suffering in Kosovo which form the background" of the dispute and "with the continuing loss of life and human suffering in all parts of Yugoslavia". It declares itself "profoundly concerned with the use of force in Yugoslavia", which "under the present circumstances ... raises very serious issues of international law". While being "mindful of the purposes and principles of the United Nations Charter and of its own responsibilities in the maintenance of peace and security under the Charter and [its] Statute", the Court "deems it necessary to emphasize that all parties before it must act in conformity with their obligations under the United Nations Charter and other rules of international law, including humanitarian law".

The Court then points out that it "does not automatically have jurisdiction over legal disputes between States" and that "one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction". It cannot indicate provisional measures without its jurisdiction in the case being established prima facie.

Concerning Article IX of the Genocide Convention, the Court states that it is not disputed that both Yugoslavia and France are parties to that Convention, without reservation, and that Article IX accordingly appears to constitute a basis on which the jurisdiction of the Court might be founded. The Court however finds that it must ascertain whether the breaches of the Convention alleged by Yugoslavia are capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one over which the Court might have jurisdiction *ratione materiae*. In its Application, Yugoslavia contends that the subject of the dispute concerns inter alia "acts of the Republic of France by which it has violated its international obligation ... not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group". It contends that the sustained and intensive bombing of the whole of its territory, including the most heavily populated areas, constitutes "a serious violation of Article II of the Genocide Convention", that it is the Yugoslav nation as a whole and as such that is targeted and that the use of certain weapons whose long-term hazards to health and the environment are already known, and the destruction of the largest part of the country's power supply system, with catastrophic consequences of which the Respondent must be aware, "impl[y] the intent to destroy, in whole or in part", the Yugoslav national group as such. For its part, France contends that the genocide, as defined by the 1948 Convention, consists of two elements: "One objective: the destruction of all or part of a national or religious group as such. The other is subjective: an intention to achieve this result, which is in conflict ... with 'the most elementary principles of morality'". It asserts that "the NATO forces ... are making all efforts to ensure that the civilian population suffers no needless harm" and stresses "the manifest absence in this case of the element of intention" and "the total silence of the applicant State" on this point. It appears to the Court that, according to the Convention, the essential characteristic of genocide is the intended destruction of a national, ethnical, racial or religious group; the Court further states that "the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of Article II of the Genocide Convention". It adds that in its opinion, it does not appear at the present stage of the proceedings that the bombings which form the subject of the Yugoslav Application "indeed entail the element of intent, towards a group as such, required by the provision" mentioned above. The Court considers therefore that it is not in a position to find, at this stage of the proceedings, that the acts imputed by Yugoslavia to France are capable of coming within the provisions of the Genocide Convention; and Article IX cannot accordingly constitute a basis on which the jurisdiction of the Court could prima facie be founded in the case.

As to Article 38, paragraph 5, of the Rules of Court, the Court stresses that, in the absence of consent by France, it cannot exercise jurisdiction in the case, even prima facie.

The Court concludes that it "lacks prima facie jurisdiction to entertain Yugoslavia's Application" and that it "cannot therefore indicate any provisional measure whatsoever". However, the findings reached by the Court "in no way prejudge the question of the jurisdiction of the Court to deal with the merits of the case" and they "leave unaffected the right of the Governments of Yugoslavia and France to submit arguments in respect of those questions".

The Court finally observes that "there is a fundamental distinction between the question of the acceptance by a State of the Court's jurisdiction and the compatibility of particular acts with international law". "The former requires consent; the latter question can only be reached when the Court deals with the merits after having established its jurisdiction and having heard full legal arguments by both parties". It emphasizes that "whether or not States accept the jurisdiction of the Court, they remain in any event responsible for acts attributable to them that violate international law, including humanitarian law" and that "any disputes relating to the legality of such acts are required to be resolved by peaceful means, the choice of which, pursuant to Article 33 of the Charter, is left to the parties". In this context, "the parties should take care not to aggravate or extend the dispute". The Court reaffirms that "when such a dispute gives rise to a threat to the peace, breach of the peace or act of aggression, the Security Council has special responsibilities under Chapter VII of the Charter".

Declaration of Vice-President Weeramantry

Judge Weeramantry expressed the view that even though the Court did not issue provisional measures, it still had the power to issue an appeal to both Parties to the effect that they should act in accordance with their obligations under the Charter of the United Nations and other rules of international law including humanitarian law and do nothing to aggravate or extend the conflict.

It had this power as it was still seized of the case and would be so seized of it until the hearing, and because this was not a case of manifest lack of jurisdiction.

He thought this was the appropriate course to be followed. The Court itself had referred to its profound concern with the human tragedy and loss of life involved and to its own responsibilities for the maintenance of peace and security under the Charter and the Statute of the Court.

Such an appeal would also be well within the Court's inherent jurisdiction as more fully explained in his dissenting opinion in *Yugoslavia* v. *Belgium*.

Such an appeal would carry more value than the mere reference to these matters in the Order itself.

Declaration of Judge Shi

Judge Shi agrees with the majority that in the cases of Yugoslavia against France, Germany, Italy and the United Kingdom there is no prima facie jurisdiction, and in the cases of Yugoslavia against Spain and the United States not even prima facie jurisdiction, for the indication of provisional measures requested by the Applicant.

Nevertheless, he is of the opinion that, being confronted with a situation of great urgency arising from the use of force in and against Yugoslavia, and upon receipt of the requests by the Applicant for the indication of provisional measures, the Court ought to have issued a general statement appealing to the Parties to act in compliance with their obligations under the United Nations Charter and all other rules of international law relevant to the situation, and at least not to aggravate or extend their dispute, regardless of what might be the Court's conclusion on prima facie jurisdiction pending its final decision.

Nothing in the Statute or Rules of Court prohibits the Court from so acting. Also, given the responsibilities of the Court within the general framework for the maintenance of peace and security under the Charter, and under the Statute as an integral part of the Charter, to issue such a statement is within the implied powers of the Court in the exercise of its judicial functions. Obviously, the Court has failed to take an opportunity to make its due contribution to the maintenance of peace and security when that is most needed.

Moreover, in spite of the request of Yugoslavia that the Court exercise its powers under Article 75, paragraph 1, of the Rules of Court to decide *proprio motu* Yugoslavia's request to indicate provisional measures, the Court failed to exercise that power, in contrast to its decision to make use of that power in the recent *LaGrand* case (Germany *v.* the United States of America) in a situation not as urgent as in the present case.

For these reasons, Judge Shi felt compelled to vote against operative paragraph (1) of the six Orders.

Declaration of Judge Koroma

In his declaration Judge Koroma observed that these were perhaps the most serious cases that have ever come before the Court for provisional measures. He stated that jurisprudentially such measures were designed to prevent violence, the use of force, to safeguard international peace and security as well as serving as an important part of the dispute settlement process under the Charter of the United Nations. In his view the indication of such measures therefore represents one of the most important functions of the Court.

But the granting of such a relief, he stressed, could only be done in accordance with the Statute of the Court. In this regard, and in the light of the jurisprudence of the Court, where prima facie jurisdiction is absent or other circumstances predominate, the Court will not grant the request for provisional measures.

Nevertheless, he considered the Court, being the principal judicial organ of the United Nations, whose primary raison d'être remains the preservation of international peace and security, to be under a positive obligation to contribute to the maintenance of international peace and security and to provide a judicial framework for the resolution of a legal conflict, especially one which not only threatens international peace and security but also involves enormous human suffering and continuing loss of life. He had therefore joined with the other Members of the Court in calling for the peaceful resolution of this conflict pursuant to Article 33 of the Charter, and in urging the Parties not to aggravate or extend the dispute and to respect international law, including humanitarian law and the human rights of all the citizens of Yugoslavia.

Declaration of Judge Vereshchetin

The extraordinary circumstances in which Yugoslavia made its request for interim measures of protection imposed a need to react immediately. The Court should have promptly expressed its profound concern over the unfolding human misery, loss of life and serious violations of international law which by the time of the request were already a matter of public knowledge. It is unbecoming for the principal judicial organ of the United Nations, whose very raison d'être is the peaceful resolution of international disputes, to maintain silence in such a situation. Even if ultimately the Court may come to the conclusion that, due to constraints in its Statute, it cannot indicate fully fledged provisional measures in accordance with Article 41 of the Statute in relation to one or another of the respondent States, the Court is inherently empowered, at the very least, immediately to call upon the Parties neither to aggravate nor to extend the conflict and to act in accordance with their obligations under the Charter of the United Nations. This power flows from its responsibility for the safeguarding of international law and from major considerations of public order. Such an authoritative appeal by the "World Court", which would also be consistent with Article 41 of its Statute and Article 74, paragraph 4, and Article 75, paragraph 1, of its Rules, could have a sobering effect on the parties involved in the military conflict, unprecedented in European history since the end of the Second World War.

The Court was urged to uphold the rule of law in the context of large-scale gross violations of international law, including of the Charter of the United Nations. Instead of acting expeditiously and, if necessary, *proprio motu*, in its capacity as "the principal guardian of international law", the majority of the Court, more than one month after the requests were made, rejected them in a sweeping way in relation to all the cases brought before the Court, including those where the prima facie jurisdiction of the Court could have been clearly established. Moreover, this decision has been taken in a situation in which deliberate intensification of bombardment of the most heavily populated areas is causing unabated loss of life among non-combatants and physical and mental harm to the population in all parts of Yugoslavia.

For the foregoing reasons, Judge Vereshchetin cannot concur with the inaction of the Court in this matter, although he concedes that in some of the cases instituted by the Applicant the basis of the Court's jurisdiction, at this stage of the proceedings, is open to doubt, and in relation to Spain and the United States is non-existent.

Separate opinion of Judge Oda

Judge Oda supports the decision of the Court in dismissing the requests for the indication of provisional measures by the Federal Republic of Yugoslavia against ten respondent States. While favouring the decision of the Court to remove the case from the General List of the Court in the cases of Spain and the United States, Judge Oda voted against the decision in the other eight cases in which the Court ordered that it "[r]eserves the subsequent procedure for further decision", because he believes that those eight cases should also be removed at this stage from the General List of the Court.

Judge Oda considers that the Federal Republic of Yugoslavia is not a Member of the United Nations and thus not a party to the Statute of the International Court of Justice. The Applications presented by the Federal Republic of Yugoslavia should therefore be declared inadmissible for this reason alone and should be removed from the General List of the Court.

He nevertheless then goes on to discuss whether, if the Federal Republic of Yugoslavia were to be considered a party to the Statute, it could have brought the present Applications on the basis of certain legal instruments. After having examined the meaning of (i) the optional clause of the Court's Statute, (ii) the background to the 1930 and 1931 instruments with Belgium and the Netherlands, respectively, and (iii) the 1948 Genocide Convention, he reaches the conclusion that none of these instruments grant the Court jurisdiction in any of the ten Applications.

Judge Oda agrees with the Court that, as it has no basis of jurisdiction, it must reject the requests for the indication of provisional measures in all ten cases. However, he considers that, the Court having decided that it has no jurisdiction to entertain the cases, not *even* prima facie, that this can only mean that it has no jurisdiction whatsoever in any of the cases. It follows, in Judge Oda's view, that not only in the cases of Spain and the United States, in which the Court states that it manifestly lacks jurisdiction, but in all the other cases, the Applications should be dismissed at this stage, given that the Court has found that there is not even a prima facie basis of jurisdiction.

Judge Oda also points out that, while the Court makes a distinction between the Applications, even though they deal virtually with the same subject matter, this distinction, which came about simply because of the different positions which individual States happened to take towards the various instruments that are to be applied concerning the Court's jurisdiction, will lead to differing results concerning the future proceedings in each of the cases. In Judge Oda's view this is an illogical situation, which supports his contention that all ten cases should be dismissed in their entirety at this stage.

Separate opinion of Judge Parra-Aranguren

Judge Parra-Aranguren recalls that Yugoslavia maintains that "the bombing of Yugoslav populated areas constitute a breach of Article II of the Genocide Convention", a contention denied by the Respondent; that a legal dispute exists between the Parties because of the existence of "a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations", as the Court stated in its decision of 11 July 1996 (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), I.C.J. Reports 1996 (II)*, pp. 614-615, para. 29); and that according

to Article IX of the Genocide Convention, "disputes between the Contracting Parties relating to the interpretation or fulfilment of the present Convention" shall be submitted to the International Court of Justice. Therefore, in his opinion the Court has prima facie jurisdiction to decide upon the provisional measures requested by Yugoslavia.

Yugoslavia requested the Court to indicate that the Respondent "shall cease immediately the acts of use of force and shall refrain from any act of threat or use of force against the Federal Republic of Yugoslavia". However, the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of the Genocide Convention. Consequently, Yugoslavia is requesting the indication of provisional measures that do not aim to guarantee its rights under the Genocide Convention, i.e., the right not to suffer acts which may be characterized as genocide crimes by the Convention. Therefore, in the opinion of Judge Parra-Aranguren, the measures requested by Yugoslavia should not be indicated.

Dissenting opinion of Judge Kreca

In his dissenting opinion Judge Kreca points out the following relevant issues:

Judge Kreca finds that none of the equalization functions of the institution of judge ad hoc have been met in this particular case. The letter and spirit of Article 31, paragraph 2, of the Statute of the Court, applied to this particular case, imply the right of Yugoslavia, as the applicant State, to choose as many judges ad hoc to sit on the Bench as is necessary to equalize the position of applicant State and that of the respondent States which have judges of their nationality on the Bench and which share the same interest. *In concreto,* the inherent right to equalization in the composition of the Bench, as an expression of a fundamental rule of equality of parties, means that the Federal Republic of Yugoslavia should have the right to choose five judges ad hoc, since even five out of ten respondent States (United States, the United Kingdom, France, Germany, and the Netherlands) have their national judges sitting on the Bench.

At the same time, according to coherent jurisprudence of the Court, none of the respondent States were entitled to appoint a judge ad hoc (*Territorial Jurisdiction of the International Commission of the River Oder; Customs Régime between Germany and Austria*).

There is no need to say that the above-mentioned issues are of upmost specific weight in view of the fact that obviously the meaning of such issues is not restricted to the procedure, but that it may have a far-reaching concrete meaning.

Judge Kreca finds that in the recent practice of the Court, in particular that in which individuals were directly affected, a high standard of humanitarian concern in the proceedings for the indication of interim measures has been formed, a standard which commanded sufficient inherent strength to brush aside some relevant, both procedural and material, rules governing the institution of provisional measures (*exampli causa*, the *LaGrand* case). Thus, humanitarian considerations, independently from the norms of international law regulating human rights and liberties, have, in a way, gained autonomous legal significance; they have transcended the moral and philanthropic sphere, and entered the sphere of law.

In the case at hand, it seems that "humanitarian concern" has lost the acquired autonomous legal position. The fact needs to be stressed in view of the special circumstances of this case. Unlike the recent practice of the Court, "humanitarian concern" has as its object the fate of an entire nation, in the literal sense. The Federal Republic of Yugoslavia and its national and ethnic groups have been subjected for more than two months now to continued attacks of a very strong, highly organized air armada of the most powerful States of the world. At the same time, the arsenal used in the attacks on Yugoslavia contains also weapons whose effects have no limitations either in space or in time such as depleted uranium which cause far-reaching and irreparable damage to the health of the whole population.

Judge Kreca is of the opinion that the extensive use of armed force, in particular if it is used against objects and means constituting conditions of normal life, can be conducive to "inflicting on the group conditions of life" bringing about "its physical destruction" (Genocide Convention, Article II).

Judge Kreca goes on to say that it can be argued that such acts are in the function of degrading the military capacity of the Federal Republic of Yugoslavia. But such an explanation can hardly be regarded as a serious argument. For the spiral of such a line of thinking may easily come to a point when, having in mind that military power is after all comprised of people, even mass killing of civilians can be claimed to constitute some sort of precautionary measure that should prevent the maintenance or, in case of mobilization, the increase of military power of a State.

Judge Kreca also points out that, in the incidental proceedings the Court cannot and should not concern itself with the definitive qualification of the intent to impose upon the group conditions in which the survival of the group is threatened. Having in mind the purpose of provisional measures, it can be said that at this stage of the proceedings it is sufficient to establish that, in the conditions of extensive bombing, there is an objective risk of bringing about conditions in which the survival of the group is threatened.

119. CASE CONCERNING LEGALITY OF USE OF FORCE (YUGOSLAVIA *v.* GERMANY) (PROVISIONAL MEASURES)

Order of 2 June 1999

In an Order issued in the case concerning Legality of Use of Force (Yugoslavia v. Germany), the Court rejected by twelve votes to three the request for the indication of provisional measures submitted by the Federal Republic of Yugoslavia (FRY). The Court also stated that it remained seized of the case. It reserved the subsequent procedure for further decision by fourteen votes to one.

The Court was composed as follows: Vice-President Weeramantry, Acting President; President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans; Judge ad hoc Kreca; Registrar Valencia-Ospina.

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

"38. For these reasons,

THE COURT,

(1) By twelve votes to three;

Rejects the request for the indication of provisional measures submitted by the Federal Republic of Yugoslavia on 29 April 1999;

IN FAVOUR: Vice-President Weeramantry, Acting President; President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Fleischhauer, Koroma, Higgins, Parra-Aranguren, Kooijmans;

AGAINST: Judges Shi, Vereshchetin; Judge ad hoc Kreca;

(2) By fourteen votes to one;

Reserves the subsequent procedure for further decision.

IN FAVOUR: Vice-President Weeramantry, Acting President; President Schwebel; Judges Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans; Judge ad hoc Kreca;

AGAINST: Judge Oda.

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Vice-President Weeramantry, Acting President, and Judges Shi, Koroma and Vereshchetin appended declarations to the Order of the Court. Judges Oda and Parra-Aranguren appended separate opinions to the Order of the Court. Judge ad hoc Kreca appended a dissenting opinion to the Order of the Court.

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Background information

On 29 April 1999 Yugoslavia filed an Application instituting proceedings against Germany "for violation of the obligation not to use force", accusing that State of bombing Yugoslav territory "together with other Member States of NATO". On the same day, it submitted a request for the indication of provisional measures, asking the Court to order Germany to "cease immediately its acts of use of force" and to "refrain from any act of threat or use of force" against the FRY.

As a basis for the jurisdiction of the Court, Yugoslavia invoked Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on 9 December 1948, as well as Article 38, paragraph 5, of the Rules of Court. Article IX of the Genocide Convention provides that disputes between the contracting parties relating to the interpretation, application or fulfilment of the Convention shall be submitted to the International Court of Justice. As to Article 38, paragraph 5, of the Rules of Court, it provides that when a State files an application against another State which has not accepted the jurisdiction of the Court, the application is transmitted to that other State, but no action is taken in the proceedings unless and until that State has accepted the Court's jurisdiction for the purposes of the case.

Reasoning of the Court

In its Order, the Court first emphasizes that it is "deeply concerned with the human tragedy, the loss of life, and the enormous suffering in Kosovo which form the background" of the dispute and "with the continuing loss of life and human suffering in all parts of Yugoslavia". It declares itself "profoundly concerned with the use of force in Yugoslavia", which "under the present circumstances ... raises very serious issues of international law". While being "mindful of the purposes and principles of the United Nations Charter and of its own responsibilities in the maintenance of peace and security under the Charter and [its] Statute", the Court "deems it necessary to emphasize that all parties before it must act in conformity with their obligations under the United Nations Charter and other rules of international law, including humanitarian law".

The Court then points out that it "does not automatically have jurisdiction over legal disputes between States" and that "one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the

consent of those States to its jurisdiction". It cannot indicate provisional measures without its jurisdiction in the case being established prima facie.

Concerning Article IX of the Genocide Convention, the Court states that it is not disputed that both Yugoslavia and Germany are parties to that Convention, without reservation, and that Article IX accordingly appears to constitute a basis on which the jurisdiction of the Court might be founded. The Court however finds that it must ascertain whether the breaches of the Convention alleged by Yugoslavia are capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one over which the Court might have jurisdiction *ratione materiae*. In its Application, Yugoslavia contends that the subject of the dispute concerns inter alia "acts of the Federal Republic of Germany by which it has violated its international obligation ... not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group". It contends that the sustained and intensive bombing of the whole of its territory, including the most heavily populated areas, constitutes "a serious violation of Article II of the Genocide Convention", that it is the Yugoslav nation as a whole and as such that is targeted and that the use of certain weapons whose long-term hazards to health and the environment are already known, and the destruction of the largest part of the country's power supply system, with catastrophic consequences of which the Respondent must be aware, "impl[y] the intent to destroy, in whole or in part", the Yugoslav national group as such. For its part, Germany contends that even if true, the breaches of international obligations alleged by Yugoslavia in its Application do not enter the definition of Article II of the Genocide Convention. It appears to the Court that, according to the Convention, the essential characteristic of genocide is the intended destruction of a national, ethnical, racial or religious group; the Court further states that "the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of Article II of the Genocide Convention". It adds that in its opinion, it does not appear at the present stage of the proceedings that the bombings which form the subject of the Yugoslav Application "indeed entail the element of intent, towards a group as such, required by the provision" mentioned above. The Court considers therefore that it is not in a position to find, at this stage of the proceedings, that the acts imputed by Yugoslavia to Germany are capable of coming within the provisions of the Genocide Convention; and Article IX cannot accordingly constitute a basis on which the jurisdiction of the Court could prima facie be founded in the case.

As to Article 38, paragraph 5, of the Rules of Court, the Court stresses that, in the absence of consent by Germany, it cannot exercise jurisdiction in the case, even prima facie.

The Court concludes that it "lacks prima facie jurisdiction to entertain Yugoslavia's Application" and that it "cannot therefore indicate any provisional measure whatsoever". However, the findings reached by the Court "in no way prejudge the question of the jurisdiction of the Court to deal with the merits of the case" and they "leave unaffected the right of the Governments of Yugoslavia and Germany to submit arguments in respect of those questions".

The Court finally observes that "there is a fundamental distinction between the question of the acceptance by a State of the Court's jurisdiction and the compatibility of particular acts with international law". "The former requires consent; the latter question can only be reached when the Court deals with the merits after having established its jurisdiction and having heard full legal arguments by both parties". It emphasizes that "whether or not States accept the jurisdiction of the Court, they remain in any event responsible for acts attributable to them that violate international law, including humanitarian law" and that "any disputes relating to the legality of such acts are required to be resolved by peaceful means, the choice of which, pursuant to Article 33 of the Charter, is left to the parties". In this context, "the parties should take care not to aggravate or extend the dispute". The Court reaffirms that "when such a dispute gives rise to a threat to the peace, breach of the peace or act of aggression, the Security Council has special responsibilities under Chapter VII of the Charter".

Declaration of Vice-President Weeramantry

Judge Weeramantry expressed the view that even though the Court did not issue provisional measures, it still had the power to issue an appeal to both Parties to the effect that they should act in accordance with their obligations under the Charter of the United Nations and other rules of international law including humanitarian law and do nothing to aggravate or extend the conflict.

It had this power as it was still seized of the case and would be so seized of it until the hearing, and because this was not a case of manifest lack of jurisdiction.

He thought this was the appropriate course to be followed. The Court itself had referred to its profound concern with the human tragedy and loss of life involved and to its own responsibilities for the maintenance of peace and security under the Charter and the Statute of the Court.

Such an appeal would also be well within the Court's inherent jurisdiction as more fully explained in his dissenting opinion in *Yugoslavia* v. *Belgium*.

Such an appeal would carry more value than the mere reference to these matters in the Order itself.

Declaration of Judge Shi

Judge Shi agrees with the majority that in the cases of Yugoslavia against France, Germany, Italy and the United Kingdom there is no prima facie jurisdiction, and in the cases of Yugoslavia against Spain and the United States not even prima facie jurisdiction, for the indication of provisional measures requested by the Applicant.

Nevertheless, he is of the opinion that, being confronted with a situation of great urgency arising from the use of force in and against Yugoslavia, and upon receipt of the

requests by the Applicant for the indication of provisional measures, the Court ought to have issued a general statement appealing to the Parties to act in compliance with their obligations under the United Nations Charter and all other rules of international law relevant to the situation, and at least not to aggravate or extend their dispute, regardless of what might be the Court's conclusion on prima facie jurisdiction pending its final decision.

Nothing in the Statute or Rules of Court prohibits the Court from so acting. Also, given the responsibilities of the Court within the general framework for the maintenance of peace and security under the Charter, and under the Statute as an integral part of the Charter, to issue such a statement is within the implied powers of the Court in the exercise of its judicial functions. Obviously, the Court has failed to take an opportunity to make its due contribution to the maintenance of peace and security when that is most needed.

Moreover, in spite of the request of Yugoslavia that the Court exercise its powers under Article 75, paragraph 1, of the Rules of Court to decide *proprio motu* Yugoslavia's request to indicate provisional measures, the Court failed to exercise that power, in contrast to its decision to make use of that power in the recent *LaGrand* case (Germany *v.* the United States of America) in a situation not as urgent as in the present case.

For these reasons, Judge Shi felt compelled to vote against operative paragraph (1) of the six Orders.

Declaration of Judge Koroma

In his declaration Judge Koroma observed that these were perhaps the most serious cases that have ever come before the Court for provisional measures. He stated that jurisprudentially such measures were designed to prevent violence, the use of force, to safeguard international peace and security as well as serving as an important part of the dispute settlement process under the Charter of the United Nations. In his view the indication of such measures therefore represents one of the most important functions of the Court.

But the granting of such a relief, he stressed, could only be done in accordance with the Statute of the Court. In this regard, and in the light of the jurisprudence of the Court, where prima facie jurisdiction is absent or other circumstances predominate, the Court will not grant the request for provisional measures.

Nevertheless, he considered the Court, being the principal judicial organ of the United Nations, whose primary raison d'être remains the preservation of international peace and security, to be under a positive obligation to contribute to the maintenance of international peace and security and to provide a judicial framework for the resolution of a legal conflict, especially one which not only threatens international peace and security but also involves enormous human suffering and continuing loss of life. He had therefore joined with the other Members of the Court in calling for the peaceful resolution of this conflict pursuant to Article 33 of the Charter, and in urging the Parties not to aggravate or extend the dispute and to respect international law, including humanitarian law and the human rights of all the citizens of Yugoslavia.

Declaration of Judge Vereshchetin

The extraordinary circumstances in which Yugoslavia made its request for interim measures of protection imposed a need to react immediately. The Court should have promptly expressed its profound concern over the unfolding human misery, loss of life and serious violations of international law which by the time of the request were already a matter of public knowledge. It is unbecoming for the principal judicial organ of the United Nations, whose very raison d'être is the peaceful resolution of international disputes, to maintain silence in such a situation. Even if ultimately the Court may come to the conclusion that, due to constraints in its Statute, it cannot indicate fully fledged provisional measures in accordance with Article 41 of the Statute in relation to one or another of the respondent States, the Court is inherently empowered, at the very least, immediately to call upon the Parties neither to aggravate nor to extend the conflict and to act in accordance with their obligations under the Charter of the United Nations. This power flows from its responsibility for the safeguarding of international law and from major considerations of public order. Such an authoritative appeal by the "World Court", which would also be consistent with Article 41 of its Statute and Article 74, paragraph 4, and Article 75, paragraph 1, of its Rules, could have a sobering effect on the parties involved in the military conflict, unprecedented in European history since the end of the Second World War.

The Court was urged to uphold the rule of law in the context of large-scale gross violations of international law, including of the Charter of the United Nations. Instead of acting expeditiously and, if necessary, *proprio motu*, in its capacity as "the principal guardian of international law", the majority of the Court, more than one month after the requests were made, rejected them in a sweeping way in relation to all the cases brought before the Court, including those where the prima facie jurisdiction of the Court could have been clearly established. Moreover, this decision has been taken in a situation in which deliberate intensification of bombardment of the most heavily populated areas is causing unabated loss of life amongst non-combatants and physical and mental harm to the population in all parts of Yugoslavia.

For the foregoing reasons, Judge Vereshchetin cannot concur with the inaction of the Court in this matter, although he concedes that in some of the cases instituted by the Applicant the basis of the Court's jurisdiction, at this stage of the proceedings, is open to doubt, and in relation to Spain and the United States is non-existent.

Separate opinion of Judge Oda

Judge Oda supports the decision of the Court in dismissing the requests for the indication of provisional measures by the Federal Republic of Yugoslavia against ten

respondent States. While favouring the decision of the Court to remove the case from the General List of the Court in the cases of Spain and the United States, Judge Oda voted against the decision in the other eight cases in which the Court ordered that it "[r]eserves the subsequent procedure for further decision", because he believes that those eight cases should also be removed at this stage from the General List of the Court.

Judge Oda considers that the Federal Republic of Yugoslavia is not a Member of the United Nations and thus not a party to the Statute of the International Court of Justice. The Applications presented by the Federal Republic of Yugoslavia should therefore be declared inadmissible for this reason alone and should be removed from the General List of the Court.

He nevertheless then goes on to discuss whether, if the Federal Republic of Yugoslavia were to be considered a party to the Statute, it could have brought the present Applications on the basis of certain legal instruments. After having examined the meaning of (i) the optional clause of the Court's Statute, (ii) the background to the 1930 and 1931 instruments with Belgium and the Netherlands, respectively, and (iii) the 1948 Genocide Convention, he reaches the conclusion that none of these instruments grant the Court jurisdiction in any of the ten Applications.

Judge Oda agrees with the Court that, as it has no basis of jurisdiction, it must reject the requests for the indication of provisional measures in all ten cases. However, he considers that, the Court having decided that it has no jurisdiction to entertain the cases, not *even* prima facie, that this can only mean that it has no jurisdiction whatsoever in any of the cases. It follows, in Judge Oda's view, that not only in the cases of Spain and the United States, in which the Court states that it manifestly lacks jurisdiction, but in all the other cases, the Applications should be dismissed at this stage, given that the Court has found that there is not even a prima facie basis of jurisdiction.

Judge Oda also points out that, while the Court makes a distinction between the Applications, even though they deal virtually with the same subject matter, this distinction, which came about simply because of the different positions which individual States happened to take towards the various instruments that are to be applied concerning the Court's jurisdiction, will lead to differing results concerning the future proceedings in each of the cases. In Judge Oda's view this is an illogical situation, which supports his contention that all ten cases should be dismissed in their entirety at this stage.

Separate opinion of Judge Parra-Aranguren

Judge Parra-Aranguren recalls that Yugoslavia maintains that "the bombing of Yugoslav populated areas constitute a breach of Article II of the Genocide Convention", a contention denied by the Respondent; that a legal dispute exists between the Parties because of the existence of "a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations", as the Court stated in its decision of 11 July 1996 (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), I.C.J. Reports 1996 (II)*, pp. 614-615, para. 29); and that according to Article IX of the Genocide Convention, "disputes between the Contracting Parties relating to the interpretation or fulfilment of the present Convention" shall be submitted to the International Court of Justice. Therefore, in his opinion the Court has prima facie jurisdiction to decide upon the provisional measures requested by Yugoslavia.

Yugoslavia requested the Court to indicate that the Respondent "shall cease immediately the acts of use of force and shall refrain from any act of threat or use of force against the Federal Republic of Yugoslavia". However, the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of the Genocide Convention. Consequently, Yugoslavia is requesting the indication of provisional measures that do not aim to guarantee its rights under the Genocide Convention, i.e., the right not to suffer acts which may be characterized as genocide crimes by the Convention. Therefore, in the opinion of Judge Parra-Aranguren, the measures requested by Yugoslavia should not be indicated.

Dissenting opinion of Judge Kreca

In his dissenting opinion Judge Kreca points out the following relevant issues:

Judge Kreca finds that none of the equalization functions of the institution of judge ad hoc have been met in this particular case. The letter and spirit of Article 31, paragraph 2, of the Statute of the Court, applied to this particular case, imply the right of Yugoslavia, as the applicant State, to choose as many judges ad hoc to sit on the Bench as is necessary to equalize the position of applicant State and that of the respondent States which have judges of their nationality on the Bench and which share the same interest. *In concreto*, the inherent right to equalization in the composition of the Bench, as an expression of a fundamental rule of equality of parties, means that the Federal Republic of Yugoslavia should have the right to choose five judges ad hoc, since even five out of ten respondent States (United States, the United Kingdom, France, Germany, and the Netherlands) have their national judges sitting on the Bench.

At the same time, according to coherent jurisprudence of the Court, none of the respondent States were entitled to appoint a judge ad hoc (*Territorial Jurisdiction of the International Commission of the River Oder; Customs Régime between Germany and Austria*).

There is no need to say that the above-mentioned issues are of upmost specific weight in view of the fact that obviously the meaning of such issues is not restricted to the procedure, but that it may have a far-reaching concrete meaning.

Judge Kreca finds that in the recent practice of the Court, in particular that in which individuals were directly affected, a high standard of humanitarian concern in the

proceedings for the indication of interim measures has been formed, a standard which commanded sufficient inherent strength to brush aside some relevant, both procedural and material, rules governing the institution of provisional measures (*exampli causa*, the *LaGrand* case). Thus, humanitarian considerations, independently from the norms of international law regulating human rights and liberties, have, in a way, gained autonomous legal significance; they have transcended the moral and philanthropic sphere, and entered the sphere of law.

In the case at hand, it seems that "humanitarian concern" has lost the acquired autonomous legal position. The fact needs to be stressed in view of the special circumstances of this case. Unlike the recent practice of the Court, "humanitarian concern" has as its object the fate of an entire nation, in the literal sense. The Federal Republic of Yugoslavia and its national and ethnic groups have been subjected for more than two months now to continued attacks of a very strong, highly organized air armada of the most powerful States of the world. At the same time, the arsenal used in the attacks on Yugoslavia contains also weapons whose effects have no limitations either in space or in time such as depleted uranium which cause far-reaching and irreparable damage to the health of the whole population.

Judge Kreca is of the opinion that the extensive use of armed force, in particular if it is used against objects and means constituting conditions of normal life, can be conducive to "inflicting on the group conditions of life" bringing about "its physical destruction" (Genocide Convention, Article II).

Judge Kreca goes on to say that it can be argued that such acts are in the function of degrading the military capacity of the Federal Republic of Yugoslavia. But such an explanation can hardly be regarded as a serious argument. For the spiral of such a line of thinking may easily come to a point when, having in mind that military power is after all comprised of people, even mass killing of civilians can be claimed to constitute some sort of precautionary measure that should prevent the maintenance or, in case of mobilization, the increase of military power of a State.

Judge Kreca also points out that, in the incidental proceedings the Court cannot and should not concern itself with the definitive qualification of the intent to impose upon the group conditions in which the survival of the group is threatened. Having in mind the purpose of provisional measures, it can be said that at this stage of the proceedings it is sufficient to establish that, in the conditions of extensive bombing, there is an objective risk of bringing about conditions in which the survival of the group is threatened.

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120. CASE CONCERNING LEGALITY OF USE OF FORCE (YUGOSLAVIA *v.* ITALY) (PROVISIONAL MEASURES)

Order of 2 June 1999

In an Order issued in the case concerning Legality of Use of Force (Yugoslavia v. Italy), the Court rejected by thirteen votes to three the request for the indication of provisional measures submitted by the Federal Republic of Yugoslavia (FRY). The Court also stated that it could not at that stage of proceedings, accede to Italy's request that the case be removed from the List. It thus remained seized of the case. The subsequent procedure had been reserved for further decision by fifteen votes to one.

The Court was composed as follows: Vice-President Weeramantry, Acting President; President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans; Judges ad hoc Gaja, Kreca; Registrar Valencia-Ospina.

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

"39. For these reasons,

THE COURT,

(1) By thirteen votes to three,

Rejects the request for the indication of provisional measures submitted by the Federal Republic of Yugoslavia on 29 April 1999;

IN FAVOUR: Vice-President Weeramantry, Acting President; President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Fleischhauer, Koroma, Higgins, Parra-Aranguren, Kooijmans; Judge ad hoc Gaja;

AGAINST: Judges Shi, Vereshchetin; Judge ad hoc Kreca;

(2) By fifteen votes to one,

Reserves the subsequent procedure for further decision.

IN FAVOUR: Vice-President Weeramantry, Acting President; President Schwebel; Judges Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans; Judges ad hoc Gaja, Kreca;

AGAINST: Judge Oda."

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Vice-President Weeramantry, Acting President, Judges Shi, Koroma and Vereshchetin, and Judge ad hoc Gaja appended declarations to the Order of the Court. Judges Oda and Parra-Aranguren appended separate opinions to the Order of the Court. Judge ad hoc Kreca appended a dissenting opinion to the Order of the Court.

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Background information

On 29 April 1999 Yugoslavia filed an Application instituting proceedings against Italy "for violation of the obligation not to use force", accusing that State of bombing Yugoslav territory "together with other Member States of NATO". On the same day, it submitted a request for the indication of provisional measures, asking the Court to order Italy to "cease immediately its acts of use of force" and to "refrain from any act of threat or use of force" against the FRY.

As a basis for the jurisdiction of the Court, Yugoslavia invoked Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on 9 December 1948, as well as Article 38, paragraph 5, of the Rules of Court. Article IX of the Genocide Convention provides that disputes between the contracting parties relating to the interpretation, application or fulfilment of the Convention shall be submitted to the International Court of Justice. As to Article 38, paragraph 5, of the Rules of Court, it provides that when a State files an application against another State which has not accepted the jurisdiction of the Court, the application is transmitted to that other State, but no action is taken in the proceedings unless and until that State has accepted the Court's jurisdiction for the purposes of the case.

Reasoning of the Court

In its Order, the Court first emphasizes that it is "deeply concerned with the human tragedy, the loss of life, and the enormous suffering in Kosovo which form the background" of the dispute and "with the continuing loss of life and human suffering in all parts of Yugoslavia". It declares itself "profoundly concerned with the use of force in Yugoslavia", which "under the present circumstances ... raises very serious issues of international law". While being "mindful of the purposes and principles of the United Nations Charter and of its own responsibilities in the maintenance of peace and security under the Charter and [its] Statute", the Court "deems it necessary to emphasize that all parties before it must act in conformity with their obligations under the United Nations Charter and other rules of international law, including humanitarian law".

The Court then points out that it "does not automatically have jurisdiction over legal disputes between States" and that "one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction". It cannot indicate provisional measures without its jurisdiction in the case being established prima facie.

Concerning Article IX of the Genocide Convention, the Court states that it is not disputed that both Yugoslavia and Italy are parties to that Convention, without reservation, and that Article IX accordingly appears to constitute a basis on which the jurisdiction of the Court might be founded. The Court however finds that it must ascertain whether the breaches of the Convention alleged by Yugoslavia are capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one over which the Court might have jurisdiction *ratione materiae*. In its Application, Yugoslavia contends that the subject of the dispute concerns inter alia "acts of the Italian Republic by which it has violated its international obligation ... not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group". It contends that the sustained and intensive bombing of the whole of its territory, including the most heavily populated areas, constitutes "a serious violation of Article II of the Genocide Convention", that it is the Yugoslav nation as a whole and as such that is targeted and that the use of certain weapons whose long-term hazards to health and the environment are already known, and the destruction of the largest part of the country's power supply system, with catastrophic consequences of which the Respondent must be aware, "impl[y] the intent to destroy, in whole or in part", the Yugoslav national group as such. For its part, Italy contends that "[m]anifestly, both the subjective element and the objective element of the crime of genocide are lacking", that the "action taken by the NATO Member States is directed at the territory of the [FRY] and not at its people" and that there is "absence of ... deliberate and intentional desire to achieve [the] inherent objective [of the crime]". It appears to the Court that, according to the Convention, the essential characteristic of genocide is the intended destruction of a national, ethnical, racial or religious group; the Court further states that "the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of Article II of the Genocide Convention". It adds that in its opinion, it does not appear at the present stage of the proceedings that the bombings which form the subject of the Yugoslav Application "indeed entail the element of intent, towards a group as such, required by the provision" mentioned above. The Court considers therefore that it is not in a position to find, at this stage of the proceedings, that the acts imputed by Yugoslavia to Italy are capable of coming within the provisions of the Genocide Convention; and Article IX cannot accordingly constitute a basis on which the jurisdiction of the Court could prima facie be founded in the case.

As to Article 38, paragraph 5, of the Rules of Court, the Court stresses that, in the absence of consent by Italy, it cannot exercise jurisdiction in the case, even prima facie.

The Court concludes that it "lacks prima facie jurisdiction to entertain Yugoslavia's Application" and that it "cannot therefore indicate any provisional measure whatsoever". However, the findings reached by the Court "in no way prejudge the question of the jurisdiction of the Court to deal with the merits of the case" and they "leave unaffected the right of the Governments of Yugoslavia and Italy to submit arguments in respect of those questions".

The Court finally observes that "there is a fundamental distinction between the question of the acceptance by a State of the Court's jurisdiction and the compatibility of particular acts with international law". "The former requires consent; the latter question can only be reached when the Court deals with the merits after having established its jurisdiction and having heard full legal arguments by both parties." It emphasizes that "whether or not States accept the jurisdiction of the Court, they remain in any event responsible for acts attributable to them that violate international law, including humanitarian law" and that "any disputes relating to the legality of such acts are required to be resolved by peaceful means, the choice of which, pursuant to Article 33 of the Charter, is left to the parties". In this context, "the parties should take care not to aggravate or extend the dispute". The Court reaffirms that "when such a dispute gives rise to a threat to the peace, breach of the peace or act of aggression, the Security Council has special responsibilities under Chapter VII of the Charter".

Declaration of Vice-President Weeramantry

Judge Weeramantry expressed the view that even though the Court did not issue provisional measures, it still had the power to issue an appeal to both Parties to the effect that they should act in accordance with their obligations under the Charter of the United Nations and other rules of international law including humanitarian law and do nothing to aggravate or extend the conflict.

It had this power as it was still seized of the case and would be so seized of it until the hearing, and because this was not a case of manifest lack of jurisdiction.

He thought this was the appropriate course to be followed. The Court itself had referred to its profound concern with the human tragedy and loss of life involved and to its own responsibilities for the maintenance of peace and security under the Charter and the Statute of the Court.

Such an appeal would also be well within the Court's inherent jurisdiction as more fully explained in his dissenting opinion in *Yugoslavia* v. *Belgium*.

Such an appeal would carry more value than the mere reference to these matters in the Order itself.

Declaration of Judge Shi

Judge Shi agrees with the majority that in the cases of Yugoslavia against France, Germany, Italy and the United Kingdom there is no prima facie jurisdiction, and in the cases of Yugoslavia against Spain and the United States not even prima facie jurisdiction, for the indication of provisional measures requested by the Applicant.

Nevertheless, he is of the opinion that, being confronted with a situation of great urgency arising from the use of force in and against Yugoslavia, and upon receipt of the requests by the Applicant for the indication of provisional measures, the Court ought to have issued a general statement appealing to the Parties to act in compliance with their obligations under the United Nations Charter and all other rules of international law relevant to the situation, and at least not to aggravate or extend their dispute, regardless of what might be the Court's conclusion on prima facie jurisdiction pending its final decision.

Nothing in the Statute or Rules of Court prohibits the Court from so acting. Also, given the responsibilities of the Court within the general framework for the maintenance of peace and security under the Charter, and under the Statute as an integral part of the Charter, to issue such a statement is within the implied powers of the Court in the exercise of its judicial functions. Obviously, the Court has failed to take an opportunity to make its due contribution to the maintenance of peace and security when that is most needed.

Moreover, in spite of the request of Yugoslavia that the Court exercise its powers under Article 75, paragraph 1, of the Rules of Court to decide *proprio motu* Yugoslavia's request to indicate provisional measures, the Court failed to exercise that power, in contrast to its decision to make use of that power in the recent *LaGrand* case (Germany *v.* the United States of America) in a situation not as urgent as in the present case.

For these reasons, Judge Shi felt compelled to vote against operative paragraph (1) of the six Orders.

Declaration of Judge Koroma

In his declaration Judge Koroma observed that these were perhaps the most serious cases that have ever come before the Court for provisional measures. He stated that jurisprudentially such measures were designed to prevent violence, the use of force, to safeguard international peace and security as well as serving as an important part of the dispute settlement process under the Charter of the United Nations. In his view the indication of such measures therefore represents one of the most important functions of the Court.

But the granting of such a relief, he stressed, could only be done in accordance with the Statute of the Court. In this regard, and in the light of the jurisprudence of the Court, where prima facie jurisdiction is absent or other circumstances predominate, the Court will not grant the request for provisional measures.

Nevertheless, he considered the Court, being the principal judicial organ of the United Nations, whose primary raison d'être remains the preservation of international peace and security, to be under a positive obligation to contribute to the maintenance of international peace and security and to provide a judicial framework for the resolution of a legal conflict, especially one which not only threatens international peace and security but also involves enormous human suffering and continuing loss of

life. He had therefore joined with the other Members of the Court in calling for the peaceful resolution of this conflict pursuant to Article 33 of the Charter, and in urging the Parties not to aggravate or extend the dispute and to respect international law, including humanitarian law and the human rights of all the citizens of Yugoslavia.

Declaration of Judge Vereshchetin

The extraordinary circumstances in which Yugoslavia made its request for interim measures of protection imposed a need to react immediately. The Court should have promptly expressed its profound concern over the unfolding human misery, loss of life and serious violations of international law which by the time of the request were already a matter of public knowledge. It is unbecoming for the principal judicial organ of the United Nations, whose very raison d'être is the peaceful resolution of international disputes, to maintain silence in such a situation. Even if ultimately the Court may come to the conclusion that, due to constraints in its Statute, it cannot indicate fully fledged provisional measures in accordance with Article 41 of the Statute in relation to one or another of the respondent States, the Court is inherently empowered, at the very least, immediately to call upon the Parties neither to aggravate nor to extend the conflict and to act in accordance with their obligations under the Charter of the United Nations. This power flows from its responsibility for the safeguarding of international law and from major considerations of public order. Such an authoritative appeal by the "World Court", which would also be consistent with Article 41 of its Statute and Article 74, paragraph 4, and Article 75, paragraph 1, of its Rules, could have a sobering effect on the parties involved in the military conflict, unprecedented in European history since the end of the Second World War.

The Court was urged to uphold the rule of law in the context of large-scale gross violations of international law, including of the Charter of the United Nations. Instead of acting expeditiously and, if necessary, *proprio motu*, in its capacity as "the principal guardian of international law", the majority of the Court, more than one month after the requests were made, rejected them in a sweeping way in relation to all the cases brought before the Court, including those where the prima facie jurisdiction of the Court could have been clearly established. Moreover, this decision has been taken in a situation in which deliberate intensification of bombardment of the most heavily populated areas is causing unabated loss of life amongst non-combatants and physical and mental harm to the population in all parts of Yugoslavia.

For the foregoing reasons, Judge Vereshchetin cannot concur with the inaction of the Court in this matter, although he concedes that in some of the cases instituted by the Applicant the basis of the Court's jurisdiction, at this stage of the proceedings, is open to doubt, and in relation to Spain and the United States is non-existent.

Declaration of Judge Gaja

In his declaration concerning the Order in the case concerning *Legality of Use of Force* (*Yugoslavia* v. *Italy*), Judge Gaja gave some explanation why this case should not be removed from the List. In his view an Order to remove a case should be given when the jurisdictional basis that is invoked by the applicant State is manifestly inexistent. When no reasonable connection exists between the dispute submitted to the Court and the treaty including a jurisdictional clause which the Applicant invokes, the same applies if no reasonable connection could conceivably appear at a subsequent stage of the proceedings.

Separate opinion of Judge Oda

Judge Oda supports the decision of the Court in dismissing the requests for the indication of provisional measures by the Federal Republic of Yugoslavia against ten respondent States. While favouring the decision of the Court to remove the case from the General List of the Court in the cases of Spain and the United States, Judge Oda voted against the decision in the other eight cases in which the Court ordered that it "[r]eserves the subsequent procedure for further decision", because he believes that those eight cases should also be removed at this stage from the General List of the Court.

Judge Oda considers that the Federal Republic of Yugoslavia is not a Member of the United Nations and thus not a party to the Statute of the International Court of Justice. The Applications presented by the Federal Republic of Yugoslavia should therefore be declared inadmissible for this reason alone and should be removed from the General List of the Court.

He nevertheless then goes on to discuss whether, if the Federal Republic of Yugoslavia were to be considered a party to the Statute, it could have brought the present Applications on the basis of certain legal instruments. After having examined the meaning of (i) the optional clause of the Court's Statute, (ii) the background to the 1930 and 1931 instruments with Belgium and the Netherlands, respectively, and (iii) the 1948 Genocide Convention, he reaches the conclusion that none of these instruments grant the Court jurisdiction in any of the ten Applications.

Judge Oda agrees with the Court that, as it has no basis of jurisdiction, it must reject the requests for the indication of provisional measures in all ten cases. However, he considers that, the Court having decided that it has no jurisdiction to entertain the cases, not *even* prima facie, that this can only mean that it has no jurisdiction whatsoever in any of the cases. It follows, in Judge Oda's view, that not only in the cases of Spain and the United States, in which the Court states that it manifestly lacks jurisdiction, but in all the other cases, the Applications should be dismissed at this stage, given that the Court has found that there is not even a prima facie basis of jurisdiction.

Judge Oda also points out that, while the Court makes a distinction between the Applications, even though they deal virtually with the same subject matter, this distinction,

which came about simply because of the different positions which individual States happened to take towards the various instruments that are to be applied concerning the Court's jurisdiction, will lead to differing results concerning the future proceedings in each of the cases. In Judge Oda's view this is an illogical situation, which supports his contention that all ten cases should be dismissed in their entirety at this stage.

Separate opinion of Judge Parra-Aranguren

Judge Parra-Aranguren recalls that Yugoslavia maintains that "the bombing of Yugoslav populated areas constitute a breach of Article II of the Genocide Convention", a contention denied by the Respondent; that a legal dispute exists between the Parties because of the existence of "a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations", as the Court stated in its decision of 11 July 1996 (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), I.C.J. Reports 1996 (II)*, pp. 614-615, para. 29); and that according to Article IX of the Genocide Convention, "disputes between the Contracting Parties relating to the interpretation or fulfilment of the present Convention" shall be submitted to the International Court of Justice. Therefore, in his opinion the Court has prima facie jurisdiction to decide upon the provisional measures requested by Yugoslavia.

Yugoslavia requested the Court to indicate that the Respondent "shall cease immediately the acts of use of force and shall refrain from any act of threat or use of force against the Federal Republic of Yugoslavia". However, the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of the Genocide Convention. Consequently, Yugoslavia is requesting the indication of provisional measures that do not aim to guarantee its rights under the Genocide Convention, i.e., the right not to suffer acts which may be characterized as genocide crimes by the Convention. Therefore, in the opinion of Judge Parra-Aranguren, the measures requested by Yugoslavia should not be indicated.

Dissenting opinion of Judge Kreca

In his dissenting opinion Judge Kreca points out the following relevant issues:

Judge Kreca finds that none of the equalization functions of the institution of judge ad hoc have been met in this particular case. The letter and spirit of Article 31, paragraph 2, of the Statute of the Court, applied to this particular case, imply the right of Yugoslavia, as the applicant State, to choose as many judges ad hoc to sit on the Bench as is necessary to equalize the position of applicant State and that of the respondent States which have judges of their nationality on the Bench and which share the same interest. *In concreto*, the inherent right to equalization in the composition of the Bench, as an expression of a fundamental rule of equality of parties, means that the Federal Republic of Yugoslavia should have the right to choose five judges ad hoc, since even five out of ten respondent States (United States, the United Kingdom, France, Germany, and the Netherlands) have their national judges sitting on the Bench.

At the same time, according to coherent jurisprudence of the Court, none of the respondent States were entitled to appoint a judge *ad hoc* (*Territorial Jurisdiction of the International Commission of the River Oder; Customs Régime between Germany and Austria*).

There is no need to say that the above-mentioned issues are of upmost specific weight in view of the fact that obviously the meaning of such issues is not restricted to the procedure, but that it may have a far-reaching concrete meaning.

Judge Kreca finds that in the recent practice of the Court, in particular that in which individuals were directly affected, a high standard of humanitarian concern in the proceedings for the indication of interim measures has been formed, a standard which commanded sufficient inherent strength to brush aside some relevant, both procedural and material, rules governing the institution of provisional measures (*exampli causa*, the *LaGrand* case). Thus, humanitarian considerations, independently from the norms of international law regulating human rights and liberties, have, in a way, gained autonomous legal significance; they have transcended the moral and philanthropic sphere, and entered the sphere of law.

In the case at hand, it seems that "humanitarian concern" has lost the acquired autonomous legal position. The fact needs to be stressed in view of the special circumstances of this case. Unlike the recent practice of the Court, "humanitarian concern" has as its object the fate of an entire nation, in the literal sense. The Federal Republic of Yugoslavia and its national and ethnic groups have been subjected for more than two months now to continued attacks of a very strong, highly organized air armada of the most powerful States of the world. At the same time, the arsenal used in the attacks on Yugoslavia contains also weapons whose effects have no limitations either in space or in time such as depleted uranium which cause far-reaching and irreparable damage to the health of the whole population.

Judge Kreca is of the opinion that the extensive use of armed force, in particular if it is used against objects and means constituting conditions of normal life, can be conducive to "inflicting on the group conditions of life" bringing about "its physical destruction" (Genocide Convention, Article II).

Judge Kreca goes on to say that it can be argued that such acts are in the function of degrading the military capacity of the Federal Republic of Yugoslavia. But such an explanation can hardly be regarded as a serious argument. For the spiral of such a line of thinking may easily come to a point when, having in mind that military power is after all comprised of people, even mass killing of civilians can be claimed to constitute some sort of precautionary measure

that should prevent the maintenance or, in case of mobilization, the increase of military power of a State.

Judge Kreca also points out that, in the incidental proceedings the Court cannot and should not concern itself with the definitive qualification of the intent to impose upon the group conditions in which the survival of the group is threatened. Having in mind the purpose of provisional measures, it can be said that at this stage of the proceedings it is sufficient to establish that, in the conditions of extensive bombing, there is an objective risk of bringing about conditions in which the survival of the group is threatened.

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121. CASE CONCERNING LEGALITY OF USE OF FORCE (YUGOSLAVIA *v.* NETHERLANDS) (PROVISIONAL MEASURES)

Order of 2 June 1999

In an Order issued in the case concerning Legality of Use of Force (Yugoslavia v. Netherlands), the Court rejected by eleven votes to four the request for the indication of provisional measures submitted by the Federal Republic of Yugoslavia (FRY). The Court also stated that it remained seized of the case. It reserved the subsequent procedure for further decision by fourteen votes to one.

The Court was composed as follows: Vice-President Weeramantry, Acting President; President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans; Judge ad hoc Kreca; Registrar Valencia-Ospina.

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

"51. For these reasons,

THE COURT,

(1) By eleven votes to four,

Rejects the request for the indication of provisional measures submitted by the Federal Republic of Yugoslavia on 29 April 1999;

IN FAVOUR: President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Fleischhauer, Koroma, Higgins, Parra-Aranguren, Kooijmans;

AGAINST: Vice-President Weeramantry, Acting President; Judges Shi, Vereshchetin; Judge ad hoc Kreca;

(2) By fourteen votes to one,

Reserves the subsequent procedure for further decision.

IN FAVOUR: Vice-President Weeramantry, Acting President; President Schwebel; Judges Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans; Judge ad hoc Kreca;

AGAINST: Judge Oda."

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Judge Koroma appended a declaration to the Court's Order. Judges Oda, Higgins, Parra-Aranguren and Kooijmans appended separate opinions. Vice-President Weeramantry, Acting President, Judges Shi and Vereshchetin, and Judge ad hoc Kreca appended dissenting opinions.

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Background information

On 29 April 1999 Yugoslavia filed an Application instituting proceedings against the Netherlands "for violation of the obligation not to use force", accusing that State of bombing Yugoslav territory "together with other Member States of NATO". On the same day, it submitted a request for the indication of provisional measures, asking the Court to order the Netherlands to "cease immediately its acts of use of force" and to "refrain from any act of threat or use of force" against the FRY.

As a basis for the jurisdiction of the Court, Yugoslavia invoked the declarations by which both States had accepted the compulsory jurisdiction of the Court in relation to any other State accepting the same obligation (Article 36, paragraph 2, of the Statute of the Court), and Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on 9 December 1948.

Article IX of the Genocide Convention provides that disputes between the contracting parties relating to the interpretation, application or fulfilment of the Convention shall be submitted to the International Court of Justice. In a supplement to its Application submitted to the Court on 12 May 1999, Yugoslavia invoked, as an additional ground of jurisdiction, Article 4 of the Treaty of Judicial Settlement, Arbitration and Conciliation between the Netherlands and the Kingdom of Yugoslavia, signed at The Hague on 11 March 1931.

Reasoning of the Court

In its Order, the Court first emphasizes that it is "deeply concerned with the human tragedy, the loss of life, and the enormous suffering in Kosovo which form the background" of the dispute and "with the continuing loss of life and human suffering in all parts of Yugoslavia". It declares itself "profoundly concerned with the use of force in Yugoslavia", which "under the present circumstances ... raises very serious issues of international law". While being "mindful of the purposes and principles of the United Nations Charter and of its own responsibilities in the maintenance of peace and security under the Charter and [its] Statute", the Court "deems it necessary to emphasize that all parties before it must act in conformity with their obligations under the United Nations Charter and other rules of international law, including humanitarian law".

The Court then points out that it "does not automatically have jurisdiction over legal disputes between States" and that "one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction". It cannot indicate provisional measures without its jurisdiction in the case being established prima facie.

Concerning the first basis of jurisdiction invoked, the Court observes that under the terms of its declaration, Yugoslavia limits its acceptance of the Court's compulsory jurisdiction to "disputes arising or which may arise after the signature of the present Declaration, with regard to the situations or facts subsequent to this signature". It states that in order to assess whether it has jurisdiction in the case, it is sufficient to decide whether the dispute brought to the Court "arose" before or after 25 April 1999, the date on which the declaration was signed. It finds that the bombings began on 24 March 1999 and have been conducted continuously over a period extending beyond 25 April 1999. The Court has thus no doubt that a "legal dispute ... 'arose' between Yugoslavia and [the Netherlands], as it did also with the other NATO member States, well before 25 April 1999". The Court concludes that the declarations made by the Parties do not constitute a basis on which the jurisdiction of the Court could prima facie be founded in the case.

As to the arguments of the Netherlands that Yugoslavia is not a member State of the United Nations in view of United Nations Security Council resolutions 757 and 777 (1992) and United Nations General Assembly resolutions 47/1 (1992) and 48/88 (1993), nor a party to the Statute of the Court, so that Yugoslavia could not validly make the declaration accepting the compulsory jurisdiction of the Court, the Court maintains that it need not consider this question, taking into account its finding that the declarations do not constitute a basis of jurisdiction.

Concerning Article IX of the Genocide Convention, the Court states that it is not disputed that both Yugoslavia and the Netherlands are parties to that Convention, without reservation, and that Article IX accordingly appears to constitute a basis on which the jurisdiction of the Court might be founded. The Court however finds that it must ascertain whether the breaches of the Convention alleged by Yugoslavia are capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one over which the Court might have jurisdiction *ratione materiae*. In its Application, Yugoslavia contends that the subject of the dispute concerns inter alia "acts of the Kingdom of the Netherlands by which it has violated its international obligation ... not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group". It contends that the sustained and intensive bombing of the whole of its territory, including the most heavily populated areas, constitutes "a serious violation of Article II of the Genocide Convention", that it is the Yugoslav nation as a whole and as such that is targeted and that the use of certain weapons whose long-term hazards to health and the environment are already known, and the destruction of the largest part of the country's power supply system, with catastrophic consequences of which the Respondent must be aware, "impl[y] the intent to destroy, in whole or in part", the Yugoslav national group as such. According to the Netherlands, Yugoslavia's Application "fails to refer to the conditions that form the core of the crime of genocide under the Convention, namely 'the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'" and the Court accordingly lacks jurisdiction *ratione materiae* on the basis of Article IX. It appears to the Court that, according to the Convention, the essential characteristic of genocide is the intended destruction of a national, ethnical, racial or religious group; the Court further states that "the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of Article II of the Genocide Convention". It adds that in its opinion, it does not appear at the present stage of the proceedings that the bombings which form the subject of the Yugoslav Application "indeed entail the element of intent, towards a group as such, required by the provision" mentioned above. The Court considers therefore that it is not in a position to find, at this stage of the proceedings, that the acts imputed by Yugoslavia to the Netherlands are capable of coming within the provisions of the Genocide Convention; and Article IX cannot accordingly constitute a basis on which the jurisdiction of the Court could prima facie be founded in the case.

As to Article 4 of the Treaty of Judicial Settlement, Arbitration and Conciliation between the Netherlands and the Kingdom of Yugoslavia, the Court observes that "the invocation by a party of a new basis of jurisdiction in the second round of oral argument on a request for the indication of provisional measures has never before occurred in the Court's practice", that "such action at this late stage, when not accepted by the other party, seriously jeopardizes the principle of procedural fairness and the sound administration of justice" and that in consequence the Court cannot take into consideration this new title of jurisdiction.

The Court having found that it has "no prima facie jurisdiction to entertain Yugoslavia's Application, either on the basis of Article 36, paragraph 2, of the Statute or of Article IX of the Genocide Convention" and having "taken

the view that it cannot, at this stage of the proceedings, take account of the additional basis of jurisdiction invoked by Yugoslavia", it follows that the Court "cannot indicate any provisional measure whatsoever". However, the findings reached by the Court "in no way prejudge the question of the jurisdiction of the Court to deal with the merits of the case" and they "leave unaffected the right of the Governments of Yugoslavia and the Netherlands to submit arguments in respect of those questions".

The Court finally observes that "there is a fundamental distinction between the question of the acceptance by a State of the Court's jurisdiction and the compatibility of particular acts with international law". "The former requires consent; the latter question can only be reached when the Court deals with the merits after having established its jurisdiction and having heard full legal arguments by both parties". It emphasizes that "whether or not States accept the jurisdiction of the Court, they remain in any event responsible for acts attributable to them that violate international law, including humanitarian law" and that "any disputes relating to the legality of such acts are required to be resolved by peaceful means, the choice of which, pursuant to Article 33 of the Charter, is left to the parties". In this context, "the parties should take care not to aggravate or extend the dispute". The Court reaffirms that "when such a dispute gives rise to a threat to the peace, breach of the peace or act of aggression, the Security Council has special responsibilities under Chapter VII of the Charter".

Declaration of Judge Koroma

In his declaration Judge Koroma observed that these were perhaps the most serious cases that have ever come before the Court for provisional measures. He stated that jurisprudentially such measures were designed to prevent violence, the use of force, to safeguard international peace and security as well as serving as an important part of the dispute settlement process under the Charter of the United Nations. In his view the indication of such measures therefore represents one of the most important functions of the Court.

But the granting of such a relief, he stressed, could only be done in accordance with the Statute of the Court. In this regard, and in the light of the jurisprudence of the Court, where prima facie jurisdiction is absent or other circumstances predominate, the Court will not grant the request for provisional measures.

Nevertheless, he considered the Court, being the principal judicial organ of the United Nations, whose primary raison d'être remains the preservation of international peace and security, to be under a positive obligation to contribute to the maintenance of international peace and security and to provide a judicial framework for the resolution of a legal conflict, especially one which not only threatens international peace and security but also involves enormous human suffering and continuing loss of life. He had therefore joined with the other Members of the Court in calling for the peaceful resolution of this conflict pursuant to Article 33 of the Charter, and in urging the Parties not to aggravate or extend the dispute and to respect international law, including humanitarian law and the human rights of all the citizens of Yugoslavia.

Separate opinion of Judge Oda

Judge Oda supports the decision of the Court in dismissing the requests for the indication of provisional measures by the Federal Republic of Yugoslavia against ten respondent States. While favouring the decision of the Court to remove the case from the General List of the Court in the cases of Spain and the United States, Judge Oda voted against the decision in the other eight cases in which the Court ordered that it "[r]eserves the subsequent procedure for further decision", because he believes that those eight cases should also be removed at this stage from the General List of the Court.

Judge Oda considers that the Federal Republic of Yugoslavia is not a Member of the United Nations and thus not a party to the Statute of the International Court of Justice. The Applications presented by the Federal Republic of Yugoslavia should therefore be declared inadmissible for this reason alone and should be removed from the General List of the Court.

He nevertheless then goes on to discuss whether, if the Federal Republic of Yugoslavia were to be considered a party to the Statute, it could have brought the present Applications on the basis of certain legal instruments. After having examined the meaning of (i) the optional clause of the Court's Statute, (ii) the background to the 1930 and 1931 instruments with Belgium and the Netherlands, respectively, and (iii) the 1948 Genocide Convention, he reaches the conclusion that none of these instruments grant the Court jurisdiction in any of the ten Applications.

Judge Oda agrees with the Court that, as it has no basis of jurisdiction, it must reject the requests for the indication of provisional measures in all ten cases. However, he considers that, the Court having decided that it has no jurisdiction to entertain the cases, not *even* prima facie, that this can only mean that it has no jurisdiction whatsoever in any of the cases. It follows, in Judge Oda's view, that not only in the cases of Spain and the United States, in which the Court states that it manifestly lacks jurisdiction, but in all the other cases, the Applications should be dismissed at this stage, given that the Court has found that there is not even a prima facie basis of jurisdiction.

Judge Oda also points out that, while the Court makes a distinction between the Applications, even though they deal virtually with the same subject matter, this distinction, which came about simply because of the different positions which individual States happened to take towards the various instruments that are to be applied concerning the Court's jurisdiction, will lead to differing results concerning the future proceedings in each of the cases. In Judge Oda's view this is an illogical situation, which supports his contention that all ten cases should be dismissed in their entirety at this stage.

Separate opinion of Judge Higgins

Judge Higgins in her separate opinions addresses two issues that arise in relation to those cases where the Federal Republic of Yugoslavia claims jurisdiction on the basis of Article 36, paragraph 2, of the Statute. The first issue concerns temporal limitations to so-called "optional clauses", and in particular the question of when a dispute arises and when the relevant events have occurred. These concepts are analysed in connection with Yugoslavia's own declaration. The second issue addresses the question of exactly what has to be shown for the Court to be satisfied it has prima facie jurisdiction when it is considering the indication of provisional measures. It is suggested that some jurisdictional issues are so complex that they cannot be addressed at all at this phase; their holding over for a later phase does not stand in the way of the Court determining whether or not it has prima facie jurisdiction for the purposes of Article 41.

Separate opinion of Judge Parra-Aranguren

Judge Parra-Aranguren recalls that Yugoslavia maintains that "the bombing of Yugoslav populated areas constitute a breach of Article II of the Genocide Convention", a contention denied by the Respondent; that a legal dispute exists between the Parties because of the existence of "a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations", as the Court stated in its decision of 11 July 1996 (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), I.C.J. Reports 1996 (II)*, pp. 614-615, para. 29); and that according to Article IX of the Genocide Convention, "disputes between the Contracting Parties relating to the interpretation or fulfilment of the present Convention" shall be submitted to the International Court of Justice. Therefore, in his opinion the Court has prima facie jurisdiction to decide upon the provisional measures requested by Yugoslavia.

Yugoslavia requested the Court to indicate that the Respondent "shall cease immediately the acts of use of force and shall refrain from any act of threat or use of force against the Federal Republic of Yugoslavia". However, the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of the Genocide Convention. Consequently, Yugoslavia is requesting the indication of provisional measures that do not aim to guarantee its rights under the Genocide Convention, i.e., the right not to suffer acts which may be characterized as genocide crimes by the Convention. Therefore, in the opinion of Judge Parra-Aranguren, the measures requested by Yugoslavia should not be indicated.

Separate opinion of Judge Kooijmans

1. Judge Kooijmans joined a separate opinion to the Order of the Court in the cases of Yugoslavia versus Belgium, Canada, the Netherlands, Portugal, Spain and the United Kingdom, respectively.

He does not agree with the Court's view that Yugoslavia's declaration of acceptance of the compulsory jurisdiction of the Court of 25 April 1999 cannot provide a basis of jurisdiction in the present case, even prima facie, because of the reservations incorporated in the declarations of Spain and the United Kingdom, cq. because of the temporal limitation contained in Yugoslavia's declaration (cases against Belgium, Canada, the Netherlands and Portugal). He is of the view that the Court lacks prima facie jurisdiction because of the controversial validity of Yugoslavia's declaration. This validity issue constitutes a preliminary issue and should, therefore, have been dealt with by the Court as a threshold question.

Since this issue is of no relevance in the four other cases (against France, Germany, Italy and the United States) as these States themselves do not recognize the compulsory jurisdiction of the Court, there is no need for a separate opinion in those cases.

2. Article 36, paragraph 2, of the Statute explicitly states that only States which are party to the Statute can recognize the compulsory jurisdiction of the Court by depositing a declaration of acceptance with the Secretary-General of the United Nations. Member States of that organization are *eo ipso* party to the Statute. All six Respondents contended, that since the Federal Republic of Yugoslavia is not a Member of the United Nations, its declaration of acceptance has not been validly made.

3. On 22 September 1992 the General Assembly, on the recommendation of the Security Council, decided that the Federal Republic of Yugoslavia cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia and therefore that it should apply for membership in the United Nations. Until that time it shall not participate in the work of the General Assembly (res. 47/1). The Federal Republic of Yugoslavia never applied for membership.

4. In its present Orders the Court avoids the question of the contested validity of Yugoslavia's declaration. It takes the position that it need not consider this issue since the declaration cannot provide the Court with a basis for prima facie jurisdiction on other grounds.

5. Judge Kooijmans is of the view that the Court's reasoning in this respect is inconsistent. Such other grounds only become relevant if the validity of the declaration — at least for the present stage of the proceedings — is accepted. The Court's reasoning is based on a presumption of validity and the Court should have said so and have given its arguments for it.

6. According to Judge Kooijmans there certainly was no need for the Court to take a definitive stand on Yugoslavia's membership of the United Nations. He is fully aware that resolution 47/1 is unprecedented and raises a number of highly complex legal questions, which require a thorough analysis and careful evaluation by the Court at a later stage of the proceedings.

Difficult though the question may be, the relevant decisions have been taken by the organs of the United Nations which have exclusive authority in matters of

membership (Security Council and General Assembly) and they cannot be overlooked or ignored.

7. According to Judge Kooijmans the doubts, raised by the decisions of the competent United Nations bodies with regard to Yugoslavia's membership and the ensuing validity of its declaration, are, however, so serious that the Court should have concluded that this declaration cannot provide it with a basis for prima facie jurisdiction. The Court should not indicate provisional measures unless its competence to entertain the dispute appears to be *reasonably probable* and this test of reasonable probability cannot be passed because of the doubtful validity of the declaration.

8. If that is the case, issues like reservations and temporal limitations on which the cases were decided by the Court, become irrelevant since they are wholly conditioned by the preliminary question of the declaration's validity.

Dissenting opinion of Vice-President Weeramantry

Judge Weeramantry has filed a dissenting opinion in this case on the same grounds as in *Yugoslavia* v. *Belgium*.

Dissenting opinion of Judge Shi

In the four cases of Yugoslavia against Belgium, Canada, the Netherlands and Portugal, Judge Shi disagrees with the Court's findings that, given the limitation *ratione temporis* contained in Yugoslavia's declaration of acceptance of compulsory jurisdiction, the Court lacked prima facie jurisdiction under Article 36, paragraph 2, of the Statute for the indication of provisional measures requested by Yugoslavia.

By that declaration, signed on 25 April 1999, Yugoslavia recognized compulsory jurisdiction "in all disputes arising or which may arise after the signature of the present Declaration, with regard to the situations or facts subsequent to this signature ...". In cases where the Court is confronted with such a "double exclusion formula", it has to ascertain both the date of the dispute and the situations or facts with regard to which the dispute has arisen.

As to the first aspect of the time condition, the Court has to determine what is the subject matter of the dispute, which in the present cases consists of a number of constituent elements. The section "Subject of the Dispute" in each of Yugoslavia's Applications indicates that subject matter to be acts of the Respondent by which it has violated its international obligations not to use force against another State, not to intervene in the internal affairs of another State, not to violate the sovereignty of another State, to protect the civilian population and civilian objects in wartime, to protect the environment, etc.

Prior to the coming into existence of all the constituent elements, the dispute cannot be said to arise. Though the aerial bombing of the territory of Yugoslavia began some weeks before the critical date of signature of the declaration, aerial bombing and its effects as such do not constitute a dispute. It is true that prior to the critical date, Yugoslavia had accused NATO of illegal use of force against it. This complaint constitutes at the most one of the many constituent elements of the dispute. Besides, NATO cannot be identified with, nor be the Respondent in the present cases *ratione personae*. The dispute only arose at the date subsequent to the signature of the declaration.

Regarding the second aspect of the time condition, the dispute relates to the alleged breach of various international obligations by acts of force, in the form of aerial bombing of the territories of Yugoslavia, which are attributed by the Applicant to the respondent State. It is obvious that the alleged breach of obligations by such a "continuing" act first occurred at the moment when the act began, weeks before the critical date. Given that the acts of aerial bombing continued well beyond the critical date and still continue, the time of commission of the breach extends over the whole period during which the acts continue and ends only when the acts of the respondent State cease.

The conclusion may be drawn that the limitation *ratione temporis* contained in Yugoslavia's declaration in no way constitutes a bar to founding prima facie jurisdiction upon Article 36, paragraph 2, of the Statute for the purpose of indicating provisional measures in the present case.

Moreover, for reasons similar to those expressed in the declarations relating to the other six cases, Judge Shi regrets that the Court, being confronted with a situation of great urgency, failed to make a general statement appealing to the Parties to act in compliance with their obligations under the United Nations Charter and all the rules of international law relevant to the situation, and at least not to aggravate or extend their disputes immediately upon receipt of Yugoslavia's request and regardless of what might be the Court's conclusion on prima facie jurisdiction pending its final decision. The Court also failed to make use of Article 75, paragraph 1, of the Rules of Court to decide the requests *proprio motu*, despite Yugoslavia having so asked.

For these reasons, Judge Shi felt compelled to vote against operative paragraph (1) of the four Orders.

Dissenting opinion of Judge Vereshchetin

Judge Vereshchetin begins his dissenting opinion with a general statement, attached to all the Orders of the Court, in which he holds that the extraordinary and unprecedented circumstances of the cases before the Court imposed on it a need to act promptly and, if necessary, *proprio motu*. After that, he proceeds to explain why he has no doubt that prima facie jurisdiction under Article 36, paragraph 2, of the Statute of the Court exists with regard to the Applications instituted against Belgium, Canada, the Netherlands and Portugal. As far as Belgium and the Netherlands are concerned, the Court also has prima facie jurisdiction under the Agreements signed between Belgium and Yugoslavia on 25 March 1930 and between the Netherlands and Yugoslavia on 11 March 1931.

Judge Vereshchetin disagrees with two cornerstone propositions on which, in his opinion, rest the arguments to the contrary upheld in the Orders of the Court. The first proposition is that the text of the Yugoslav declaration accepting the jurisdiction of the Court, and in particular the

wording of the reservation contained therein, does not grant prima facie jurisdiction to the Court. The second proposition is that the timing of the presentation by Yugoslavia of the additional bases for jurisdiction does not allow the Court to conclude that it has prima facie jurisdiction in respect of the cases instituted against Belgium and the Netherlands.

As concerns the first proposition, Judge Vereshchetin takes the view that the Court, by refusing to take into account the clear intention of Yugoslavia, reads its declaration in a way that could lead to the absurd conclusion that Yugoslavia intended by its declaration of acceptance of the Court's jurisdiction to exclude the jurisdiction of the Court over its Applications instituting proceedings against the Respondents.

As to the second proposition connected with the invocation of additional grounds of jurisdiction in relation to Belgium and the Netherlands, in the opinion of Judge Vereshchetin, the legitimate concern of the Court over the observance of "the principle of procedural fairness and the sound administration of justice" cannot be stretched to such an extent as to exclude a priori the additional basis of jurisdiction from its consideration, solely because the respondent States have not been given adequate time to prepare their counter-arguments. Admittedly, it cannot be considered normal for a new basis of jurisdiction to be invoked in the second round of the hearings. However, the respondent States were given the possibility of presenting their counter-arguments to the Court, and they used this possibility to make various observations and objections to the new basis of jurisdiction. If necessary, they could have asked for the prolongation of the hearings. In turn, the Applicant may reasonably claim that the belated invocation of the new titles of jurisdiction was caused by the extraordinary situation in Yugoslavia, in which the preparation of the Applications had been carried out under conditions of daily aerial bombardment by the Respondents.

The refusal of the majority to take into consideration the new bases of jurisdiction is clearly contrary to Article 38 of the Rules of Court and to the Court's jurisprudence. The refusal to have due regard to the intention of a State making a declaration of acceptance of the Court's jurisdiction is also incompatible with the Court's case-law and with the customary rules for interpreting legal instruments. In the view of Judge Vereshchetin, all the requirements for the indication of provisional measures, flowing from Article 41 of the Court's Statute and from its well-established jurisprudence, have been met, and the Court should undoubtedly have indicated such measures so far as the above four States are concerned.

Dissenting opinion of Judge Kreca

In his dissenting opinion Judge Kreca points out the following relevant issues:

Judge Kreca finds that none of the equalization functions of the institution of judge ad hoc have been met in this particular case. The letter and spirit of Article 31, paragraph 2, of the Statute of the Court, applied to this particular case, imply the right of Yugoslavia, as the applicant State, to choose as many judges ad hoc to sit on the Bench as is necessary to equalize the position of applicant State and that of the respondent States which have judges of their nationality on the Bench and which share the same interest. *In concreto*, the inherent right to equalization in the composition of the Bench, as an expression of a fundamental rule of equality of parties, means that the Federal Republic of Yugoslavia should have the right to choose five judges ad hoc, since even five out of ten respondent States (United States, the United Kingdom, France, Germany, and the Netherlands) have their national judges sitting on the Bench.

At the same time, according to coherent jurisprudence of the Court, none of the respondent States were entitled to appoint a judge *ad hoc* (*Territorial Jurisdiction of the International Commission of the River Oder; Customs Régime between Germany and Austria*).

There is no need to say that the above-mentioned issues are of upmost specific weight in view of the fact that obviously the meaning of such issues is not restricted to the procedure, but that it may have a far-reaching concrete meaning.

Judge Kreca finds that in the recent practice of the Court, in particular that in which individuals were directly affected, a high standard of humanitarian concern in the proceedings for the indication of interim measures has been formed, a standard which commanded sufficient inherent strength to brush aside some relevant, both procedural and material, rules governing the institution of provisional measures (*exampli causa*, the *LaGrand* case). Thus, humanitarian considerations, independently from the norms of international law regulating human rights and liberties, have, in a way, gained autonomous legal significance; they have transcended the moral and philanthropic sphere, and entered the sphere of law.

In the case at hand, it seems that "humanitarian concern" has lost the acquired autonomous legal position. The fact needs to be stressed in view of the special circumstances of this case. Unlike the recent practice of the Court, "humanitarian concern" has as its object the fate of an entire nation, in the literal sense. The Federal Republic of Yugoslavia and its national and ethnic groups have been subjected for more than two months now to continued attacks of a very strong, highly organized air armada of the most powerful States of the world. At the same time, the arsenal used in the attacks on Yugoslavia contains also weapons whose effects have no limitations either in space or in time such as depleted uranium which cause far-reaching and irreparable damage to the health of the whole population.

Judge Kreca finds that, as regards the membership of Yugoslavia in the United Nations, the Court remained consistent with its "avoidance" position, persisting in its statement that it "need not consider this question for the purpose of deciding whether or not it can indicate provisional measures in the present case. But it is the profound conviction of Judge Kreca that the Court should have answered the question whether the Federal Republic of

Yugoslavia can or cannot, in the light of the content of General Assembly resolution 47/1 and of the practice of the world Organization, be considered to be a Member of the United Nations and especially party to the Statute of the Court; namely the text of resolution 47/1 makes no mention of the status of the Federal Republic of Yugoslavia as a party to the Statute of the International Court of Justice. Judge Kreca is equally convinced that, especially because the Court should have answered that question, both the content of the resolution which represents *contradictio in adiecto* and in particular the practice of the world Organization after its adoption over a period of nearly seven years, offered ample arguments for it to pronounce itself on this matter.

Judge Kreca is of the opinion that the extensive use of armed force, in particular if it is used against objects and means constituting conditions of normal life, can be conducive to "inflicting on the group conditions of life" bringing about "its physical destruction" (Genocide Convention, Article II).

Judge Kreca goes on to say that it can be argued that such acts are in the function of degrading the military capacity of the Federal Republic of Yugoslavia. But such an explanation can hardly be regarded as a serious argument. For the spiral of such a line of thinking may easily come to a point when, having in mind that military power is after all comprised of people, even mass killing of civilians can be claimed to constitute some sort of precautionary measure that should prevent the maintenance or, in case of mobilization, the increase of military power of a State.

Judge Kreca also points out that, in the incidental proceedings the Court cannot and should not concern itself with the definitive qualification of the intent to impose upon the group conditions in which the survival of the group is threatened. Having in mind the purpose of provisional measures, it can be said that at this stage of the proceedings it is sufficient to establish that, in the conditions of extensive bombing, there is an objective risk of bringing about conditions in which the survival of the group is threatened.

Judge Kreca finds that the stance of the Court as regards jurisdiction of the Court *ratione temporis* is highly questionable for two basic reasons. Firstly, for reasons of a general nature to do with the jurisprudence of the Court in this particular matter, on the one hand, and with the nature of the proceedings for the indication of provisional measures, on the other and, secondly, for reasons of a specific nature deriving from circumstances of the case in hand. As far as jurisdiction of the Court is concerned, it seems incontestable that a liberal approach towards the temporal element of the Court's jurisdiction in the indication of provisional measures has become apparent. It is understandable that the proceeding for the indication of provisional measures is surely not designed for the purpose of the final and definitive establishment of the jurisdiction of the Court. The determinant "prima facie" itself implies that what is involved is not definitely established jurisdiction, but the jurisdiction deriving or supposed to be normally deriving from a relevant legal fact which is defined as the "title of jurisdiction". It could be said that the "title of jurisdiction" is sufficient *per se* to constitute prima facie jurisdiction except in the case of the absence of jurisdiction on the merits is manifest (*Fisheries Jurisdiction* cases).

Judge Kreca disagrees with the stance of the Court regarding the additional ground of jurisdiction (Article 4 of the 1931 Treaty), since he finds that three essential conditions necessary to qualify the additional ground as admissible are met in this particular case:

(*a*) that the Applicant makes it clear that it intends to proceed upon that basis;

(*b*) that the result of invoking additional grounds is not to transform the dispute brought before the Court by the Application into another dispute which is different in character; and

(*c*) that additional grounds afford a basis on which the jurisdiction of the Court to entertain the Application might be prima facie established.

It should be stressed, in the opinion of Judge Kreca, that the 1931 Treaty was concluded and designed for the purpose of dealing with disputes which may arise between the Contracting Parties through "conciliation, judicial settlement and arbitration" *per definitionem* affords a basis on which the jurisdiction of the Court to entertain the Application may be established. Article 4 (1) stipulated that "the dispute shall be submitted jointly under a special agreement" and, as that obviously is not the case, only paragraph 2 of the said Article may be the appropriate basis of jurisdiction of the Court *pro futuro*.

At the same time he points out that even if the document in which the Applicant pointed to the Treaty of 1931 as additional grounds of jurisdiction were declared "inadmissible", the Court could not have ignored the fact that the Treaty exists. In that case, the Court could have differentiated between the document as such and the Treaty of 1931, per se, as a basis of jurisdiction.

122. CASE CONCERNING LEGALITY OF USE OF FORCE (YUGOSLAVIA *v.* PORTUGAL) (PROVISIONAL MEASURES)

Order of 2 June 1999

In an Order issued in the case concerning Legality of Use of Force (Yugoslavia v. Portugal), the Court rejected by eleven votes to four the request for the indication of provisional measures submitted by the Federal Republic of Yugoslavia (FRY). The Court also stated that it remained seized of the case. It reserved the subsequent procedure for further decision by fourteen votes to one.

The Court was composed as follows: Vice-President Weeramantry, Acting President; President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans; Judge ad hoc Kreca; Registrar Valencia-Ospina.

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

"50. For these reasons,

THE COURT,

(1) By eleven votes to four,

Rejects the request for the indication of provisional measures submitted by the Federal Republic of Yugoslavia on 29 April 1999;

IN FAVOUR: President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Fleischhauer, Koroma, Higgins, Parra-Aranguren, Kooijmans;

AGAINST: Vice-President Weeramantry, Acting President; Judges Shi, Vereshchetin; Judge ad hoc Kreca;

(2) By fourteen votes to one,

Reserves the subsequent procedure for further decision.

IN FAVOUR: Vice-President Weeramantry, Acting President; President Schwebel; Judges Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans; Judge ad hoc Kreca;

AGAINST: Judge Oda."

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Judge Koroma appended a declaration to the Court's Order. Judges Oda, Higgins, Parra-Aranguren and Kooijmans appended separate opinions. Vice-President Weeramantry, Acting President, Judges Shi and Vereshchetin, and Judge ad hoc Kreca appended dissenting opinions.

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Background information

On 29 April 1999 Yugoslavia filed an Application instituting proceedings against Portugal "for violation of the obligation not to use force", accusing that State of bombing Yugoslav territory "together with other Member States of NATO". On the same day, it submitted a request for the indication of provisional measures, asking the Court to order Portugal to "cease immediately its acts of use of force" and to "refrain from any act of threat or use of force" against the FRY.

As a basis for the jurisdiction of the Court, Yugoslavia invoked the declarations by which both States had accepted the compulsory jurisdiction of the Court in relation to any other State accepting the same obligation (Article 36, paragraph 2, of the Statute of the Court), and Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on 9 December 1948. Article IX of the Genocide Convention provides that disputes between the contracting parties relating to the interpretation, application or fulfilment of the Convention shall be submitted to the International Court of Justice.

Reasoning of the Court

In its Order, the Court first emphasizes that it is "deeply concerned with the human tragedy, the loss of life, and the enormous suffering in Kosovo which form the background" of the dispute and "with the continuing loss of life and human suffering in all parts of Yugoslavia". It declares itself "profoundly concerned with the use of force in Yugoslavia", which "under the present circumstances ... raises very serious issues of international law". While being "mindful of the purposes and principles of the United Nations Charter and of its own responsibilities in the maintenance of peace and security under the Charter and [its] Statute", the Court "deems it necessary to emphasize that all parties before it must act in conformity with their obligations under the United Nations Charter and other rules of international law, including humanitarian law".

The Court then points out that it "does not automatically have jurisdiction over legal disputes between States" and that "one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction". It cannot indicate provisional measures without its jurisdiction in the case being established prima facie.

Concerning the first basis of jurisdiction invoked, the Court observes that under the terms of its declaration, Yugoslavia limits its acceptance of the Court's compulsory jurisdiction to "disputes arising or which may arise after the signature of the present Declaration, with regard to the situations or facts subsequent to this signature". It states that in order to assess whether it has jurisdiction in the case, it is sufficient to decide whether the dispute brought to the Court "arose" before or after 25 April 1999, the date on which the declaration was signed. It finds that the bombings began on 24 March 1999 and have been conducted continuously over a period extending beyond 25 April 1999. The Court has thus no doubt that a "legal dispute ... 'arose' between Yugoslavia and [Portugal], as it did also with the other NATO member States, well before 25 April 1999". The Court concludes that the declarations made by the Parties do not constitute a basis on which the jurisdiction of the Court could prima facie be founded in the case.

As to Portugal's argument that Yugoslavia is not a Member State of the United Nations in view of United Nations Security Council resolutions 777 (1992) and 821 (1993), as well as of General Assembly resolutions 47/1 (1992) and 48/8 (1993), nor a party to the Statute of the Court, the Court maintains that it need not consider this question, taking into account its finding that the declarations do not constitute a basis of jurisdiction.

Concerning Article IX of the Genocide Convention, the Court finds that it must ascertain whether the breaches of the Convention alleged by Yugoslavia are capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one over which the Court might have jurisdiction *ratione materiae*. In its Application, Yugoslavia contends that the subject of the dispute concerns inter alia "acts of Portugal by which it has violated its international obligation ... not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group". It contends that the sustained and intensive bombing of the whole of its territory, including the most heavily populated areas, constitutes "a serious violation of Article II of the Genocide Convention", that it is the Yugoslav nation as a whole and as such that is targeted and that the use of certain weapons whose long-term hazards to health and the environment are already known, and the destruction of the largest part of the country's power supply system, with catastrophic consequences of which the Respondent must be aware, "impl[y] the intent to destroy, in whole or in part", the Yugoslav national group as such. For its part, Portugal contends that "the specific intent which is necessary for the crime [of genocide]'s existence is absent in the case", that the actions in which Portugal allegedly took part "are clearly inadequate to the commitment of a crime that would require a selective effort in the choice of the victims, incompatible with the contingent effect of the employed means" and that in consequence, "both the objective and subjective elements of the crime are missing". It appears to the Court that, according to the Convention, the essential characteristic of genocide is the intended destruction of a national, ethnical, racial or religious group; the Court further states that "the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of Article II of the Genocide Convention". It adds that in its opinion, it does not appear at the present stage of the proceedings that the bombings which form the subject of the Yugoslav Application "indeed entail the element of intent, towards a group as such, required by the provision" mentioned above. The Court considers therefore that it is not in a position to find, at this stage of the proceedings, that the acts imputed by Yugoslavia to Portugal are capable of coming within the provisions of the Genocide Convention; and Article IX cannot accordingly constitute a basis on which the jurisdiction of the Court could prima facie be founded in the case.

Concerning Portugal's argument that at the date on which Yugoslavia filed its Application ... "Portugal was not party to the Genocide Convention — although its instrument of accession had already been deposited in the United Nations", the Court considers that with regard to the finding it reached on Article IX of the Genocide Convention as a basis of jurisdiction, there is no need for it to consider this question for the purpose of deciding whether or not it can indicate provisional measures in the case.

The Court concludes that it "lacks prima facie jurisdiction to entertain Yugoslavia's Application" and that it "cannot therefore indicate any provisional measure whatsoever". However, the findings reached by the Court "in no way prejudge the question of the jurisdiction of the Court to deal with the merits of the case" and they "leave unaffected the right of the Governments of Yugoslavia and Portugal to submit arguments in respect of those questions".

The Court finally observes that "there is a fundamental distinction between the question of the acceptance by a State of the Court's jurisdiction and the compatibility of particular acts with international law". "The former requires consent; the latter question can only be reached when the Court deals with the merits after having established its jurisdiction and having heard full legal arguments by both parties". It emphasizes that "whether or not States accept the jurisdiction of the Court, they remain in any event responsible for acts attributable to them that violate international law, including humanitarian law" and that "any disputes relating to the legality of such acts are required to be resolved by peaceful means, the choice of which, pursuant to Article 33 of the Charter, is left to the parties". In this context, "the parties should take care not to aggravate or extend the dispute". The Court reaffirms that "when such a dispute gives rise to a threat to the peace, breach of the peace or act of aggression, the Security Council has special responsibilities under Chapter VII of the Charter".

Declaration of Judge Koroma

In his declaration Judge Koroma observed that these were perhaps the most serious cases that have ever come before the Court for provisional measures. He stated that jurisprudentially such measures were designed to prevent violence, the use of force, to safeguard international peace and security as well as serving as an important part of the

dispute settlement process under the Charter of the United Nations. In his view the indication of such measures therefore represents one of the most important functions of the Court.

But the granting of such a relief, he stressed, could only be done in accordance with the Statute of the Court. In this regard, and in the light of the jurisprudence of the Court, where prima facie jurisdiction is absent or other circumstances predominate, the Court will not grant the request for provisional measures.

Nevertheless, he considered the Court, being the principal judicial organ of the United Nations, whose primary raison d'être remains the preservation of international peace and security, to be under a positive obligation to contribute to the maintenance of international peace and security and to provide a judicial framework for the resolution of a legal conflict, especially one which not only threatens international peace and security but also involves enormous human suffering and continuing loss of life. He had therefore joined with the other Members of the Court in calling for the peaceful resolution of this conflict pursuant to Article 33 of the Charter, and in urging the Parties not to aggravate or extend the dispute and to respect international law, including humanitarian law and the human rights of all the citizens of Yugoslavia.

Separate opinion of Judge Oda

Judge Oda supports the decision of the Court in dismissing the requests for the indication of provisional measures by the Federal Republic of Yugoslavia against ten respondent States. While favouring the decision of the Court to remove the case from the General List of the Court in the cases of Spain and the United States, Judge Oda voted against the decision in the other eight cases in which the Court ordered that it "[r]eserves the subsequent procedure for further decision", because he believes that those eight cases should also be removed at this stage from the General List of the Court.

Judge Oda considers that the Federal Republic of Yugoslavia is not a Member of the United Nations and thus not a party to the Statute of the International Court of Justice. The Applications presented by the Federal Republic of Yugoslavia should therefore be declared inadmissible for this reason alone and should be removed from the General List of the Court.

He nevertheless then goes on to discuss whether, if the Federal Republic of Yugoslavia were to be considered a party to the Statute, it could have brought the present Applications on the basis of certain legal instruments. After having examined the meaning of (i) the optional clause of the Court's Statute, (ii) the background to the 1930 and 1931 instruments with Belgium and the Netherlands, respectively, and (iii) the 1948 Genocide Convention, he reaches the conclusion that none of these instruments grant the Court jurisdiction in any of the ten Applications.

Judge Oda agrees with the Court that, as it has no basis of jurisdiction, it must reject the requests for the indication of provisional measures in all ten cases. However, he considers that, the Court having decided that it has no jurisdiction to entertain the cases, not *even* prima facie, that this can only mean that it has no jurisdiction whatsoever in any of the cases. It follows, in Judge Oda's view, that not only in the cases of Spain and the United States, in which the Court states that it manifestly lacks jurisdiction, but in all the other cases, the Applications should be dismissed at this stage, given that the Court has found that there is not even a prima facie basis of jurisdiction.

Judge Oda also points out that, while the Court makes a distinction between the Applications, even though they deal virtually with the same subject matter, this distinction, which came about simply because of the different positions which individual States happened to take towards the various instruments that are to be applied concerning the Court's jurisdiction, will lead to differing results concerning the future proceedings in each of the cases. In Judge Oda's view this is an illogical situation, which supports his contention that all ten cases should be dismissed in their entirety at this stage.

Separate opinion of Judge Higgins

Judge Higgins in her separate opinions addresses two issues that arise in relation to those cases where the Federal Republic of Yugoslavia claims jurisdiction on the basis of Article 36, paragraph 2, of the Statute. The first issue concerns temporal limitations to so-called "optional clauses", and in particular the question of when a dispute arises and when the relevant events have occurred. These concepts are analysed in connection with Yugoslavia's own declaration. The second issue addresses the question of exactly what has to be shown for the Court to be satisfied it has prima facie jurisdiction when it is considering the indication of provisional measures. It is suggested that some jurisdictional issues are so complex that they cannot be addressed at all at this phase; their holding over for a later phase does not stand in the way of the Court determining whether or not it has prima facie jurisdiction for the purposes of Article 41.

Separate opinion of Judge Parra-Aranguren

Judge Parra-Aranguren recalls that Yugoslavia maintains that "the bombing of Yugoslav populated areas constitute a breach of Article II of the Genocide Convention", a contention denied by the Respondent; that a legal dispute exists between the Parties because of the existence of "a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations", as the Court stated in its decision of 11 July 1996 (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), I.C.J. Reports 1996 (II)*, pp. 614-615, para. 29); and that according to Article IX of the Genocide Convention, "disputes between the Contracting Parties relating to the interpretation or fulfilment of the present Convention" shall be submitted

to the International Court of Justice. Therefore, in his opinion the Court has prima facie jurisdiction to decide upon the provisional measures requested by Yugoslavia.

Yugoslavia requested the Court to indicate that the Respondent "shall cease immediately the acts of use of force and shall refrain from any act of threat or use of force against the Federal Republic of Yugoslavia". However, the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of the Genocide Convention. Consequently, Yugoslavia is requesting the indication of provisional measures that do not aim to guarantee its rights under the Genocide Convention, i.e., the right not to suffer acts which may be characterized as genocide crimes by the Convention. Therefore, in the opinion of Judge Parra-Aranguren, the measures requested by Yugoslavia should not be indicated.

Separate opinion of Judge Kooijmans

1. Judge Kooijmans joined a separate opinion to the Order of the Court in the cases of Yugoslavia versus Belgium, Canada, the Netherlands, Portugal, Spain and the United Kingdom, respectively.

He does not agree with the Court's view that Yugoslavia's declaration of acceptance of the compulsory jurisdiction of the Court of 25 April 1999 cannot provide a basis of jurisdiction in the present case, even prima facie, because of the reservations incorporated in the declarations of Spain and the United Kingdom, cq. because of the temporal limitation contained in Yugoslavia's declaration (cases against Belgium, Canada, the Netherlands and Portugal). He is of the view that the Court lacks prima facie jurisdiction because of the controversial validity of Yugoslavia's declaration. This validity issue constitutes a preliminary issue and should, therefore, have been dealt with by the Court as a threshold question.

Since this issue is of no relevance in the four other cases (against France, Germany, Italy and the United States) as these States themselves do not recognize the compulsory jurisdiction of the Court, there is no need for a separate opinion in those cases.

2. Article 36, paragraph 2, of the Statute explicitly states that only States which are party to the Statute can recognize the compulsory jurisdiction of the Court by depositing a declaration of acceptance with the Secretary-General of the United Nations. Member States of that organization are *eo ipso* party to the Statute. All six Respondents contended that since the Federal Republic of Yugoslavia is not a Member of the United Nations, its declaration of acceptance has not been validly made.

3. On 22 September 1992 the General Assembly, on the recommendation of the Security Council, decided that the Federal Republic of Yugoslavia cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia and therefore that it should apply for membership in the United Nations. Until that time it shall not participate in the work of the General Assembly (res. 47/1). The Federal Republic of Yugoslavia never applied for membership.

4. In its present Orders the Court avoids the question of the contested validity of Yugoslavia's declaration. It takes the position that it need not consider this issue since the declaration cannot provide the Court with a basis for prima facie jurisdiction on other grounds.

5. Judge Kooijmans is of the view that the Court's reasoning in this respect is inconsistent. Such other grounds only become relevant if the validity of the declaration — at least for the present stage of the proceedings — is accepted. The Court's reasoning is based on a presumption of validity and the Court should have said so and have given its arguments for it.

6. According to Judge Kooijmans there certainly was no need for the Court to take a definitive stand on Yugoslavia's membership of the United Nations. He is fully aware that resolution 47/1 is unprecedented and raises a number of highly complex legal questions, which require a thorough analysis and careful evaluation by the Court at a later stage of the proceedings.

Difficult though the question may be, the relevant decisions have been taken by the organs of the United Nations which have exclusive authority in matters of membership (Security Council and General Assembly) and they cannot be overlooked or ignored.

7. According to Judge Kooijmans the doubts, raised by the decisions of the competent United Nations bodies with regard to Yugoslavia's membership and the ensuing validity of its declaration, are, however, so serious that the Court should have concluded that this declaration cannot provide it with a basis for prima facie jurisdiction. The Court should not indicate provisional measures unless its competence to entertain the dispute appears to be *reasonably probable* and this test of reasonable probability cannot be passed because of the doubtful validity of the declaration.

8. If that is the case, issues like reservations and temporal limitations on which the cases were decided by the Court, become irrelevant since they are wholly conditioned by the preliminary question of the declaration's validity.

Dissenting opinion of Vice-President Weeramantry

Judge Weeramantry has filed a dissenting opinion in this case on the same grounds as in *Yugoslavia* v. *Belgium*.

Dissenting opinion of Judge Shi

In the four cases of Yugoslavia against Belgium, Canada, the Netherlands and Portugal, Judge Shi disagrees with the Court's findings that, given the limitation *ratione temporis* contained in Yugoslavia's declaration of acceptance of compulsory jurisdiction, the Court lacked prima facie jurisdiction under Article 36, paragraph 2, of the Statute for the indication of provisional measures requested by Yugoslavia.

By that declaration, signed on 25 April 1999, Yugoslavia recognized compulsory jurisdiction "in all

disputes arising or which may arise after the signature of the present Declaration, with regard to the situations or facts subsequent to this signature ...". In cases where the Court is confronted with such a "double exclusion formula", it has to ascertain both the date of the dispute and the situations or facts with regard to which the dispute has arisen.

As to the first aspect of the time condition, the Court has to determine what is the subject matter of the dispute, which in the present cases consists of a number of constituent elements. The section "Subject of the Dispute" in each of Yugoslavia's Applications indicates that subject matter to be acts of the Respondent by which it has violated its international obligations not to use force against another State, not to intervene in the internal affairs of another State, not to violate the sovereignty of another State, to protect the civilian population and civilian objects in wartime, to protect the environment, etc.

Prior to the coming into existence of all the constituent elements, the dispute cannot be said to arise. Though the aerial bombing of the territory of Yugoslavia began some weeks before the critical date of signature of the declaration, aerial bombing and its effects as such do not constitute a dispute. It is true that prior to the critical date, Yugoslavia had accused NATO of illegal use of force against it. This complaint constitutes at the most one of the many constituent elements of the dispute. Besides, NATO cannot be identified with, nor be the Respondent in the present cases *ratione personae*. The dispute only arose at the date subsequent to the signature of the declaration.

Regarding the second aspect of the time condition, the dispute relates to the alleged breach of various international obligations by acts of force, in the form of aerial bombing of the territories of Yugoslavia, which are attributed by the Applicant to the respondent State. It is obvious that the alleged breach of obligations by such a "continuing" act first occurred at the moment when the act began, weeks before the critical date. Given that the acts of aerial bombing continued well beyond the critical date and still continue, the time of commission of the breach extends over the whole period during which the acts continue and ends only when the acts of the respondent State cease.

The conclusion may be drawn that the limitation *ratione temporis* contained in Yugoslavia's declaration in no way constitutes a bar to founding prima facie jurisdiction upon Article 36, paragraph 2, of the Statute for the purpose of indicating provisional measures in the present case.

Moreover, for reasons similar to those expressed in the declarations relating to the other six cases, Judge Shi regrets that the Court, being confronted with a situation of great urgency, failed to make a general statement appealing to the Parties to act in compliance with their obligations under the United Nations Charter and all the rules of international law relevant to the situation, and at least not to aggravate or extend their disputes immediately upon receipt of Yugoslavia's request and regardless of what might be the Court's conclusion on prima facie jurisdiction pending its final decision. The Court also failed to make use of Article 75, paragraph 1, of the Rules of Court to decide the requests *proprio motu*, despite Yugoslavia having so asked.

For these reasons, Judge Shi felt compelled to vote against operative paragraph (1) of the four Orders.

Dissenting opinion of Judge Vereshchetin

Judge Vereshchetin begins his dissenting opinion with a general statement, attached to all the Orders of the Court, in which he holds that the extraordinary and unprecedented circumstances of the cases before the Court imposed on it a need to act promptly and, if necessary, *proprio motu*. After that, he proceeds to explain why he has no doubt that prima facie jurisdiction under Article 36, paragraph 2, of the Statute of the Court exists with regard to the Applications instituted against Belgium, Canada, the Netherlands and Portugal. As far as Belgium and the Netherlands are concerned, the Court also has prima facie jurisdiction under the Agreements signed between Belgium and Yugoslavia on 25 March 1930 and between the Netherlands and Yugoslavia on 11 March 1931.

Judge Vereshchetin disagrees with two cornerstone propositions on which, in his opinion, rest the arguments to the contrary upheld in the Orders of the Court. The first proposition is that the text of the Yugoslav declaration accepting the jurisdiction of the Court, and in particular the wording of the reservation contained therein, does not grant prima facie jurisdiction to the Court. The second proposition is that the timing of the presentation by Yugoslavia of the additional bases for jurisdiction does not allow the Court to conclude that it has prima facie jurisdiction in respect of the cases instituted against Belgium and the Netherlands.

As concerns the first proposition, Judge Vereshchetin takes the view that the Court, by refusing to take into account the clear intention of Yugoslavia, reads its declaration in a way that could lead to the absurd conclusion that Yugoslavia intended by its declaration of acceptance of the Court's jurisdiction to exclude the jurisdiction of the Court over its Applications instituting proceedings against the Respondents.

As to the second proposition connected with the invocation of additional grounds of jurisdiction in relation to Belgium and the Netherlands, in the opinion of Judge Vereshchetin, the legitimate concern of the Court over the observance of "the principle of procedural fairness and the sound administration of justice" cannot be stretched to such an extent as to exclude a priori the additional basis of jurisdiction from its consideration, solely because the respondent States have not been given adequate time to prepare their counter-arguments. Admittedly, it cannot be considered normal for a new basis of jurisdiction to be invoked in the second round of the hearings. However, the respondent States were given the possibility of presenting their counter-arguments to the Court, and they used this possibility to make various observations and objections to the new basis of jurisdiction. If necessary, they could have asked for the prolongation of the hearings. In turn, the Applicant may reasonably claim that the belated invocation of the new titles of jurisdiction was caused by the

extraordinary situation in Yugoslavia, in which the preparation of the Applications had been carried out under conditions of daily aerial bombardment by the Respondents.

The refusal of the majority to take into consideration the new bases of jurisdiction is clearly contrary to Article 38 of the Rules of Court and to the Court's jurisprudence. The refusal to have due regard to the intention of a State making a declaration of acceptance of the Court's jurisdiction is also incompatible with the Court's case-law and with the customary rules for interpreting legal instruments. In the view of Judge Vereshchetin, all the requirements for the indication of provisional measures, flowing from Article 41 of the Court's Statute and from its well-established jurisprudence, have been met, and the Court should undoubtedly have indicated such measures so far as the above four States are concerned.

Dissenting opinion of Judge Kreca

In his dissenting opinion Judge Kreca points out the following relevant issues:

Judge Kreca finds that none of the equalization functions of the institution of judge ad hoc have been met in this particular case. The letter and spirit of Article 31, paragraph 2, of the Statute of the Court, applied to this particular case, imply the right of Yugoslavia, as the applicant State, to choose as many judges ad hoc to sit on the Bench as is necessary to equalize the position of applicant State and that of the respondent States which have judges of their nationality on the Bench and which share the same interest. *In concreto*, the inherent right to equalization in the composition of the Bench, as an expression of a fundamental rule of equality of parties, means that the Federal Republic of Yugoslavia should have the right to choose five judges ad hoc, since even five out of ten respondent States (United States, the United Kingdom, France, Germany, and the Netherlands) have their national judges sitting on the Bench.

At the same time, according to coherent jurisprudence of the Court, none of the respondent States were entitled to appoint a judge *ad hoc* (*Territorial Jurisdiction of the International Commission of the River Oder; Customs Régime between Germany and Austria*).

There is no need to say that the above-mentioned issues are of upmost specific weight in view of the fact that obviously the meaning of such issues is not restricted to the procedure, but that it may have a far-reaching concrete meaning.

Judge Kreca finds that in the recent practice of the Court, in particular that in which individuals were directly affected, a high standard of humanitarian concern in the proceedings for the indication of interim measures has been formed, a standard which commanded sufficient inherent strength to brush aside some relevant, both procedural and material, rules governing the institution of provisional measures (*exampli causa*, the *LaGrand* case). Thus, humanitarian considerations, independently from the norms of international law regulating human rights and liberties, have, in a way, gained autonomous legal significance; they have transcended the moral and philanthropic sphere, and entered the sphere of law.

In the case at hand, it seems that "humanitarian concern" has lost the acquired autonomous legal position. The fact needs to be stressed in view of the special circumstances of this case. Unlike the recent practice of the Court, "humanitarian concern" has as its object the fate of an entire nation, in the literal sense. The Federal Republic of Yugoslavia and its national and ethnic groups have been subjected for more than two months now to continued attacks of a very strong, highly organized air armada of the most powerful States of the world. At the same time, the arsenal used in the attacks on Yugoslavia contains also weapons whose effects have no limitations either in space or in time such as depleted uranium which cause far-reaching and irreparable damage to the health of the whole population.

Judge Kreca finds that, as regards the membership of Yugoslavia in the United Nations, the Court remained consistent with its "avoidance" position, persisting in its statement that it "need not consider this question for the purpose of deciding whether or not it can indicate provisional measures in the present case. But it is the profound conviction of Judge Kreca that the Court should have answered the question whether the Federal Republic of Yugoslavia can or cannot, in the light of the content of General Assembly resolution 47/1 and of the practice of the world Organization, be considered to be a Member of the United Nations and especially party to the Statute of the Court; namely the text of resolution 47/1 makes no mention of the status of the Federal Republic of Yugoslavia as a party to the Statute of the International Court of Justice. Judge Kreca is equally convinced that, especially because the Court should have answered that question, both the content of the resolution which represents *contradictio in adiecto* and in particular the practice of the world Organization after its adoption over a period of nearly seven years, offered ample arguments for it to pronounce itself on this matter.

Judge Kreca is of the opinion that the extensive use of armed force, in particular if it is used against objects and means constituting conditions of normal life, can be conducive to "inflicting on the group conditions of life" bringing about "its physical destruction" (Genocide Convention, Article II).

Judge Kreca goes on to say that it can be argued that such acts are in the function of degrading the military capacity of the Federal Republic of Yugoslavia. But such an explanation can hardly be regarded as a serious argument. For the spiral of such a line of thinking may easily come to a point when, having in mind that military power is after all comprised of people, even mass killing of civilians can be claimed to constitute some sort of precautionary measure that should prevent the maintenance or, in case of mobilization, the increase of military power of a State.

Judge Kreca also points out that, in the incidental proceedings the Court cannot and should not concern itself

with the definitive qualification of the intent to impose upon the group conditions in which the survival of the group is threatened. Having in mind the purpose of provisional measures, it can be said that at this stage of the proceedings it is sufficient to establish that, in the conditions of extensive bombing, there is an objective risk of bringing about conditions in which the survival of the group is threatened.

Judge Kreca finds that the stance of the Court as regards jurisdiction of the Court *ratione temporis* is highly questionable for two basic reasons. Firstly, for reasons of a general nature to do with the jurisprudence of the Court in this particular matter, on the one hand, and with the nature of the proceedings for the indication of provisional measures, on the other and, secondly, for reasons of a specific nature deriving from circumstances of the case in hand. As far as jurisdiction of the Court is concerned, it seems incontestable that a liberal approach towards the temporal element of the Court's jurisdiction in the indication of provisional measures has become apparent. It is understandable that the proceeding for the indication of provisional measures is surely not designed for the purpose of the final and definitive establishment of the jurisdiction of the Court. The determinant "prima facie" itself implies that what is involved is not definitely established jurisdiction, but the jurisdiction deriving or supposed to be normally deriving from a relevant legal fact which is defined as the "title of jurisdiction". It could be said that the "title of jurisdiction" is sufficient per se to constitute prima facie jurisdiction except in the case of the absence of jurisdiction on the merits is manifest (*Fisheries Jurisdiction* cases).

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123. CASE CONCERNING LEGALITY OF USE OF FORCE (YUGOSLAVIA *v.* SPAIN) (PROVISIONAL MEASURES)

Order of 2 June 1999

In an Order issued in the case concerning Legality of Use of Force (Yugoslavia v. Spain), the Court rejected by fourteen votes to two the request for the indication of provisional measures submitted by the Federal Republic of Yugoslavia (FRY).

In its Order, the Court, having found that it manifestly lacked jurisdiction to entertain the case, decided to dismiss it. It ordered by thirteen votes to three that the case be removed from the List.

The Court was composed as follows: Vice-President Weeramantry, Acting President; President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans; Judges ad hoc Torres Bernárdez, Kreca; Registrar Valencia-Ospina.

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

40. For these reasons,

"THE COURT,

(1) By fourteen votes to two,

Rejects the request for the indication of provisional measures submitted by the Federal Republic of Yugoslavia on 29 April 1999;

IN FAVOUR: Vice-President Weeramantry, Acting President; President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Fleischhauer, Koroma, Higgins, Parra-Aranguren, Kooijmans; Judges ad hoc Torres Bernárdez, Kreca;

AGAINST: Judges Shi, Vereshchetin;

(2) By thirteen votes to three,

Orders that the case be removed from the List.

IN FAVOUR: Vice-President Weeramantry, Acting President; President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Higgins, Kooijmans; Judge ad hoc Torres Bernárdez;

AGAINST: Judges Vereshchetin, Parra-Aranguren; Judge ad hoc Kreca.

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Judges Shi, Koroma and Vereshchetin appended declarations to the Court's Order. Judges Oda, Higgins, Parra-Aranguren and Kooijmans, and Judge ad hoc Kreca appended separate opinions.

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Background information

On 29 April 1999 Yugoslavia filed an Application instituting proceedings against Spain "for violation of the obligation not to use force", accusing that State of bombing Yugoslav territory "together with other Member States of NATO" (see Press Communiqué 99/17). On the same day, it submitted a request for the indication of provisional measures, asking the Court to order Spain to "cease immediately its acts of use of force" and to "refrain from any act of threat or use of force" against the FRY.

As a basis for the jurisdiction of the Court, Yugoslavia invoked the declarations by which both States had accepted the compulsory jurisdiction of the Court in relation to any other State accepting the same obligation (Article 36, paragraph 2, of the Statute of the Court), and Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on 9 December 1948. Article IX of the Genocide Convention provides that disputes between the contracting parties relating to the interpretation, application or fulfilment of the Convention shall be submitted to the International Court of Justice.

Reasoning of the Court

In its Order, the Court first emphasizes that it is "deeply concerned with the human tragedy, the loss of life, and the enormous suffering in Kosovo which form the background" of the dispute and "with the continuing loss of life and human suffering in all parts of Yugoslavia". It declares itself "profoundly concerned with the use of force in Yugoslavia", which "under the present circumstances ... raises very serious issues of international law". While being "mindful of the purposes and principles of the United Nations Charter and of its own responsibilities in the maintenance of peace and security under the Charter and [its] Statute", the Court "deems it necessary to emphasize that all parties before it must act in conformity with their obligations under the United Nations Charter and other rules of international law, including humanitarian law".

The Court then points out that it "does not automatically have jurisdiction over legal disputes between States" and that "one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction". It cannot indicate provisional measures without its jurisdiction in the case being established prima facie (at first sight).

Concerning the first basis of jurisdiction invoked, the Court observes that Spain contended that its declaration contains a reservation which is relevant to the case. Under the terms of that reservation, Spain does not recognize the jurisdiction of the Court in respect of "disputes to which the other party or parties have accepted the compulsory jurisdiction of the Court less than 12 months prior to the filing of the application bringing the dispute before the Court". The Court notes that Yugoslavia deposited its declaration of acceptance of the compulsory jurisdiction of the Court with the United Nations Secretary-General on 26 April 1999 and that it brought the dispute to the Court on 29 April 1999. It states that there can be no doubt that the conditions for the exclusion of the Court's jurisdiction provided for in Spain's declaration are satisfied. The Court concludes that the declarations made by the Parties manifestly cannot constitute a basis of jurisdiction in the case, even prima facie.

As for Spain's argument that Yugoslavia is not a member State of the United Nations in view of United Nations Security Council resolution 777 (1992) and United Nations General Assembly resolution 47/1 (1992), nor a party to the Statute of the Court, and that it cannot appear before the Court, the Court maintains that it need not consider this question, taking into account its finding that the declarations do not constitute a basis of jurisdiction.

Concerning Article IX of the Genocide Convention, the Court states that it is not disputed that both Yugoslavia and Spain are parties to that Convention, but that Spain's instrument of accession, deposited with the United Nations Secretary-General on 13 September 1968, contains a reservation "in respect of the whole of Article IX". Since the Genocide Convention does not prohibit reservations and since Yugoslavia did not object to the Spanish reservation, the Court considers that Article IX manifestly does not constitute a basis of jurisdiction in the case, even prima facie.

The Court concludes that it "manifestly lacks jurisdiction to entertain Yugoslavia's Application" and that "it cannot therefore indicate any provisional measure whatsoever". It adds that "within a system of consensual jurisdiction, to maintain on the General List a case upon which it appears certain that the Court will not be able to adjudicate on the merits would most assuredly not contribute to the sound administration of justice".

The Court finally observes that "there is a fundamental distinction between the question of the acceptance by a State of the Court's jurisdiction and the compatibility of particular acts with international law". "The former requires consent; the latter question can only be reached when the Court deals with the merits after having established its jurisdiction and having heard full legal arguments by both parties." It emphasizes that "whether or not States accept the jurisdiction of the Court, they remain in any event responsible for acts attributable to them that violate international law, including humanitarian law" and that "any disputes relating to the legality of such acts are required to be resolved by peaceful means, the choice of which, pursuant to Article 33 of the Charter, is left to the parties". In this context, "the parties should take care not to aggravate or extend the dispute". The Court reaffirms that "when such a dispute gives rise to a threat to the peace, breach of the peace or act of aggression, the Security Council has special responsibilities under Chapter VII of the Charter".

Declaration of Judge Shi

Judge Shi agrees with the majority that in the cases of Yugoslavia against France, Germany, Italy and the United Kingdom there is no prima facie jurisdiction, and in the cases of Yugoslavia against Spain and the United States not even prima facie jurisdiction, for the indication of provisional measures requested by the Applicant.

Nevertheless, he is of the opinion that, being confronted with a situation of great urgency arising from the use of force in and against Yugoslavia, and upon receipt of the requests by the Applicant for the indication of provisional measures, the Court ought to have issued a general statement appealing to the Parties to act in compliance with their obligations under the United Nations Charter and all other rules of international law relevant to the situation, and

at least not to aggravate or extend their dispute, regardless of what might be the Court's conclusion on prima facie jurisdiction pending its final decision.

Nothing in the Statute or Rules of Court prohibits the Court from so acting. Also, given the responsibilities of the Court within the general framework for the maintenance of peace and security under the Charter, and under the Statute as an integral part of the Charter, to issue such a statement is within the implied powers of the Court in the exercise of its judicial functions. Obviously, the Court has failed to take an opportunity to make its due contribution to the maintenance of peace and security when that is most needed.

Moreover, in spite of the request of Yugoslavia that the Court exercise its powers under Article 75, paragraph 1, of the Rules of Court to decide *proprio motu* Yugoslavia's request to indicate provisional measures, the Court failed to exercise that power, in contrast to its decision to make use of that power in the recent *LaGrand* case (Germany *v.* the United States of America) in a situation not as urgent as in the present case.

For these reasons, Judge Shi felt compelled to vote against operative paragraph (1) of the six Orders.

Declaration of Judge Koroma

In his declaration Judge Koroma observed that these were perhaps the most serious cases that have ever come before the Court for provisional measures. He stated that jurisprudentially such measures were designed to prevent violence, the use of force, to safeguard international peace and security as well as serving as an important part of the dispute settlement process under the Charter of the United Nations. In his view the indication of such measures therefore represents one of the most important functions of the Court.

But the granting of such a relief, he stressed, could only be done in accordance with the Statute of the Court. In this regard, and in the light of the jurisprudence of the Court, where prima facie jurisdiction is absent or other circumstances predominate, the Court will not grant the request for provisional measures.

Nevertheless, he considered the Court, being the principal judicial organ of the United Nations, whose primary raison d'être remains the preservation of international peace and security, to be under a positive obligation to contribute to the maintenance of international peace and security and to provide a judicial framework for the resolution of a legal conflict, especially one which not only threatens international peace and security but also involves enormous human suffering and continuing loss of life. He had therefore joined with the other Members of the Court in calling for the peaceful resolution of this conflict pursuant to Article 33 of the Charter, and in urging the Parties not to aggravate or extend the dispute and to respect international law, including humanitarian law and the human rights of all the citizens of Yugoslavia.

Declaration of Judge Vereshchetin

The extraordinary circumstances in which Yugoslavia made its request for interim measures of protection imposed a need to react immediately. The Court should have promptly expressed its profound concern over the unfolding human misery, loss of life and serious violations of international law which by the time of the request were already a matter of public knowledge. It is unbecoming for the principal judicial organ of the United Nations, whose very raison d'être is the peaceful resolution of international disputes, to maintain silence in such a situation. Even if ultimately the Court may come to the conclusion that, due to constraints in its Statute, it cannot indicate fully fledged provisional measures in accordance with Article 41 of the Statute in relation to one or another of the respondent States, the Court is inherently empowered, at the very least, immediately to call upon the Parties neither to aggravate nor to extend the conflict and to act in accordance with their obligations under the Charter of the United Nations. This power flows from its responsibility for the safeguarding of international law and from major considerations of public order. Such an authoritative appeal by the "World Court", which would also be consistent with Article 41 of its Statute and Article 74, paragraph 4, and Article 75, paragraph 1, of its Rules, could have a sobering effect on the parties involved in the military conflict, unprecedented in European history since the end of the Second World War.

The Court was urged to uphold the rule of law in the context of large-scale gross violations of international law, including of the Charter of the United Nations. Instead of acting expeditiously and, if necessary, *proprio motu*, in its capacity as "the principal guardian of international law", the majority of the Court, more than one month after the requests were made, rejected them in a sweeping way in relation to all the cases brought before the Court, including those where the prima facie jurisdiction of the Court could have been clearly established. Moreover, this decision has been taken in a situation in which deliberate intensification of bombardment of the most heavily populated areas is causing unabated loss of life amongst non-combatants and physical and mental harm to the population in all parts of Yugoslavia.

For the foregoing reasons, Judge Vereshchetin cannot concur with the inaction of the Court in this matter, although he concedes that in some of the cases instituted by the Applicant the basis of the Court's jurisdiction, at this stage of the proceedings, is open to doubt, and in relation to Spain and the United States is non-existent.

Separate opinion of Judge Oda

Judge Oda supports the decision of the Court in dismissing the requests for the indication of provisional measures by the Federal Republic of Yugoslavia against ten respondent States. While favouring the decision of the Court to remove the case from the General List of the Court in the cases of Spain and the United States, Judge Oda voted against the decision in the other eight cases in which the

Court ordered that it "[r]eserves the subsequent procedure for further decision", because he believes that those eight cases should also be removed at this stage from the General List of the Court.

Judge Oda considers that the Federal Republic of Yugoslavia is not a Member of the United Nations and thus not a party to the Statute of the International Court of Justice. The Applications presented by the Federal Republic of Yugoslavia should therefore be declared inadmissible for this reason alone and should be removed from the General List of the Court.

He nevertheless then goes on to discuss whether, if the Federal Republic of Yugoslavia were to be considered a party to the Statute, it could have brought the present Applications on the basis of certain legal instruments. After having examined the meaning of (i) the optional clause of the Court's Statute, (ii) the background to the 1930 and 1931 instruments with Belgium and the Netherlands, respectively, and (iii) the 1948 Genocide Convention, he reaches the conclusion that none of these instruments grant the Court jurisdiction in any of the ten Applications.

Judge Oda agrees with the Court that, as it has no basis of jurisdiction, it must reject the requests for the indication of provisional measures in all ten cases. However, he considers that, the Court having decided that it has no jurisdiction to entertain the cases, not even prima facie, that this can only mean that it has no jurisdiction whatsoever in any of the cases. It follows, in Judge Oda's view, that not only in the cases of Spain and the United States, in which the Court states that it manifestly lacks jurisdiction, but in all the other cases, the Applications should be dismissed at this stage, given that the Court has found that there is not even a prima facie basis of jurisdiction.

Judge Oda also points out that, while the Court makes a distinction between the Applications, even though they deal virtually with the same subject matter, this distinction, which came about simply because of the different positions which individual States happened to take towards the various instruments that are to be applied concerning the Court's jurisdiction, will lead to differing results concerning the future proceedings in each of the cases. In Judge Oda's view this is an illogical situation, which supports his contention that all ten cases should be dismissed in their entirety at this stage.

Separate opinion of Judge Higgins

Judge Higgins in her separate opinions addresses two issues that arise in relation to those cases where the Federal Republic of Yugoslavia claims jurisdiction on the basis of Article 36, paragraph 2, of the Statute. The first issue concerns temporal limitations to so-called "optional clauses", and in particular the question of when a dispute arises and when the relevant events have occurred. These concepts are analysed in connection with Yugoslavia's own declaration. The second issue addresses the question of exactly what has to be shown for the Court to be satisfied it has prima facie jurisdiction when it is considering the indication of provisional measures. It is suggested that some jurisdictional issues are so complex that they cannot be addressed at all at this phase; their holding over for a later phase does not stand in the way of the Court determining whether or not it has prima facie jurisdiction for the purposes of Article 41.

Separate opinion of Judge Parra-Aranguren

Judge Parra-Aranguren recalls that Article 79 of the Rules of Court prescribes that any objection by the Respondent to the jurisdiction of the Court shall be made in writing within the time limit fixed for the delivery of the Counter-Memorial. Such preliminary objection shall be decided as provided by paragraph 7 of the said Article 79. The Court has no discretionary powers to depart from the rules established by Article 79; and the present proceedings have not yet reached the stage when the Respondent may submit preliminary objections. Therefore, in his opinion, when deciding upon a request for provisional measures the Court can neither make its final decision on jurisdiction nor order the removal of the case from the Court's List.

Separate opinion of Judge Kooijmans

1. Judge Kooijmans joined a separate opinion to the Order of the Court in the cases of Yugoslavia versus Belgium, Canada, the Netherlands, Portugal, Spain and the United Kingdom, respectively.

He does not agree with the Court's view that Yugoslavia's declaration of acceptance of the compulsory jurisdiction of the Court of 25 April 1999 cannot provide a basis of jurisdiction in the present case, even prima facie, because of the reservations incorporated in the declarations of Spain and the United Kingdom, cq. because of the temporal limitation contained in Yugoslavia's declaration (cases against Belgium, Canada, the Netherlands and Portugal). He is of the view that the Court lacks prima facie jurisdiction because of the controversial validity of Yugoslavia's declaration. This validity issue constitutes a preliminary issue and should, therefore, have been dealt with by the Court as a threshold question.

Since this issue is of no relevance in the four other cases (against France, Germany, Italy and the United States) as these States themselves do not recognize the compulsory jurisdiction of the Court, there is no need for a separate opinion in those cases.

2. Article 36, paragraph 2, of the Statute explicitly states that only States which are party to the Statute can recognize the compulsory jurisdiction of the Court by depositing a declaration of acceptance with the Secretary-General of the United Nations. Member States of that organization are *eo ipso* party to the Statute. All six Respondents contended that since the Federal Republic of Yugoslavia is not a Member of the United Nations, its declaration of acceptance has not been validly made.

3. On 22 September 1992 the General Assembly, on the recommendation of the Security Council, decided that the Federal Republic of Yugoslavia cannot continue automatically the membership of the former Socialist

Federal Republic of Yugoslavia and therefore that it should apply for membership in the United Nations. Until that time it shall not participate in the work of the General Assembly (res. 47/1). The Federal Republic of Yugoslavia never applied for membership.

4. In its present Orders the Court avoids the question of the contested validity of Yugoslavia's declaration. It takes the position that it need not consider this issue since the declaration cannot provide the Court with a basis for prima facie jurisdiction on other grounds.

5. Judge Kooijmans is of the view that the Court's reasoning in this respect is inconsistent. Such other grounds only become relevant if the validity of the declaration — at least for the present stage of the proceedings — is accepted. The Court's reasoning is based on a presumption of validity and the Court should have said so and have given its arguments for it.

6. According to Judge Kooijmans there certainly was no need for the Court to take a definitive stand on Yugoslavia's membership of the United Nations. He is fully aware that resolution 47/1 is unprecedented and raises a number of highly complex legal questions, which require a thorough analysis and careful evaluation by the Court at a later stage of the proceedings.

Difficult though the question may be, the relevant decisions have been taken by the organs of the United Nations which have exclusive authority in matters of membership (Security Council and General Assembly) and they cannot be overlooked or ignored.

7. According to Judge Kooijmans the doubts, raised by the decisions of the competent United Nations bodies with regard to Yugoslavia's membership and the ensuing validity of its declaration, are, however, so serious that the Court should have concluded that this declaration cannot provide it with a basis for prima facie jurisdiction. The Court should not indicate provisional measures unless its competence to entertain the dispute appears to be *reasonably probable* and this test of reasonable probability cannot be passed because of the doubtful validity of the declaration.

8. If that is the case, issues like reservations and temporal limitations on which the cases were decided by the Court, become irrelevant since they are wholly conditioned by the preliminary question of the declaration's validity.

Separate opinion of Judge Kreca

In his separate opinion Judge Kreca points out the following relevant issues:

Judge Kreca finds that none of the equalization functions of the institution of judge ad hoc have been met in this particular case. The letter and spirit of Article 31, paragraph 2, of the Statute of the Court, applied to this particular case, imply the right of Yugoslavia, as the applicant State, to choose as many judges ad hoc to sit on the Bench as is necessary to equalize the position of applicant State and that of the respondent States which have judges of their nationality on the Bench and which share the same interest. *In concreto*, the inherent right to equalization in the composition of the Bench, as an expression of a fundamental rule of equality of parties, means that the Federal Republic of Yugoslavia should have the right to choose five judges ad hoc, since even five out of ten respondent States (United States, the United Kingdom, France, Germany, and the Netherlands) have their national judges sitting on the Bench.

At the same time, according to coherent jurisprudence of the Court, none of the respondent States were entitled to appoint a judge ad hoc (*Territorial Jurisdiction of the International Commission of the River Oder; Customs Régime between Germany and Austria*).

There is no need to say that the above-mentioned issues are of upmost specific weight in view of the fact that obviously the meaning of such issues is not restricted to the procedure, but that it may have a far-reaching concrete meaning.

Judge Kreca points out that a reservation such as the one made by Spain in respect to Article IX on the Convention on the Prevention and Punishment of the Crime of Genocide does not contribute to the implementation of the concept of an organized de jure international community. States do not express verbally their belief in international law, by making declaratory vows, but by taking effective measures aimed at implementation of human rights and fundamental freedoms. This is especially true in regard to the Genocide Convention since:

> "In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'être of the convention" (*Advisory Opinion of the International Court of Justice*)

124. CASE CONCERNING LEGALITY OF USE OF FORCE (YUGOSLAVIA *v.* UNITED KINGDOM) (PROVISIONAL MEASURES)

Order of 2 June 1999

In an Order issued in the case concerning Legality of Use of Force (Yugoslavia *v.* United Kingdom), the Court rejected by twelve votes to three the request for the indication of provisional measures submitted by the Federal Republic of Yugoslavia (FRY). The Court also stated that it remained seized of the case. It reserved the subsequent procedure for further decision by fourteen votes to one.

The Court was composed as follows: Vice-President Weeramantry, Acting President; President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans; Judge ad hoc Kreca; Registrar Valencia-Ospina.

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

"43. For these reasons,

THE COURT,

(1) By twelve votes to three,

Rejects the request for the indication of provisional measures submitted by the Federal Republic of Yugoslavia on 29 April 1999;

IN FAVOUR: Vice-President Weeramantry, Acting President; President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Fleischhauer, Koroma, Higgins, Parra-Aranguren, Kooijmans;

AGAINST: Judges Shi, Vereshchetin; Judge ad hoc Kreca;

(2) By fourteen votes to one,

Reserves the subsequent procedure for further decision.

IN FAVOUR: Vice-President Weeramantry, Acting President; President Schwebel; Judges Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans; Judge ad hoc Kreca;

AGAINST: Judge Oda."

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Vice-President Weeramantry, Acting President, Judges Shi, Koroma and Vereshchetin appended declarations to the Court's Order. Judges Oda, Higgins, Parra-Aranguren and Kooijmans appended separate opinions. Judge ad hoc Kreca appended a dissenting opinion.

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Background information

On 29 April 1999 Yugoslavia filed an Application instituting proceedings against the United Kingdom "for violation of the obligation not to use force", accusing that State of bombing Yugoslav territory "together with other Member States of NATO". On the same day, it submitted a request for the indication of provisional measures, asking the Court to order the United Kingdom to "cease immediately its acts of use of force" and to "refrain from any act of threat or use of force" against the FRY.

As a basis for the jurisdiction of the Court, Yugoslavia invoked the declarations by which both States had accepted the compulsory jurisdiction of the Court in relation to any other State accepting the same obligation (Article 36, paragraph 2, of the Statute of the Court), and Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on 9 December 1948. Article IX of the Genocide Convention provides that disputes between the contracting parties relating to the interpretation, application or fulfilment of the Convention shall be submitted to the International Court of Justice.

Reasoning of the Court

In its Order, the Court first emphasizes that it is "deeply concerned with the human tragedy, the loss of life, and the enormous suffering in Kosovo which form the background" of the dispute and "with the continuing loss of life and human suffering in all parts of Yugoslavia". It declares itself "profoundly concerned with the use of force in Yugoslavia", which "under the present circumstances ... raises very serious issues of international law". While being "mindful of the purposes and principles of the United Nations Charter and of its own responsibilities in the maintenance of peace and security under the Charter and [its] Statute", the Court "deems it necessary to emphasize that all parties before it must act in conformity with their obligations under the United Nations Charter and other rules of international law, including humanitarian law".

The Court then points out that it "does not automatically have jurisdiction over legal disputes between States" and that "one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction". It cannot indicate provisional measures without its jurisdiction in the case being established prima facie.

Concerning the first basis of jurisdiction invoked, the Court observes that the United Kingdom contended that its declaration contains reservations. Under the terms of one of those reservations, the United Kingdom does not recognize the jurisdiction of the Court in respect of "disputes in respect of which any other Party to the dispute has accepted the compulsory jurisdiction of the ... Court ... in relation to or for the purposes of the dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of any other Party to the dispute was deposited or ratified less than 12 months prior to the filing of the application bringing the dispute before the Court". The Court notes that Yugoslavia deposited its declaration of acceptance of the compulsory jurisdiction of the Court with the United Nations Secretary-General on 26 April 1999 and that it brought the dispute to the Court on 29 April 1999. It states that there can be no doubt that the conditions for the exclusion of the Court's jurisdiction provided for in the declaration of the United Kingdom are satisfied. The Court concludes that the declarations made by the Parties manifestly cannot constitute a basis of jurisdiction in the case, even prima facie.

As to the United Kingdom's argument that Yugoslavia is not a member State of the United Nations in view of United Nations Security Council resolution 777 (1992) and United Nations General Assembly resolution 47/1 (1992), nor a party to the Statute of the Court, so that Yugoslavia could not establish a jurisdictional link with parties to the Statute by making a declaration accepting the compulsory jurisdiction of the Court, the Court maintains that it need not consider this question, taking into account its finding that the declarations do not constitute a basis of jurisdiction.

Concerning Article IX of the Genocide Convention, the Court states that it is not disputed that both Yugoslavia and the United Kingdom are parties to that Convention, without reservation, and that Article IX accordingly appears to constitute a basis on which the jurisdiction of the Court might be founded. The Court however finds that it must ascertain whether the breaches of the Convention alleged by Yugoslavia are capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one over which the Court might have jurisdiction *ratione materiae*. In its Application, Yugoslavia contends that the subject of the dispute concerns inter alia "acts of the United Kingdom ... by which it has violated its international obligation ... not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group". It contends that the sustained and intensive bombing of the whole of its territory, including the most heavily populated areas, constitutes "a serious violation of Article II of the Genocide Convention", that it is the Yugoslav nation as a whole and as such that is targeted and that the use of certain weapons whose long-term hazards to health and the environment are already known, and the destruction of the largest part of the country's power supply system, with catastrophic consequences of which the Respondent must be aware, "impl[y] the intent to destroy, in whole or in part", the Yugoslav national group as such. For its part, the United Kingdom emphasizes that Yugoslavia has failed to adduce any specific evidence of violations of the Convention and has not established the intent required thereunder. It appears to the Court that, according to the Convention, the essential characteristic of genocide is the intended destruction of a national, ethnical, racial or religious group; the Court further states that "the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of Article II of the Genocide Convention". It adds that in its opinion, it does not appear at the present stage of the proceedings that the bombings which form the subject of the Yugoslav Application "indeed entail the element of intent, towards a group as such, required by the provision" mentioned above. The Court considers therefore that it is not in a position to find, at this stage of the proceedings, that the acts imputed by Yugoslavia to the United Kingdom are capable of coming within the provisions of the Genocide Convention; and Article IX cannot accordingly constitute a basis on which the jurisdiction of the Court could prima facie be founded in the case.

The Court concludes that it "lacks prima facie jurisdiction to entertain Yugoslavia's Application" and that it "cannot therefore indicate any provisional measure whatsoever". However, the findings reached by the Court "in no way prejudge the question of the jurisdiction of the Court to deal with the merits of the case" and they "leave unaffected the right of the Governments of Yugoslavia and the United Kingdom to submit arguments in respect of those questions".

The Court finally observes that "there is a fundamental distinction between the question of the acceptance by a State of the Court's jurisdiction and the compatibility of particular acts with international law". "The former requires consent; the latter question can only be reached when the Court deals with the merits after having established its jurisdiction and having heard full legal arguments by both parties." It emphasizes that "whether or not States accept the jurisdiction of the Court, they remain in any event responsible for acts attributable to them that violate international law, including humanitarian law" and that "any disputes relating to the legality of such acts are required to be resolved by peaceful means, the choice of which, pursuant to Article 33 of the Charter, is left to the parties". In this context, "the parties should take care not to aggravate or extend the dispute". The Court reaffirms that "when such a dispute gives rise to a threat to the peace, breach of the peace or act of aggression, the Security Council has special responsibilities under Chapter VII of the Charter".

Declaration of Vice-President Weeramantry

Judge Weeramantry expressed the view that even though the Court did not issue provisional measures, it still had the power to issue an appeal to both Parties to the effect that they should act in accordance with their obligations under the Charter of the United Nations and other rules of international law including humanitarian law and do nothing to aggravate or extend the conflict.

It had this power as it was still seized of the case and would be so seized of it until the hearing, and because this was not a case of manifest lack of jurisdiction.

He thought this was the appropriate course to be followed. The Court itself had referred to its profound concern with the human tragedy and loss of life involved and to its own responsibilities for the maintenance of peace and security under the Charter and the Statute of the Court.

Such an appeal would also be well within the Court's inherent jurisdiction as more fully explained in his dissenting opinion in *Yugoslavia* v. *Belgium*.

Such an appeal would carry more value than the mere reference to these matters in the Order itself.

Declaration of Judge Shi

Judge Shi agrees with the majority that in the cases of Yugoslavia against France, Germany, Italy and the United Kingdom there is no prima facie jurisdiction, and in the cases of Yugoslavia against Spain and the United States not even prima facie jurisdiction, for the indication of provisional measures requested by the Applicant.

Nevertheless, he is of the opinion that, being confronted with a situation of great urgency arising from the use of force in and against Yugoslavia, and upon receipt of the requests by the Applicant for the indication of provisional measures, the Court ought to have issued a general statement appealing to the Parties to act in compliance with their obligations under the United Nations Charter and all other rules of international law relevant to the situation, and at least not to aggravate or extend their dispute, regardless of what might be the Court's conclusion on prima facie jurisdiction pending its final decision.

Nothing in the Statute or Rules of Court prohibits the Court from so acting. Also, given the responsibilities of the Court within the general framework for the maintenance of peace and security under the Charter, and under the Statute as an integral part of the Charter, to issue such a statement is within the implied powers of the Court in the exercise of its judicial functions. Obviously, the Court has failed to take an opportunity to make its due contribution to the maintenance of peace and security when that is most needed.

Moreover, in spite of the request of Yugoslavia that the Court exercise its powers under Article 75, paragraph 1, of the Rules of Court to decide *proprio motu* Yugoslavia's request to indicate provisional measures, the Court failed to exercise that power, in contrast to its decision to make use of that power in the recent *LaGrand* case (Germany *v.* the United States of America) in a situation not as urgent as in the present case.

For these reasons, Judge Shi felt compelled to vote against operative paragraph (1) of the six Orders.

Declaration of Judge Koroma

In his declaration Judge Koroma observed that these were perhaps the most serious cases that have ever come before the Court for provisional measures. He stated that jurisprudentially such measures were designed to prevent violence, the use of force, to safeguard international peace and security as well as serving as an important part of the dispute settlement process under the Charter of the United Nations. In his view the indication of such measures therefore represents one of the most important functions of the Court.

But the granting of such a relief, he stressed, could only be done in accordance with the Statute of the Court. In this regard, and in the light of the jurisprudence of the Court, where prima facie jurisdiction is absent or other circumstances predominate, the Court will not grant the request for provisional measures.

Nevertheless, he considered the Court, being the principal judicial organ of the United Nations, whose primary raison d'être remains the preservation of international peace and security, to be under a positive obligation to contribute to the maintenance of international peace and security and to provide a judicial framework for the resolution of a legal conflict, especially one which not only threatens international peace and security but also involves enormous human suffering and continuing loss of life. He had therefore joined with the other Members of the Court in calling for the peaceful resolution of this conflict pursuant to Article 33 of the Charter, and in urging the Parties not to aggravate or extend the dispute and to respect international law, including humanitarian law and the human rights of all the citizens of Yugoslavia.

Declaration of Judge Vereshchetin

The extraordinary circumstances in which Yugoslavia made its request for interim measures of protection imposed a need to react immediately. The Court should have promptly expressed its profound concern over the unfolding human misery, loss of life and serious violations of international law which by the time of the request were already a matter of public knowledge. It is unbecoming for the principal judicial organ of the United Nations, whose very raison d'être is the peaceful resolution of international disputes, to maintain silence in such a situation. Even if ultimately the Court may come to the conclusion that, due to constraints in its Statute, it cannot indicate fully fledged provisional measures in accordance with Article 41 of the Statute in relation to one or another of the respondent States, the Court is inherently empowered, at the very least, immediately to call upon the Parties neither to aggravate nor to extend the conflict and to act in accordance with their obligations under the Charter of the United Nations. This power flows from its responsibility for the safeguarding of international law and from major considerations of public order. Such an authoritative appeal by the "World Court", which would also be consistent with Article 41 of its Statute and Article 74, paragraph 4, and Article 75, paragraph 1, of its Rules, could have a sobering effect on the parties involved in the military conflict, unprecedented in European history since the end of the Second World War.

The Court was urged to uphold the rule of law in the context of large-scale gross violations of international law,

including of the Charter of the United Nations. Instead of acting expeditiously and, if necessary, *proprio motu*, in its capacity as "the principal guardian of international law", the majority of the Court, more than one month after the requests were made, rejected them in a sweeping way in relation to all the cases brought before the Court, including those where the prima facie jurisdiction of the Court could have been clearly established. Moreover, this decision has been taken in a situation in which deliberate intensification of bombardment of the most heavily populated areas is causing unabated loss of life amongst non-combatants and physical and mental harm to the population in all parts of Yugoslavia.

For the foregoing reasons, Judge Vereshchetin cannot concur with the inaction of the Court in this matter, although he concedes that in some of the cases instituted by the Applicant the basis of the Court's jurisdiction, at this stage of the proceedings, is open to doubt, and in relation to Spain and the United States is non-existent.

Separate opinion of Judge Oda

Judge Oda supports the decision of the Court in dismissing the requests for the indication of provisional measures by the Federal Republic of Yugoslavia against ten respondent States. While favouring the decision of the Court to remove the case from the General List of the Court in the cases of Spain and the United States, Judge Oda voted against the decision in the other eight cases in which the Court ordered that it "[r]eserves the subsequent procedure for further decision", because he believes that those eight cases should also be removed at this stage from the General List of the Court.

Judge Oda considers that the Federal Republic of Yugoslavia is not a Member of the United Nations and thus not a party to the Statute of the International Court of Justice. The Applications presented by the Federal Republic of Yugoslavia should therefore be declared inadmissible for this reason alone and should be removed from the General List of the Court.

He nevertheless then goes on to discuss whether, if the Federal Republic of Yugoslavia were to be considered a party to the Statute, it could have brought the present Applications on the basis of certain legal instruments. After having examined the meaning of (i) the optional clause of the Court's Statute, (ii) the background to the 1930 and 1931 instruments with Belgium and the Netherlands, respectively, and (iii) the 1948 Genocide Convention, he reaches the conclusion that none of these instruments grant the Court jurisdiction in any of the ten Applications.

Judge Oda agrees with the Court that, as it has no basis of jurisdiction, it must reject the requests for the indication of provisional measures in all ten cases. However, he considers that, the Court having decided that it has no jurisdiction to entertain the cases, not *even* prima facie, that this can only mean that it has no jurisdiction whatsoever in any of the cases. It follows, in Judge Oda's view, that not only in the cases of Spain and the United States, in which the Court states that it manifestly lacks jurisdiction, but in all the other cases, the Applications should be dismissed at this stage, given that the Court has found that there is not even a prima facie basis of jurisdiction.

Judge Oda also points out that, while the Court makes a distinction between the Applications, even though they deal virtually with the same subject matter, this distinction, which came about simply because of the different positions which individual States happened to take towards the various instruments that are to be applied concerning the Court's jurisdiction, will lead to differing results concerning the future proceedings in each of the cases. In Judge Oda's view this is an illogical situation, which supports his contention that all ten cases should be dismissed in their entirety at this stage.

Separate opinion of Judge Higgins

Judge Higgins in her separate opinions addresses two issues that arise in relation to those cases where the Federal Republic of Yugoslavia claims jurisdiction on the basis of Article 36, paragraph 2, of the Statute. The first issue concerns temporal limitations to so-called "optional clauses", and in particular the question of when a dispute arises and when the relevant events have occurred. These concepts are analysed in connection with Yugoslavia's own declaration. The second issue addresses the question of exactly what has to be shown for the Court to be satisfied it has prima facie jurisdiction when it is considering the indication of provisional measures. It is suggested that some jurisdictional issues are so complex that they cannot be addressed at all at this phase; their holding over for a later phase does not stand in the way of the Court determining whether or not it has prima facie jurisdiction for the purposes of Article 41.

Separate opinion of Judge Parra-Aranguren

Judge Parra-Aranguren recalls that Yugoslavia maintains that "the bombing of Yugoslav populated areas constitute a breach of Article II of the Genocide Convention", a contention denied by the Respondent; that a legal dispute exists between the Parties because of the existence of "a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations", as the Court stated in its decision of 11 July 1996 (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia). I.C.J. Reports 1996 (II)*, pp. 614-615, para. 29); and that according to Article IX of the Genocide Convention, "disputes between the Contracting Parties relating to the interpretation or fulfilment of the present Convention" shall be submitted to the International Court of Justice. Therefore, in his opinion the Court has prima facie jurisdiction to decide upon the provisional measures requested by Yugoslavia.

Yugoslavia requested the Court to indicate that the Respondent "shall cease immediately the acts of use of force and shall refrain from any act of threat or use of force against the Federal Republic of Yugoslavia". However, the

threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of the Genocide Convention. Consequently, Yugoslavia is requesting the indication of provisional measures that do not aim to guarantee its rights under the Genocide Convention, i.e., the right not to suffer acts which may be characterized as genocide crimes by the Convention. Therefore, in the opinion of Judge Parra-Aranguren, the measures requested by Yugoslavia should not be indicated.

Separate opinion of Judge Kooijmans

1. Judge Kooijmans joined a separate opinion to the Order of the Court in the cases of Yugoslavia versus Belgium, Canada, the Netherlands, Portugal, Spain and the United Kingdom, respectively.

He does not agree with the Court's view that Yugoslavia's declaration of acceptance of the compulsory jurisdiction of the Court of 25 April 1999 cannot provide a basis of jurisdiction in the present case, even prima facie, because of the reservations incorporated in the declarations of Spain and the United Kingdom, cq. because of the temporal limitation contained in Yugoslavia's declaration (cases against Belgium, Canada, the Netherlands and Portugal). He is of the view that the Court lacks prima facie jurisdiction because of the controversial validity of Yugoslavia's declaration. This validity issue constitutes a preliminary issue and should, therefore, have been dealt with by the Court as a threshold question.

Since this issue is of no relevance in the four other cases (against France, Germany, Italy and the United States) as these States themselves do not recognize the compulsory jurisdiction of the Court, there is no need for a separate opinion in those cases.

2. Article 36, paragraph 2, of the Statute explicitly states that only States which are party to the Statute can recognize the compulsory jurisdiction of the Court by depositing a declaration of acceptance with the Secretary-General of the United Nations. Member States of that organization are *eo ipso* party to the Statute. All six Respondents contended, that since the Federal Republic of Yugoslavia is not a Member of the United Nations, its declaration of acceptance has not been validly made.

3. On 22 September 1992 the General Assembly, on the recommendation of the Security Council, decided that the Federal Republic of Yugoslavia cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia and therefore that it should apply for membership in the United Nations. Until that time it shall not participate in the work of the General Assembly (res. 47/1). The Federal Republic of Yugoslavia never applied for membership.

4. In its present Orders the Court avoids the question of the contested validity of Yugoslavia's declaration. It takes the position that it need not consider this issue since the declaration cannot provide the Court with a basis for prima facie jurisdiction on other grounds.

5. Judge Kooijmans is of the view that the Court's reasoning in this respect is inconsistent. Such other grounds only become relevant if the validity of the declaration — at least for the present stage of the proceedings — is accepted. The Court's reasoning is based on a presumption of validity and the Court should have said so and have given its arguments for it.

6. According to Judge Kooijmans there certainly was no need for the Court to take a definitive stand on Yugoslavia's membership of the United Nations. He is fully aware that resolution 47/1 is unprecedented and raises a number of highly complex legal questions, which require a thorough analysis and careful evaluation by the Court at a later stage of the proceedings.

Difficult though the question may be, the relevant decisions have been taken by the organs of the United Nations which have exclusive authority in matters of membership (Security Council and General Assembly) and they cannot be overlooked or ignored.

7. According to Judge Kooijmans the doubts, raised by the decisions of the competent United Nations bodies with regard to Yugoslavia's membership and the ensuing validity of its declaration, are, however, so serious that the Court should have concluded that this declaration cannot provide it with a basis for prima facie jurisdiction. The Court should not indicate provisional measures unless its competence to entertain the dispute appears to be *reasonably probable* and this test of reasonable probability cannot be passed because of the doubtful validity of the declaration.

8. If that is the case, issues like reservations and temporal limitations on which the cases were decided by the Court, become irrelevant since they are wholly conditioned by the preliminary question of the declaration's validity.

Dissenting opinion of Judge Kreca

In his dissenting opinion Judge Kreca points out the following relevant issues:

Judge Kreca finds that none of the equalization functions of the institution of judge ad hoc have been met in this particular case. The letter and spirit of Article 31, paragraph 2, of the Statute of the Court, applied to this particular case, imply the right of Yugoslavia, as the applicant State, to choose as many judges ad hoc to sit on the Bench as is necessary to equalize the position of applicant State and that of the respondent States which have judges of their nationality on the Bench and which share the same interest. *In concreto*, the inherent right to equalization in the composition of the Bench, as an expression of a fundamental rule of equality of parties, means that the Federal Republic of Yugoslavia should have the right to choose five judges ad hoc, since even five out of ten respondent States (United States, the United Kingdom, France, Germany, and the Netherlands) have their national judges sitting on the Bench.

At the same time, according to coherent jurisprudence of the Court, none of the respondent States were entitled to appoint a judge ad hoc (*Territorial Jurisdiction of the*

International Commission of the River Oder; *Customs Régime between Germany and Austria*).

There is no need to say that the above-mentioned issues are of upmost specific weight in view of the fact that obviously the meaning of such issues is not restricted to the procedure, but that it may have a far-reaching concrete meaning.

Judge Kreca finds that in the recent practice of the Court, in particular that in which individuals were directly affected, a high standard of humanitarian concern in the proceedings for the indication of interim measures has been formed, a standard which commanded sufficient inherent strength to brush aside some relevant, both procedural and material, rules governing the institution of provisional measures (*exampli causa*, the *LaGrand* case). Thus, humanitarian considerations, independently from the norms of international law regulating human rights and liberties, have, in a way, gained autonomous legal significance; they have transcended the moral and philanthropic sphere, and entered the sphere of law.

In the case at hand, it seems that "humanitarian concern" has lost the acquired autonomous legal position. The fact needs to be stressed in view of the special circumstances of this case. Unlike the recent practice of the Court, "humanitarian concern" has as its object the fate of an entire nation, in the literal sense. The Federal Republic of Yugoslavia and its national and ethnic groups have been subjected for more than two months now to continued attacks of a very strong, highly organized air armada of the most powerful States of the world. At the same time, the arsenal used in the attacks on Yugoslavia contains also weapons whose effects have no limitations either in space or in time such as depleted uranium which cause far-reaching and irreparable damage to the health of the whole population.

Judge Kreca finds that, as regards the membership of Yugoslavia in the United Nations, the Court remained consistent with its "avoidance" position, persisting in its statement that it "need not consider this question for the purpose of deciding whether or not it can indicate provisional measures in the present case. But it is the profound conviction of Judge Kreca that the Court should have answered the question whether the Federal Republic of Yugoslavia can or cannot, in the light of the content of General Assembly resolution 47/1 and of the practice of the world Organization, be considered to be a Member of the United Nations and especially party to the Statute of the Court; namely the text of resolution 47/1 makes no mention of the status of the Federal Republic of Yugoslavia as a party to the Statute of the International Court of Justice. Judge Kreca is equally convinced that, especially because the Court should have answered that question, both the content of the resolution which represents *contradictio in adiecto* and in particular the practice of the world Organization after its adoption over a period of nearly seven years, offered ample arguments for it to pronounce itself on this matter.

Judge Kreca is of the opinion that the extensive use of armed force, in particular if it is used against objects and means constituting conditions of normal life, can be conducive to "inflicting on the group conditions of life" bringing about "its physical destruction" (Genocide Convention, Article II).

Judge Kreca goes on to say that it can be argued that such acts are in the function of degrading the military capacity of the Federal Republic of Yugoslavia. But such an explanation can hardly be regarded as a serious argument. For the spiral of such a line of thinking may easily come to a point when, having in mind that military power is after all comprised of people, even mass killing of civilians can be claimed to constitute some sort of precautionary measure that should prevent the maintenance or, in case of mobilization, the increase of military power of a State.

Judge Kreca also points out that, in the incidental proceedings the Court cannot and should not concern itself with the definitive qualification of the intent to impose upon the group conditions in which the survival of the group is threatened. Having in mind the purpose of provisional measures, it can be said that at this stage of the proceedings it is sufficient to establish that, in the conditions of extensive bombing, there is an objective risk of bringing about conditions in which the survival of the group is threatened.

125. CASE CONCERNING LEGALITY OF USE OF FORCE (YUGOSLAVIA *v.* UNITED STATES OF AMERICA) (PROVISIONAL MEASURES)

Order of 2 June 1999

In an Order issued in the case concerning Legality of Use of Force (Yugoslavia *v.* United States of America), the Court rejected by twelve votes to three the request for the indication of provisional measures submitted by the Federal Republic of Yugoslavia (FRY).

In its Order, the Court, having found that it manifestly lacked jurisdiction to entertain the case, decided to dismiss it. It ordered by twelve votes to three that the case be removed from the List.

The Court was composed as follows: Vice-President Weeramantry, Acting President; President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans; Judge ad hoc Kreca; Registrar Valencia-Ospina.

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

"34. For these reasons,

THE COURT,

(1) By twelve votes to three,

Rejects the request for the indication of provisional measures submitted by the Federal Republic of Yugoslavia on 29 April 1999;

IN FAVOUR: Vice-President Weeramantry, Acting President; President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Fleischhauer, Koroma, Higgins, Parra-Aranguren, Kooijmans;

AGAINST: Judges Shi, Vereshchetin; Judge ad hoc Kreca;

(2) By twelve votes to three,

Orders that the case be removed from the List.

IN FAVOUR: Vice-President Weeramantry, Acting President; President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Higgins, Kooijmans;

AGAINST: Judges Vereshchetin, Parra-Aranguren; Judge ad hoc Kreca."

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Judges Shi, Koroma and Vereshchetin appended declarations to the Court's Order. Judges Oda and Parra-Aranguren appended separate opinions. Judge ad hoc Kreca appended a dissenting opinion.

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Background information

On 29 April 1999 Yugoslavia filed an Application instituting proceedings against the United States of America "for violation of the obligation not to use force", accusing that State of bombing Yugoslav territory "together with other Member States of NATO". On the same day, it submitted a request for the indication of provisional measures, asking the Court to order the United States of America to "cease immediately its acts of use of force" and to "refrain from any act of threat or use of force" against the FRY.

As a basis for the jurisdiction of the Court, Yugoslavia invoked Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on 9 December 1948, as well as Article 38, paragraph 5, of the Rules of Court. Article IX of the Genocide Convention provides that disputes between the contracting parties relating to the interpretation, application or fulfilment of the Convention shall be submitted to the International Court of Justice. As to Article 38, paragraph 5, of the Rules of Court, it provides that when a State files an application against another State which has not accepted the jurisdiction of the Court, the application is transmitted to that other State, but no action is taken in the proceedings unless and until that State has accepted the Court's jurisdiction for the purposes of the case.

Reasoning of the Court

In its Order, the Court first emphasizes that it is "deeply concerned with the human tragedy, the loss of life, and the enormous suffering in Kosovo which form the background" of the dispute and "with the continuing loss of life and human suffering in all parts of Yugoslavia". It declares itself "profoundly concerned with the use of force in Yugoslavia", which "under the present circumstances ... raises very serious issues of international law". While being "mindful of the purposes and principles of the United Nations Charter and of its own responsibilities in the maintenance of peace and security under the Charter and [its] Statute", the Court "deems it necessary to emphasize that all parties before it must act in conformity with their obligations under the United Nations Charter and other rules of international law, including humanitarian law".

The Court then points out that it "does not automatically have jurisdiction over legal disputes between States" and that "one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the

consent of those States to its jurisdiction". It cannot indicate provisional measures without its jurisdiction in the case being established prima facie.

Concerning Article IX of the Genocide Convention, the Court states that it is not disputed that both Yugoslavia and the United States of America are parties to that Convention, but that when the United States ratified the Convention on 25 November 1988, it made a reservation. That reservation provides that with reference to Article IX, before any dispute to which the United States is a party may be submitted to the jurisdiction of the Court, "the specific consent of the United States is required in each case". However, in this case, the United States has indicated that it had not given specific consent and that it would not do so. Since the Genocide Convention does not prohibit reservations and since Yugoslavia did not object to the reservation made by the United States, the Court considers that Article IX manifestly does not constitute a basis of jurisdiction in the case, even prima facie.

As to Article 38, paragraph 5, of the Rules of Court, the Court stresses that, in the absence of consent by the United States, it cannot exercise jurisdiction in the case, even prima facie.

The Court concludes that it "manifestly lacks jurisdiction to entertain Yugoslavia's Application" and that "it cannot therefore indicate any provisional measure whatsoever". It adds that "within a system of consensual jurisdiction, to maintain on the General List a case upon which it appears certain that the Court will not be able to adjudicate on the merits would most assuredly not contribute to the sound administration of justice".

The Court finally observes that "there is a fundamental distinction between the question of the acceptance by a State of the Court's jurisdiction and the compatibility of particular acts with international law". "The former requires consent; the latter question can only be reached when the Court deals with the merits after having established its jurisdiction and having heard full legal arguments by both parties." It emphasizes that "whether or not States accept the jurisdiction of the Court, they remain in any event responsible for acts attributable to them that violate international law, including humanitarian law" and that "any disputes relating to the legality of such acts are required to be resolved by peaceful means, the choice of which, pursuant to Article 33 of the Charter, is left to the parties". In this context, "the parties should take care not to aggravate or extend the dispute". The Court reaffirms that "when such a dispute gives rise to a threat to the peace, breach of the peace or act of aggression, the Security Council has special responsibilities under Chapter VII of the Charter".

Declaration of Judge Shi

Judge Shi agrees with the majority that in the cases of Yugoslavia against France, Germany, Italy and the United Kingdom there is no prima facie jurisdiction, and in the cases of Yugoslavia against Spain and the United States not even prima facie jurisdiction, for the indication of provisional measures requested by the Applicant.

Nevertheless, he is of the opinion that, being confronted with a situation of great urgency arising from the use of force in and against Yugoslavia, and upon receipt of the requests by the Applicant for the indication of provisional measures, the Court ought to have issued a general statement appealing to the Parties to act in compliance with their obligations under the United Nations Charter and all other rules of international law relevant to the situation, and at least not to aggravate or extend their dispute, regardless of what might be the Court's conclusion on prima facie jurisdiction pending its final decision.

Nothing in the Statute or Rules of Court prohibits the Court from so acting. Also, given the responsibilities of the Court within the general framework for the maintenance of peace and security under the Charter, and under the Statute as an integral part of the Charter, to issue such a statement is within the implied powers of the Court in the exercise of its judicial functions. Obviously, the Court has failed to take an opportunity to make its due contribution to the maintenance of peace and security when that is most needed.

Moreover, in spite of the request of Yugoslavia that the Court exercise its powers under Article 75, paragraph 1, of the Rules of Court to decide *proprio motu* Yugoslavia's request to indicate provisional measures, the Court failed to exercise that power, in contrast to its decision to make use of that power in the recent *LaGrand* case (Germany *v.* the United States of America) in a situation not as urgent as in the present case.

For these reasons, Judge Shi felt compelled to vote against operative paragraph (1) of the six Orders.

Declaration of Judge Koroma

In his declaration Judge Koroma observed that these were perhaps the most serious cases that have ever come before the Court for provisional measures. He stated that jurisprudentially such measures were designed to prevent violence, the use of force, to safeguard international peace and security as well as serving as an important part of the dispute settlement process under the Charter of the United Nations. In his view the indication of such measures therefore represents one of the most important functions of the Court.

But the granting of such a relief, he stressed, could only be done in accordance with the Statute of the Court. In this regard, and in the light of the jurisprudence of the Court, where prima facie jurisdiction is absent or other circumstances predominate, the Court will not grant the request for provisional measures.

Nevertheless, he considered the Court, being the principal judicial organ of the United Nations, whose primary raison d'être remains the preservation of international peace and security, to be under a positive obligation to contribute to the maintenance of international peace and security and to provide a judicial framework for the resolution of a legal conflict, especially one which not only threatens international peace and security but also involves enormous human suffering and continuing loss of

life. He had therefore joined with the other Members of the Court in calling for the peaceful resolution of this conflict pursuant to Article 33 of the Charter, and in urging the Parties not to aggravate or extend the dispute and to respect international law, including humanitarian law and the human rights of all the citizens of Yugoslavia.

Declaration of Judge Vereshchetin

The extraordinary circumstances in which Yugoslavia made its request for interim measures of protection imposed a need to react immediately. The Court should have promptly expressed its profound concern over the unfolding human misery, loss of life and serious violations of international law which by the time of the request were already a matter of public knowledge. It is unbecoming for the principal judicial organ of the United Nations, whose very raison d'être is the peaceful resolution of international disputes, to maintain silence in such a situation. Even if ultimately the Court may come to the conclusion that, due to constraints in its Statute, it cannot indicate fully fledged provisional measures in accordance with Article 41 of the Statute in relation to one or another of the respondent States, the Court is inherently empowered, at the very least, immediately to call upon the Parties neither to aggravate nor to extend the conflict and to act in accordance with their obligations under the Charter of the United Nations. This power flows from its responsibility for the safeguarding of international law and from major considerations of public order. Such an authoritative appeal by the "World Court", which would also be consistent with Article 41 of its Statute and Article 74, paragraph 4, and Article 75, paragraph 1, of its Rules, could have a sobering effect on the parties involved in the military conflict, unprecedented in European history since the end of the Second World War.

The Court was urged to uphold the rule of law in the context of large-scale gross violations of international law, including of the Charter of the United Nations. Instead of acting expeditiously and, if necessary, *proprio motu*, in its capacity as "the principal guardian of international law", the majority of the Court, more than one month after the requests were made, rejected them in a sweeping way in relation to all the cases brought before the Court, including those where the prima facie jurisdiction of the Court could have been clearly established. Moreover, this decision has been taken in a situation in which deliberate intensification of bombardment of the most heavily populated areas is causing unabated loss of life among non-combatants and physical and mental harm to the population in all parts of Yugoslavia.

For the foregoing reasons, Judge Vereshchetin cannot concur with the inaction of the Court in this matter, although he concedes that in some of the cases instituted by the Applicant the basis of the Court's jurisdiction, at this stage of the proceedings, is open to doubt, and in relation to Spain and the United States is non-existent.

Separate opinion of Judge Oda

Judge Oda supports the decision of the Court in dismissing the requests for the indication of provisional measures by the Federal Republic of Yugoslavia against ten respondent States. While favouring the decision of the Court to remove the case from the General List of the Court in the cases of Spain and the United States, Judge Oda voted against the decision in the other eight cases in which the Court ordered that it "[r]eserves the subsequent procedure for further decision", because he believes that those eight cases should also be removed at this stage from the General List of the Court.

Judge Oda considers that the Federal Republic of Yugoslavia is not a Member of the United Nations and thus not a party to the Statute of the International Court of Justice. The Applications presented by the Federal Republic of Yugoslavia should therefore be declared inadmissible for this reason alone and should be removed from the General List of the Court.

He nevertheless then goes on to discuss whether, if the Federal Republic of Yugoslavia were to be considered a party to the Statute, it could have brought the present Applications on the basis of certain legal instruments. After having examined the meaning of (i) the optional clause of the Court's Statute, (ii) the background to the 1930 and 1931 instruments with Belgium and the Netherlands, respectively, and (iii) the 1948 Genocide Convention, he reaches the conclusion that none of these instruments grant the Court jurisdiction in any of the ten Applications.

Judge Oda agrees with the Court that, as it has no basis of jurisdiction, it must reject the requests for the indication of provisional measures in all ten cases. However, he considers that, the Court having decided that it has no jurisdiction to entertain the cases, not *even* prima facie, that this can only mean that it has no jurisdiction whatsoever in any of the cases. It follows, in Judge Oda's view, that not only in the cases of Spain and the United States, in which the Court states that it manifestly lacks jurisdiction, but in all the other cases, the Applications should be dismissed at this stage, given that the Court has found that there is not even a prima facie basis of jurisdiction.

Judge Oda also points out that, while the Court makes a distinction between the Applications, even though they deal virtually with the same subject matter, this distinction, which came about simply because of the different positions which individual States happened to take towards the various instruments that are to be applied concerning the Court's jurisdiction, will lead to differing results concerning the future proceedings in each of the cases. In Judge Oda's view this is an illogical situation, which supports his contention that all ten cases should be dismissed in their entirety at this stage.

Separate opinion of Judge Parra-Aranguren

Judge Parra-Aranguren recalls that Article 79 of the Rules of Court prescribes that any objection by the Respondent to the jurisdiction of the Court shall be made in writing within the time limit fixed for the delivery of the Counter-Memorial. Such preliminary objection shall be decided as provided by paragraph 7 of the said Article 79. The Court has no discretionary powers to depart from the

rules established by Article 79; and the present proceedings have not yet reached the stage when the Respondent may submit preliminary objections. Therefore, in his opinion, when deciding upon a request for provisional measures the Court can neither make its final decision on jurisdiction nor order the removal of the case from the Court's List.

Dissenting opinion of Judge Kreca

In his dissenting opinion Judge Kreca points out the following relevant issues:

Judge Kreca finds that none of the equalization functions of the institution of judge ad hoc have been met in this particular case. The letter and spirit of Article 31, paragraph 2, of the Statute of the Court, applied to this particular case, imply the right of Yugoslavia, as the applicant State, to choose as many judges ad hoc to sit on the Bench as is necessary to equalize the position of applicant State and that of the respondent States which have judges of their nationality on the Bench and which share the same interest. *In concreto*, the inherent right to equalization in the composition of the Bench, as an expression of a fundamental rule of equality of parties, means that the Federal Republic of Yugoslavia should have the right to choose five judges ad hoc, since even five out of ten respondent States (United States, the United Kingdom, France, Germany, and the Netherlands) have their national judges sitting on the Bench.

At the same time, according to coherent jurisprudence of the Court, none of the respondent States were entitled to appoint a judge ad hoc (*Territorial Jurisdiction of the International Commission of the River Oder*; *Customs Régime between Germany and Austria*).

There is no need to say that the above-mentioned issues are of upmost specific weight in view of the fact that obviously the meaning of such issues is not restricted to the procedure, but that it may have a far-reaching concrete meaning.

Judge Kreca finds that in the recent practice of the Court, in particular that in which individuals were directly affected, a high standard of humanitarian concern in the proceedings for the indication of interim measures has been formed, a standard which commanded sufficient inherent strength to brush aside some relevant, both procedural and material, rules governing the institution of provisional measures (*exampli causa*, the *LaGrand* case). Thus, humanitarian considerations, independently from the norms of international law regulating human rights and liberties, have, in a way, gained autonomous legal significance; they have transcended the moral and philanthropic sphere, and entered the sphere of law.

In the case at hand, it seems that "humanitarian concern" has lost the acquired autonomous legal position. The fact needs to be stressed in view of the special circumstances of this case. Unlike the recent practice of the Court, "humanitarian concern" has as its object the fate of an entire nation, in the literal sense. The Federal Republic of Yugoslavia and its national and ethnic groups have been subjected for more than two months now to continued attacks of a very strong, highly organized air armada of the most powerful States of the world. At the same time, the arsenal used in the attacks on Yugoslavia contains also weapons whose effects have no limitations either in space or in time such as depleted uranium which cause far-reaching and irreparable damage to the health of the whole population.

Judge Kreca points out that the first and the second of "understandings" lodged by the United States to Article II are actually reservations incompatible with the object and purpose of the Genocide Convention. Namely, at least Articles II, III and IV of the Genocide Convention represent *ius cogens*. The norms of *ius cogens* are of an overriding character; thus, they make null and void any act, be it unilateral, bilateral or multilateral, which is not in accordance with them. Such a logical conclusion based on the peremptory or absolutely binding nature of *ius cogens* norms, expressing in the normative sphere the fundamental values of the international community as a whole, have been confirmed in the *North Sea Continental Shelf* cases. The only possible way of excluding nullity effects in regard to the United States' reservation to Article IX of the Genocide Convention, may lie in the interpretation that nullity affects only "understandings" and that it has no legal consequences for the reservation itself. But such an interpretation would run counter to the fundamental rule of inseparability of the acts conflicting with the norm belonging to *corpus iuris cogentis* expressed in Article 44, paragraph 5, of the Vienna Convention on the Law of Treaties.

Judge Kreca is of the opinion that the extensive use of armed force, in particular if it is used against objects and means constituting conditions of normal life, can be conducive to "inflicting on the group conditions of life" bringing about "its physical destruction" (Genocide Convention, Article II).

Judge Kreca goes on to say that it can be argued that such acts are in the function of degrading the military capacity of the Federal Republic of Yugoslavia. But such an explanation can hardly be regarded as a serious argument. For the spiral of such a line of thinking may easily come to a point when, having in mind that military power is after all comprised of people, even mass killing of civilians can be claimed to constitute some sort of precautionary measure that should prevent the maintenance or, in case of mobilization, the increase of military power of a State.

Judge Kreca also points out that, in the incidental proceedings the Court cannot and should not concern itself with the definitive qualification of the intent to impose upon the group conditions in which the survival of the group is threatened. Having in mind the purpose of provisional measures, it can be said that at this stage of the proceedings it is sufficient to establish that, in the conditions of extensive bombing, there is an objective risk of bringing about conditions in which the survival of the group is threatened.

126. LAND AND MARITIME BOUNDARY BETWEEN CAMEROON AND NIGERIA (CAMEROON *v.* NIGERIA) (Permission to intervene by Equatorial Guinea)

Order of 21 October 1999

By its Order the Court authorized Equatorial Guinea to intervene in the case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon *v.* Nigeria) "to the extent, in the manner and for the purposes set out in its Application for permission to intervene".

The Court took the decision unanimously.

The Court was composed as follows: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek; Judges ad hoc Mbaye, Ajibola; Registrar Valencia-Ospina.

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The complete text of the Order is as follows:

"The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 48 and 62 of the Statute of the Court and to Articles 81, 83, 84 and 85 of the Rules of Court,

Having regard to the Application filed by the Republic of Cameroon in the Registry of the Court on 29 March 1994 instituting proceedings against the Federal Republic of Nigeria in respect of a dispute described as 'relat[ing] essentially to the question of sovereignty over the Bakassi Peninsula', in which the Court was also requested 'to determine the course of the maritime boundary between the two States beyond the line fixed in 1975',

Having regard to the Additional Application submitted by Cameroon on 6 June 1994,

Having regard to the Order of 16 June 1994, whereby the Court indicated that it had no objection to the Additional Application being treated as an amendment to the initial Application and fixed the time limits for the filing of the Memorial of Cameroon and the Counter-Memorial of Nigeria, respectively,

Having regard to the Memorial filed by Cameroon and the preliminary objections submitted by Nigeria within the time limits thus fixed,

Having regard to the Judgment of 11 June 1998, whereby the Court ruled on the preliminary objections raised by Nigeria,

Having regard to the Order of 30 June 1998, whereby the Court fixed a new time limit for the filing of the Counter-Memorial of Nigeria, and to the Order of 3 March 1999, whereby it extended that time limit,

Having regard to the Counter-Memorial filed by Nigeria within the time limit thus extended,

Having regard to the Order of 30 June 1999, whereby the Court decided inter alia that Cameroon should submit a Reply and Nigeria should submit a Rejoinder, and fixed 4 April 2000 and 4 January 2001 respectively as the time limits for the filing of those pleadings,

Makes the following Order:

1. Whereas, by a letter dated 27 June 1999, received in the Registry on 30 June 1999, the Prime Minister of the Republic of Equatorial Guinea submitted to the Court an 'Application ... to intervene in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria*) pursuant to Article 62 of the Statute of the Court and Article 81 of the Rules of the Court'; and whereas that same letter appointed H.E. Mr. Ricardo Mangue Obama N'Fube, Minister of State, Secretary-General of the Presidency of the Government, as Agent;

2. Whereas, in the introduction to its Application, Equatorial Guinea refers to the eighth preliminary objection raised by Nigeria in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria*) and quotes as follows paragraph 116 of the Judgment handed down by the Court on 11 June 1998 on the objections of Nigeria (*I.C.J. Reports 1998*, p. 324):

> 'The Court notes that the geographical location of the territories of the other States bordering the Gulf of Guinea, and in particular Equatorial Guinea and Sao Tome and Principe, demonstrates that it is evident that the prolongation of the maritime boundary between the Parties ... will eventually run into maritime zones where the rights and interests of Cameroon and Nigeria will overlap those of third States. It thus appears that rights and interests of third States will become involved if the Court accedes to Cameroon's request ... The Court cannot therefore, in the present case, give a decision on the eighth preliminary objection as a preliminary matter. In order to determine where a prolonged maritime boundary ... would run, where and to what extent it would meet possible claims of other States, and how its judgment would affect the rights and interests of these States, the Court would of necessity have to deal with the merits of Cameroon's request. At the same time, the Court cannot rule out the possibility that the impact of the judgment required by Cameroon on the rights and interests of third States could be such that the Court would be prevented

from rendering it in the absence of these States, and that consequently Nigeria's eighth preliminary objection would have to be upheld at least in part. *Whether such third States would choose to exercise their rights to intervene in these proceedings pursuant to the Statute remains to be seen.* (Emphasis added)';

and whereas Equatorial Guinea adds:

'It is in this context that Equatorial Guinea comes before the Court. Equatorial Guinea wishes to be very clear that it has no intention of intervening in those aspects of the proceedings that relate to the land boundary between Cameroon and Nigeria, including determination of sovereignty over the Bakassi Peninsula. It is only the maritime boundary aspects of the case before the Court with which Equatorial Guinea is concerned; and, as is explained more fully below, it is the purpose of Equatorial Guinea's intervention to inform the Court of Equatorial Guinea's legal rights and interests so that these may remain unaffected as the Court proceeds to address the question of the maritime boundary between Cameroon and Nigeria, the parties to the case before it. Equatorial Guinea does *not* seek to become a party to the case.';

3. Whereas, in its Application, Equatorial Guinea, referring to Article 81, paragraph 2 (*a*), of the Rules of Court sets out inter alia in these terms 'the interest of a legal nature which [it] considers may be affected by the decision in that case':

'in accordance with its national law, Equatorial Guinea claims the sovereign rights and jurisdiction which pertain to it under international law up to the median line between Equatorial Guinea and Nigeria on the one hand, and between Equatorial Guinea and Cameroon on the other hand. It is these legal rights and interests which Equatorial Guinea seeks to protect ... Equatorial Guinea ... wishes to emphasize that it does not seek the Court's determination of its boundaries with Cameroon or Nigeria. Equatorial Guinea does wish to protect its legal rights and interests, however, and that requires that any Cameroon-Nigeria maritime boundary that may be determined by the Court should not cross over the median line with Equatorial Guinea. If the Court were to determine a Cameroon-Nigeria maritime boundary that extended into Equatorial Guinea waters, as defined by the median line, Equatorial Guinea's rights and interests would be prejudiced ... It is the purpose of Equatorial Guinea to present and to demonstrate its legal rights and interests to the Court and, as appropriate, to state its views as to how the maritime boundary claims of Cameroon or Nigeria may or may not affect the legal rights and interests of Equatorial Guinea';

4. Whereas, in its Application, Equatorial Guinea, referring to Article 81, paragraph 2 (*b*) of the Rules of Court, sets out 'the precise object of the intervention' as follows:

'First, generally, to protect the legal rights of the Republic of Equatorial Guinea in the Gulf of Guinea by all legal means available, and in this regard, therefore, to make use of the procedure established by Article 62 of the Statute of the Court.

Second, to inform the Court of the nature of the legal rights and interests of Equatorial Guinea that could be affected by the Court's decision in the light of the maritime boundary claims advanced by the Parties to the case before the Court';

5. Whereas, in its Application, Equatorial Guinea, referring to Article 81, paragraph 2 (*c*) of the Rules of Court, expresses the following opinion concerning the 'basis of jurisdiction which is claimed to exist as between [it] and the parties to the case':

'The Republic of Equatorial Guinea does not seek to be a party to the case before the Court. There is no basis for jurisdiction under the Statute and Rules of the Court which arises out of the pre-existing understandings between Equatorial Guinea, Nigeria and Cameroon. Equatorial Guinea has not made a declaration under Article 36.2 of the Statute of the Court nor is there an agreement in force among the three States which confers jurisdiction on the Court in this regard. It would be open, of course, to the three countries affirmatively to request the Court not only to determine the Cameroon-Nigeria maritime boundary but also to determine Equatorial Guinea's maritime boundaries with these two States. However, Equatorial Guinea has made no such request and wishes to continue to seek to determine its maritime boundaries with its neighbours through negotiations.

Accordingly, Equatorial Guinea's request to intervene is based solely upon Article 62 of the Statute of the Court';

6. Whereas, in ending its Application, Equatorial Guinea formulates the following conclusion:

'On the basis of the foregoing observations, Equatorial Guinea respectfully requests permission to intervene in the present proceedings between Cameroon and Nigeria for the object and purpose specified herein, and to participate in those proceedings in accordance with Article 85 of the Rules of the Court';

7. Whereas, in accordance with Article 83, paragraph 1, of the Rules of Court, the Deputy-Registrar, by letters dated 30 June 1999, transmitted certified copies of the Application for permission to intervene to the Government of Cameroon and the Government of Nigeria, which were informed that the Court had fixed 16 August 1999 as the time limit for the submission of their written observations on that Application; and whereas, in accordance with paragraph 2 of that same provision, the Deputy-Registrar, on 30 June 1999, also

transmitted a copy of the Application to the Secretary-General of the United Nations;

8. Whereas Cameroon and Nigeria each submitted written observations within the time limit thus fixed; and whereas the Registry transmitted to each Party a copy of the other's observations, as well as copies of the observations of both Parties to Equatorial Guinea;

9. Whereas, in its written observations, Cameroon informs the Court that it 'has no objection in principle to [the intervention of Equatorial Guinea], limited to the maritime boundary, which could allow the Court to be better informed on the general background to the case and to determine more completely the dispute submitted to it'; whereas it adds, referring to the Judgment handed down by the Court on 11 June 1998 (Preliminary Objections), that 'the Court envisaged the possibility that third States might intervene, among which was clearly the Republic of Equatorial Guinea'; and whereas it considers that 'the intervention of Equatorial Guinea should allow the Court to decide on a delimitation of the boundary which will be stable and final in relation to the States involved'; and whereas, in those same written observations, Cameroon moreover

> 'entirely reserves its position in relation to the validity and possible consequences of the unilateral delimitation undertaken by Equatorial Guinea, whose claims, based solely on the principle of equidistance, do not take into account the special geographical features of the area in dispute';

10. Whereas, in its written observations, Nigeria notes that 'Equatorial Guinea does not seek to intervene as a party in the proceedings'; and whereas it adds the following:

> 'Whether or not Equatorial Guinea's Application is accepted, it will in Nigeria's view make no difference to the legal position of Nigeria to the present proceedings, or to the jurisdiction of the Court. On that basis, Nigeria leaves it to the Court to judge whether and to what extent it is appropriate or useful to grant Equatorial Guinea's Application';

11. Whereas communications were subsequently addressed to the Registry by the Parties and by Equatorial Guinea, and whereas the Registry transmitted copies of each of those communications to the other two States; whereas Equatorial Guinea, by a letter dated 3 September 1999, noted that neither Cameroon nor Nigeria 'ha[d] objected in principle to the intervention of Equatorial Guinea'; whereas Nigeria, by a letter dated 13 September 1999, referred to certain passages in the written observations of Cameroon and maintained that Cameroon 'misrepresent[ed] the position' of Equatorial Guinea, in that '[a]s Nigeria understands the position, Equatorial Guinea did not seek to intervene as a party, but as a third party'; whereas Cameroon, by a letter dated 11 October 1999, indicated that 'it [did] not dispute the right of Equatorial Guinea to intervene as a non-party intervener' and expressed the view that 'it [was] not for Nigeria to take the place of Equatorial Guinea in deciding on the latter's entitlement to intervene', it being for the Court itself to determine the legal effects of such an intervention; and whereas Equatorial Guinea, in a further communication, dated 11 October 1999, observed that 'there [could] be no question of the Court's eventual Judgment determining the maritime boundaries of Equatorial Guinea, whether with Cameroon or Nigeria' and that it '[sought] the status of a non-party intervener';

12. Whereas neither of the Parties objects to the Application by Equatorial Guinea for permission to intervene being granted;

13. Whereas, in the opinion of the Court, Equatorial Guinea has sufficiently established that it has an interest of a legal nature which could be affected by any judgment which the Court might hand down for the purpose of determining the maritime boundary between Cameroon and Nigeria;

14. Whereas, moreover, as a Chamber of the Court has already had occasion to observe,

> '[s]o far as the object of [a State's] intervention is 'to inform the Court of the nature of the legal rights [of that State] which are in issue in the dispute', it cannot be said that this object is not a proper one: it seems indeed to accord with the function of intervention' (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application by Nicaragua for permission to intervene, Judgment of 13 September 1990*, I.C.J. *Reports* 1990, p. 130, para. 90);

15. Whereas in addition, as the same Chamber pointed out,

> '[i]t ... follows ... from the juridical nature and from the purposes of intervention that the existence of a valid link of jurisdiction between the would-be intervener and the parties is not a requirement for the success of the application. On the contrary, the procedure of intervention is to ensure that a State with possibly affected interests may be permitted to intervene even though there is no jurisdictional link and it therefore cannot become a party' (ibid., p. 135, para. 100);

16. Whereas, in view of the position of the Parties and the conclusions which the Court itself has reached, the Court considers that there is nothing to prevent the Application by Equatorial Guinea for permission to intervene from being granted;

17. Whereas copies of the pleadings and documents annexed, as filed in the case at present, have already been communicated to Equatorial Guinea pursuant to Article 53, paragraph 1, of the Rules of Court; and whereas a copy of the Reply of Cameroon and of the Rejoinder of Nigeria, which the Court has directed them to submit pursuant to its Order of 30 June 1999, will also be so communicated; whereas, in accordance with the provisions of Article 85 of the Rules of Court, it is necessary to fix time limits for the filing, respectively, of a 'written statement' by Equatorial Guinea and of

'written observations' by Cameroon and by Nigeria on that statement; and whereas those time limits must 'so far as possible, coincide with those already fixed for the pleadings in the case', in the present instance by the above-mentioned Order of 30 June 1999;

18. For these reasons,

The Court,

Unanimously,

1. *Decides* that the Republic of Equatorial Guinea is permitted to intervene in the case, pursuant to Article 62 of the Statute, to the extent, in the manner and for the purposes set out in its Application for permission to intervene;

2. *Fixes* the following time limits for the filing of the written statement and the written observations referred to in Article 85, paragraph 1, of the Rules of Court:

4 April 2001 for the written statement of the Republic of Equatorial Guinea;

4 July 2001 for the written observations of the Republic of Cameroon and of the Federal Republic of Nigeria;

3. *Reserves* the subsequent procedure for further decision."

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* *

Background information

On 30 June 1999 Equatorial Guinea filed an Application for permission to intervene in the above-mentioned case. It stated that the purpose of its intervention was "to protect [its] legal rights in the Gulf of Guinea by all legal means" and "to inform the Court of Equatorial Guinea's legal rights and interests so that these may remain unaffected as the Court proceeds to address the question of the maritime boundary between Cameroon and Nigeria". Equatorial Guinea made it clear that it did not seek to intervene in those aspects of the proceedings that relate to the land boundary between Cameroon and Nigeria, nor to become a party to the case. It further stated that, although it would be open to the three countries to request the Court not only to determine the Cameroon-Nigeria maritime boundary but also to determine Equatorial Guinea's maritime boundary with these two States, Equatorial Guinea had made no such request and wished to continue to seek to determine its maritime boundary with its neighbours by negotiation.

In support of its Application, Equatorial Guinea stressed that one of the claims presented by Cameroon in its Memorial of 16 March 1995 "ignored the legal rights of Equatorial Guinea in the most flagrant way" because it disregarded the median line (the line dividing maritime zones between two States of which every point is equidistant from the coasts of each of those States) and that, moreover, "in the bilateral diplomacy between Cameroon and Equatorial Guinea, Cameroon ... never once hinted that it did not accept the median line as the maritime boundary between itself and Equatorial Guinea". Observing that "the general maritime area where the interests of Equatorial Guinea, Nigeria and Cameroon come together is an area of active oil and gas exploration and exploitation", Equatorial Guinea maintained that "any judgment extending the boundary between Cameroon and Nigeria across the median line with Equatorial Guinea [would] be relied upon by concessionaires who would likely ignore Equatorial Guinea's protests and proceed to explore and exploit resources to the legal and economic detriment" of that country.

Under Article 83 of the Rules of Court, Equatorial Guinea's Application was immediately communicated to Cameroon and Nigeria, and the Court fixed 16 August 1999 as the time limit for the filing of written observations by those States.

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127. CASE CONCERNING KASIKILI/SEDUDU ISLAND (BOTSWANA *v.* NAMIBIA)

Judgment of 13 December 1999

In its judgment in the case concerning Kasikili/Sedudu Island (Botswana/Namibia), the Court found, by eleven votes to four, that "the boundary between the Republic of Botswana and the Republic of Namibia follows the line of the deepest soundings in the northern channel of the Chobe River around Kasikili/Sedudu Island" and, by eleven votes to four again, that "Kasikili/Sedudu Island forms part of the territory of the Republic of Botswana".

The Court added unanimously that, "in the two channels around Kasikili/Sedudu Island, the nationals of, and vessels flying the flags of, the Republic of Botswana and the Republic of Namibia shall enjoy equal national treatment".

The Court was composed as follows: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek; Registrar Valencia-Ospina.

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

"104. For these reasons,

THE COURT,

(1) By eleven votes to four,

Finds that the boundary between the Republic of Botswana and the Republic of Namibia follows the line of deepest soundings in the northern channel of the Chobe River around Kasikili/Sedudu Island;

IN FAVOUR: President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Koroma, Vereshchetin, Higgins, Kooijmans;

AGAINST: Vice-President Weeramantry; Judges Fleischhauer, Parra-Aranguren, Rezek.

(2) By eleven votes to four,

Finds that Kasikili/Sedudu Island forms part of the territory of the Republic of Botswana;

IN FAVOUR: President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Koroma, Vereshchetin, Higgins, Kooijmans;

AGAINST: Vice-President Weeramantry; Judges Fleischhauer, Parra-Aranguren, Rezek.

(3) Unanimously,

Finds that, in the two channels around Kasikili/Sedudu Island, the nationals of, and vessels flying the flags of, the Republic of Botswana and the Republic of Namibia shall enjoy equal national treatment."

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Judges Ranjeva, Koroma, and Higgins appended declarations to the judgment of the Court; Judges Oda and Kooijmans appended separate opinions; and Vice-President Weeramantry and judges Fleichhauer, Parra-Aranguren and Rezek appended dissenting opinions.

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Review of the proceedings and submissions of the Parties
(paras. 1-10)

By joint letter dated 17 May 1996, Botswana and Namibia transmitted to the Registrar the original text of a Special Agreement between the two States, signed at Gaborone on 15 February 1996 and entered into force on 15 May 1996, Article I of which reads as follows:

"The Court is asked to determine, on the basis of the Anglo-German Treaty of 1 July 1890 [an agreement between Great Britain and Germany respecting the spheres of influence of the two countries in Africa] and the rules and principles of international law, the boundary between Namibia and Botswana around Kasikili/Sedudu Island and the legal status of the island."

The Court then recites the successive stages of the proceedings and sets out the submissions of the Parties:

Botswana's final submission as presented at the hearing of 5 March 1999 were as follows:

"*May it please the Court*:

(1) to adjudge and declare:

(*a*) that the northern and western channel of the Chobe River in the vicinity of Kasikili/Sedudu Island constitutes the 'main channel' of the Chobe River in accordance with the provisions of Article III (2) of the Anglo-German Agreement of 1890; and

(*b*) consequently, sovereignty in respect of Kasikili/Sedudu Island vests exclusively in the Republic of Botswana; and further

(2) to determine the boundary around Kasikili/Sedudu Island on the basis of the thalweg in the northern and western channel of the Chobe River."

Namibia's final submissions read at the hearing of 2 March 1999 were as follows:

"*May it please the Court, rejecting all claims and submissions to the contrary, to adjudge and declare*

1. The channel that lies to the south of Kasikili/Sedudu Island is the main channel of the Chobe River.

2. The channel that lies to the north of Kasikili/Sedudu Island is not the main channel of the Chobe River.

3. Namibia and its predecessors have occupied and used Kasikili Island and exercised sovereign jurisdiction over it, with the knowledge and acquiescence of Botswana and its predecessors since at least 1890.

4. The boundary between Namibia and Botswana around Kasikili/Sedudu Island lies in the centre (that is to say, the *thalweg*) of the southern channel of the Chobe River.

5. The legal status of Kasikili/Sedudu Island is that it is a part of the territory under the sovereignty of Namibia."

Background to the case
(paras. 11-16)

The Court then gives a description of the geography of the area concerned, illustrated by three sketch maps.

Thereafter the Court recounts the history of the dispute between the Parties which is set against the background of the nineteenth century race among the European colonial powers for the partition of Africa. In the spring of 1890, Germany and Great Britain entered into negotiations with a view to reaching agreement concerning their trade and their spheres of influence in Africa. The resulting Treaty of 1 July 1980 delimited inter alia the spheres of influence of Germany and Great Britain in south-west Africa; that delimitation lies at the heart of the present case.

In the ensuing century, the territories involved experienced various mutations in status. The independent Republic of Botswana came into being on 30 September 1966, on the territory of the former British Bechuanaland

Protectorate, while Namibia (of which the Caprivi Strip forms part) became independent on 21 March 1990.

Shortly after Namibian independence, differences arose between the two States concerning the location of the boundary around Kasikili/Sedudu Island. In May 1992, it was agreed to submit the determination of the boundary around the Island to a Joint Team of Technical Experts. In February 1995, the Joint Team Report, in which the Team announced that it had failed to reach an agreed conclusion on the question put to it, was considered and it was decided to submit the dispute to the International Court of Justice for a final and binding determination.

The rules of interpretation applicable to the 1890 Treaty
(paras. 18-20)

The Court begins by observing that the law applicable to the present case has its source first in the 1890 Treaty, which Botswana and Namibia acknowledge to be binding on them. As regards the interpretation of that Treaty, the Court notes that neither Botswana nor Namibia are parties to the Vienna Convention on the Law of Treaties of 23 May 1969, but that both of them consider that Article 31 of the Vienna Convention is applicable inasmuch as it reflects customary international law.

According to Article 31 of the Vienna Convention on the Law of Treaties:

> "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (*a*) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (*b*) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."

The Court indicates that it shall proceed to interpret the provisions of the 1890 Treaty by applying the rules of interpretation set forth in the 1969 Vienna Convention, recalling that

> "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." (*Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, pp. 21-22, para. 41).

The text of the 1890 Treaty
(paras. 21-46)

The Court first examines the text of the 1890 Treaty, Article III of which reads as follows:

> "In Southwest Africa the sphere in which the exercise of influence is reserved to Germany is bounded:
>
> 1. To the south by a line commencing at the mouth of the Orange river, and ascending the north bank of that river to the point of its intersection by the 20th degree of east longitude.
>
> 2. To the east by a line commencing at the above-named point, and following the 20th degree of east longitude to the point of its intersection by the 22nd parallel of south latitude; it runs eastward along that parallel to the point of its intersection by the 21st degree of east longitude; thence it follows that degree northward to the point of its intersection by the 18th parallel of south latitude; it runs eastward along that parallel till it reaches the river Chobe, and descends the centre of the main channel of that river to its junction with the Zambesi, where it terminates.
>
> It is understood that under this arrangement Germany shall have free access from her Protectorate to the Zambesi by a strip of territory which shall at no point be less than 20 English miles in width.
>
> The sphere in which the exercise of influence is reserved to Great Britain is bounded to the west and northwest by the above-mentioned line. It includes Lake Ngami.
>
> The course of the above boundary is traced in general accordance with a map officially prepared for the British Government in 1889."

As far as the region covered by the present case is concerned, this provision locates the dividing line between the spheres of influence of the contracting parties in the "main channel" of the River Chobe; however, neither this, nor any other provision of the Treaty, furnishes criteria enabling that "main channel" to be identified. It must also be noted that in the English version refers to the "centre" of the main channel, while the German version uses the term "thalweg" of that channel (*Thalweg des Hauptlaufes*). Observing that Botswana and Namibia did not themselves express any real difference of opinion on the meaning of these terms, the Court indicates that it will accordingly treat the words "centre of the main channel" in Article III, paragraph 2, of the 1890 Treaty as having the same meaning as the words "Thalweg des Hauptlaufes". In the Court's opinion, the real dispute between the Parties concerns the location of the main channel where the boundary lies. In Botswana's view, it is to be found "on the basis of the thalwegs in the northern and western channel of the Chobe", whereas in Namibia's view, it "lies in the centre (that is to say thalwegs) of the southern channel of the Chobe River". The Court observes that by introducing the term "main channel" into the draft treaty, the contracting parties must be assumed to have intended that a precise meaning be given to it. For these reasons, the Court indicates that it will therefore

proceed first to determine the main channel. In so doing, it will seek to determine the ordinary meaning of the words "main channel" by reference to the most commonly used criteria in international law and practice, to which the Parties have referred.

Criteria for identifying the "main channel"
(paras. 29-42)

The Court notes that the Parties to the dispute agree on many of the criteria for identifying the "main channel", but disagree on the relevance and applicability of several of those criteria.

For Botswana, the relevant criteria are as follows: greatest depth and width; bed profile configuration; navigability; greater flow of water. Botswana also lays stress on the importance, from the standpoint of identification of the main channel, of "channel capacity", "flow velocity" and "volume of flow". Namibia acknowledges that:

> "[p]ossible criteria for identifying the main channel in a river with more than one channel are the channel with the greatest width, or the greatest depth, or the channel that carries the largest proportion of the annual flow of the river. In many cases the main channel will have all three of these characteristics."

It adds, however, referring to the sharp variations in the level of the Chobe's waters, that:

> "neither width nor depth are suitable criteria for determining which channel is the main channel."

Among the possible criteria, Namibia therefore attaches the greatest weight to the amount of flow: according to it, the main channel is the one "that carries the largest proportion of the annual flow of the river". Namibia also emphasized that another key task was to identify the channel that is most used for river traffic.

The Court notes that the Parties have expressed their views on one or another aspect of the criteria, distinguishing between them or placing emphasis on their complementarity and their relationship with other criteria. Before coming to a conclusion on the respective role and significance of the various criteria thus chosen, the Court further notes that the present hydrological situation of the Chobe around Kasikili/Sedudu Island may be presumed to be essentially the same as that which existed when the 1890 Treaty was concluded.

Depth
(para. 32)

Notwithstanding all the difficulties involved in sounding the depth of the channels and interpreting the results, the Court concludes that the northern channel is deeper than the southern one, as regards mean depth, and even as regards minimum depth.

Width
(para. 33)

With regard to the width, the Court finds, on the basis of a report dating from as early as 1912, aerial photographs taken between 1925 and 1985, and satellite pictures taken in June 1975, that the northern channel is wider than the southern channel.

Flow of water
(paras. 34-37)

With regard to the flow, i.e., the volume of water carried, the Court is not in a position to reconcile the figures submitted by the Parties, who take a totally different approach to the definition of the channels concerned. The Court is of the opinion that the determination of the main channel must be made according to the low water baseline and not the floodline. The evidence shows that when the river is in flood, the Island is submerged by flood water and the entire region takes on the appearance of an enormous lake. Since the two channels are then no longer distinguishable, it is not possible to determine the main channel in relation to the other channel. The Court therefore is not persuaded by Namibia's argument concerning the existence of a major "main" channel whose visible southern channel would merely constitute the thalweg.

Visibility
(para. 38)

The Court is further unable to conclude that, in terms of visibility — or of general physical appearance — the southern channel is to be preferred to the northern channel, as maintained by Namibia.

Bed profile configuration
(para. 39)

Having examined the arguments, maps and photographs put forward by the Parties, the Court is also unable to conclude that, from its bed configuration, the southern channel constitutes the principal and natural prolongation of the course of the Chobe before the bifurcation.

Navigability
(paras. 40-42)

The Court notes that the navigability of watercourses varies greatly, depending on prevailing natural conditions. Those conditions can prevent the use of the watercourse in question by large vessels carrying substantial cargoes, but permit light flat-bottomed vessels to navigate. In the present case, the data furnished by the Parties tend to prove that the navigability of the two channels around Kasikili/Sedudu Island is limited by their shallowness. This situation inclines the Court to the view that, in this respect, the "main channel" in this part of the Chobe is that of the two which offers more favourable conditions for navigation. In the Court's view, it is the northern channel which meets this criterion.

For the foregoing reasons, the Court concludes that, in accordance with the ordinary meaning of the terms that appear in the pertinent provision of the 1890 Treaty, the northern channel of the River Chobe around Kasikili/Sedudu Island must be regarded as its main channel. It observes that this conclusion is supported by the results of three on-site surveys carried out in 1912, 1948 and 1985, which concluded that the main channel of the River Chobe was the northern channel.

The object and purpose of the 1890 Treaty
(paras. 43-46)

The Court then considers how and to what extent the object and purpose of the treaty can clarify the meaning to be given to its terms. While the treaty in question is not a boundary treaty proper but a treaty delimiting spheres of influence, the Parties nonetheless accept it as the treaty determining the boundary between their territories. The contracting powers, the Court observes, by opting for the words "centre of the main channel", intended to establish a boundary separating their spheres of influence even in the case of a river having more than one channel.

The Court notes that navigation appears to have been a factor in the choice of the contracting powers in delimiting their spheres of influence, but it does not consider that navigation was the sole objective of the provisions of Article III, paragraph 2, of the Treaty. In referring to the main channel of the Chobe, the parties sought both to secure for themselves freedom of navigation on the river and to delimit as precisely as possible their respective spheres of influence.

The subsequent practice
(paras. 47-80)

In the course of the proceedings, Botswana and Namibia made abundant reference to the subsequent practice of the parties to the 1890 Treaty — and of their successors — as an element in the interpretation of that Treaty. While both Parties accept that interpretative agreements and subsequent practice do constitute elements of treaty interpretation under international law, they disagree on the consequences to be drawn from the facts in this case for purposes of the interpretation of the 1890 Treaty.

Article 31, paragraph 3, of the 1969 Vienna Convention on the Law of Treaties, which, as stated earlier, reflects customary law, provides, for the interpretation of treaties, as follows:

> "3. There shall be taken into account, together with the context:
>
> (*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretations."

In support of its interpretation of Article III, paragraph 2, of the 1890 Treaty, Botswana relies principally on three sets of documents: a report on a reconnaissance of the Chobe produced in August 1912 by an officer of the Bechuanaland Protectorate Police, Captain Eason; an arrangement arrived at in August 1951 between Major Trollope, Magistrate for the Eastern Caprivi, and Mr. Dickinson, a District Commissioner in the Bechuanaland Protectorate, together with the correspondence that preceded and followed that arrangement; and an agreement concluded in December 1984 between the authorities of Botswana and South Africa for the conduct of a Joint Survey of the Chobe, together with the resultant Survey Report.

The Eason Report (1912)
(paras. 53-55)

The Court shares the view, put forward by Namibia and accepted by Botswana in the final version of its argument, that the Eason Report and its surrounding circumstances cannot be regarded as representing "subsequent practice in the application of the treaty" of 1890, within the meaning of Article 31, paragraph 3 (*b*), of the Vienna Convention.

The Trollope-Redman correspondence (1947-1951)
(paras. 56-63)

In 1947, Mr. Ker, who was operating a transport business in Bechuanaland, planned to bring timber down the Chobe using the northern channel. He obtained the necessary permission from the competent official in the Caprivi Strip, Major Trollope, but also raised the matter with the Bechuanaland authorities. Following a Joint Report entitled "Boundary between the Bechuanaland Protectorate and the Eastern Caprivi Zipfel: Kasikili Island" produced by Major Trollope and Mr. Redman (District Commissioner at Kasane, Bechuanaland) in 1948, and forwarded to their respective authorities, there ensued an extended correspondence between those authorities.

In 1951 an exchange of correspondence between Mr. Dickinson, who had in the meantime succeeded Mr. Redman as District Commissioner at Kasane (Bechuanaland) and Major Trollope led to the following "gentlemen's agreement":

> "(*a*) That we agree to differ on the legal aspect regarding Kasikili Island, and the concomitant question of the Northern Waterway;
>
> (*b*) That the administrative arrangements which we hereafter make are entirely without prejudice to the rights of the Protectorate and the Strip to pursue the legal question mentioned in (*a*) should it at any time seem desirable to do so and will not be used as an argument that either territory has made any admissions or abandoned any claims; and
>
> (*c*) That, having regard to the foregoing, the position revert to what it was de facto before the whole question was made an issue in 1947 — i.e. that Kasikili Island continue to be used by Caprivi tribesmen and that the

Northern Waterway continue to be used as a 'free for all' thoroughfare."

Each side however made a caveat with regard to its position in any future controversy over the Island.

The Court observes that each of the Parties to the present proceedings relies on the Trollope-Redman Joint Report and the correspondence relating thereto in support of its position. From its examination of the extended correspondencc, the Court concludes that the above-mentioned events, which occurred between 1947 and 1951, demonstrate the absence of agreement between South Africa and Bechuanaland with regard to the location of the boundary around Kasikili/Sedudu Island and the status of the Island. Those events cannot therefore constitute "subsequent practice in the application of the treaty [of 1890] which establishes the agreement of the parties regarding its interpretation" (1969 Vienna Convention on the Law of Treaties, Art. 31, para. 3 (*b*)). *A fortiori*, they cannot have given rise to an "agreement between the parties regarding the interpretation of the treaty or the application of its provisions" (ibid., Art. 31, para. 3 (*a*)).

The Joint Survey of 1985
(paras. 64-68)

In October 1984 an incident during which shots were fired took place bctween members of the Botswana Defence Force and South African soldiers who were travelling by boat in the Chobe's southern channel. At a meeting held in Pretoria on 19 December 1984 between representatives of various South African and Botswanan ministries, it emerged that the incident had arisen out of differences of interpretation as to the precise location of the boundary around Kasikili/Sedudu Island. At this meeting, reference was made to the terms of the 1890 Treaty and it was agreed "that a joint survey should take place as a matter of urgency to determine whether the main Channel of the Chobe River is located to the north or the south of the Sidudu/Kasikili Island". The joint survey was carried out at the beginning of July 1985. The conclusions of the survey report were as follows:

> "The main channel of the Chobe River now passes Sidudu/Kasikili Island to the west and to the north of it. (See annexed maps)
>
> The evidence available seems to point to the fact that this has been the case, at least, since 1912.
>
> It was not possible to ascertain whether a particularly heavy flood changed the course of the river between 1890 and 1912. Captain Eason of the Bechuanaland Protectorate Police states, on page 4 of Part I of the report which has been referred to earlier, that floods occurred in 1899 and in June and July of 1909.
>
> If the main channel of the river was ever situated to the south of the island, it is probable that erosion in the Sidudu Valley, the location of which can be seen in the annexed Map C, has caused the partial silting up of the southern channel.
>
> Air photographs showing the channels of the river in the vicinity of the island are available in the archives of the two national survey organizations. They were taken in 1925, 1943, 1972, 1977, 1981 and 1982. No substantial change in the position of the channels is evident from the photographs."

Having examined the subsequent correspondence between the South African and Botswana authorities, the Court finds that it cannot conclude therefrom that in 1984-1985 South Africa and Botswana had agreed on anything more than the despatch of the joint team of experts. In particular, the Court cannot conclude that the two States agreed in some fashion or other to recognize themselves as legally bound by the results of the joint survey carried out in July 1985. Neither the record of the meeting held in Pretoria on 19 December 1984 nor the experts' terms of reference serve to establish that any such agreement was reached. Moreover, the subsequent correspondence between the South African and Botswana authorities appears to deny the existence of any such agreement: in a Note of 4 November 1985, Botswana called upon South Africa to accept the survey conclusions; not only did South Africa fail to accept them but on several occasions it emphasized the need for Botswana to negotiate and agree on the question of the boundary with the relevant authorities of South West Africa/Namibia, or indeed of the future independent Namibia.

Presence of Masubia on the Island
(paras. 71-75)

In the proceedings Namibia, too, invoked in support of its arguments the subsequent practice of the parties to the 1890 Treaty. In its Memorial it contended that this conduct

> "is relevant to the present controversy in three distinct ways. In the first place, it corroborates the interpretation of the Treaty ... Second, it gives rise to a second and entirely independent basis for Namibia's claim under the doctrines concerning acquisition of territory by prescription, acquiescence and recognition. Finally, the conduct of the parties shows that Namibia was in possession of the Island at the time of termination of colonial rule, a fact that is pertinent to the application of the principle of *uti possidetis*."

The subsequent practice relied on by Namibia consists of

> "[t]he control and use of Kasikili Island by the Masubia of Caprivi, the exercise of jurisdiction over the Island by the Namibian governing authorities, and the silence by Botswana and its predecessors persisting for almost a century with full knowledge of the facts ..."

The Court indicates that it will not at this point examine Namibia's argument concerning prescription. It will merely seek to ascertain whether the long-standing, unopposed, presence of Masubia tribes people on Kasikili/Sedudu Island constitutes "subsequent practice in the application of the [1890] treaty which establishes the agreement of the parties regarding its interpretation" (1969 Vienna Convention on

the Law of Treaties, Art. 31, para. 3 (*b*)). To establish such practice, at least two criteria would have to be satisfied: first, that the occupation of the Island by the Masubia was linked to a belief on the part of the Caprivi authorities that the boundary laid down by the 1890 Treaty followed the southern channel of the Chobe; and, second, that the Bechuanaland authorities were fully aware of and accepted this as a confirmation of the Treaty boundary.

There is nothing that shows, in the opinion of the Court, that the intermittent presence on the Island of people from the Caprivi Strip was linked to territorial claims by the Caprivi authorities. It further seems to the Court that, as far as Bechuanaland, and subsequently Botswana, were concerned, the intermittent presence of the Masubia on the Island did not trouble anyone and was tolerated, not least because it did not appear to be connected with interpretation of the terms of the 1890 Treaty. The Court thus finds that the peaceful and public use of Kasikili/Sedudu Island, over a period of many years, by Masubia tribesmen from the Eastern Caprivi does not constitute "subsequent practice in the application of the [1890] treaty" within the meaning of Article 31, paragraph 3 (*b*), of the Vienna Convention on the Law of Treaties.

*

The Court concludes from all of the foregoing that the subsequent practice of the parties to the 1890 Treaty did not result in any "agreement between the parties regarding the interpretation of the treaty or the application of its provisions", within the meaning of Article 31, paragraph 3 (*a*), of the 1969 Vienna Convention on the Law of Treaties, nor did it result in any "practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation", within the meaning of subparagraph (*b*) of that same provision.

Maps as evidence
(paras. 81-87)

Both Parties have submitted in evidence in support of their respective positions a large number of maps, dating back as far as 1880. Namibia points out that the majority of the maps submitted in these proceedings, even those emanating from British colonial sources and intended to show the boundaries of Bechuanaland, tend to place the boundary around Kasikili/Sedudu Island in the southern channel. Namibia relies on this as "a specialized form of 'subsequent practice' and ... also an aspect both of the exercise of jurisdiction and the acquiescence in it that matures into prescriptive title". Botswana for its part places less reliance on maps, pointing out, inter alia, that most of the early maps show too little detail, or are too small in scale, to be of value in this case. Botswana asserts, however, that the available maps and sketches indicate that, from the time the Chobe was surveyed with any particularity by European explorers from the 1860s onwards, a north channel around the Island was known and regularly depicted. Botswana does not, however, attempt to demonstrate that this places the boundary in the northern channel. Rather, its overall position is that the map evidence is far less consistent in placing the boundary in the southern channel than Namibia claims.

The Court begins by recalling what the Chamber dealing with the *Frontier Dispute* (*Burkina Faso/Republic of Mali*) case had to say on the evidentiary value of maps:

> "maps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights. Of course, in some cases maps may acquire such legal force, but where this is so the legal force does not arise solely from their intrinsic merits: it is because such maps fall into the category of physical expressions of the will of the State or States concerned. This is the case, for example, when maps are annexed to an official text of which they form an integral part. Except in this clearly defined case, maps are only extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts." (*I.C.J. Reports 1986*, p. 582, para. 54)

After examining the map evidence produced in this case, the Court considers itself unable to draw conclusions from it, in view of the absence of any map officially reflecting the intentions of the parties to the 1890 Treaty and of any express or tacit agreement between them or their successors concerning the validity of the boundary depicted in a map, as well as in the light of the uncertainty and inconsistency of the cartographic material submitted to it. That evidence cannot therefore "endors[e] a conclusion at which a court has arrived by other means unconnected with the maps" (*Frontier Dispute (Burkina Faso/Republic of Mali), I.C.J. Reports 1986*, p. 583, para. 56), nor can it alter the results of the Court's textual interpretation of the 1890 Treaty.

"Centre of the main channel" or Thalweg
(paras. 88-89)

The foregoing interpretation of the relevant provisions of the 1890 Treaty leads the Court to conclude that the boundary between Botswana and Namibia around Kasikili/Sedudu Island provided for in this Treaty lies in the northern channel of the Chobe River.

According to the English text of the Treaty, this boundary follows the "centre" of the main channel; the German text uses the word "thalweg". The Court has already indicated that the parties to the 1890 Treaty intended these terms to be synonymous and that Botswana and Namibia had not themselves expressed any real difference of opinion on this subject.

It is moreover clear from the *travaux préparatoires* of the Treaty that there was an expectation of navigation on the Chobe by both contracting parties, and a common intention to exploit this possibility. Although the parties in 1890 used the terms "thalweg" and "centre of the channel"

interchangeably, the former reflects more accurately the common intention to exploit navigation than does the latter. Accordingly this is the term that the Court will consider determinative in Article III, paragraph 2.

Inasmuch as Botswana and Namibia agreed, in their replies to a question put by a Member of the Court, that the thalweg of the Chobe was formed by the line of deepest soundings in that river, the Court concludes that the boundary follows that line in the northern channel around Kasikili/Sedudu Island.

Acquisitive prescription
(paras. 90-99)

The Court continues by observing that Namibia, however, claims title to Kasikili/Sedudu Island, not only on the basis of the 1890 Treaty but also, in the alternative, on the basis of the doctrine of prescription. Namibia argues that

> "by virtue of continuous and exclusive occupation and use of Kasikili Island and exercise of sovereign jurisdiction over it from the beginning of the century, with full knowledge, acceptance and acquiescence by the governing authorities in Bechuanaland and Botswana, Namibia has prescriptive title to the Island".

Botswana maintains that the Court cannot take into consideration Namibia's arguments relating to prescription and acquiescence as these are not included in the scope of the question submitted to it under the terms of the Special Agreement.

The Court notes that under the terms of Article I of the Special Agreement it is asked to determine the boundary between Namibia and Botswana around Kasikili/Sedudu Island and the legal status of the Island "on the basis of the Anglo-German Treaty of 1 July 1890 and the rules and principles of international law". In the Court's view the Special Agreement, in referring to the "rules and principles of international law", not only authorizes the Court to interpret the 1890 Treaty in the light of those rules and principles but also to apply those rules and principles independently. The Court therefore considers that the Special Agreement does not preclude the Court from examining arguments relating to prescription put forward by Namibia.

After summarizing the arguments advanced by each of the Parties the Court observes that they agree between themselves that acquisitive prescription is recognized in international law and that they further agree on the conditions under which title to territory may be acquired by prescription, but that their views differ on whether those conditions are satisfied in this case. Their disagreement relates primarily to the legal inferences which may be drawn from the presence on Kasikili/Sedudu Island of the Masubia of Eastern Caprivi: while Namibia bases its argument primarily on that presence, considered in the light of the concept of "indirect rule", to claim that its predecessors exercised title-generating State authority over the Island, Botswana sees this as simply a "private" activity, without any relevance in the eyes of international law.

The Court continues by pointing out that for present purposes, it need not concern itself with the status of acquisitive prescription in international law or with the conditions for acquiring title to territory by prescription. The Court considers, for the reasons set out below, that the conditions cited by Namibia itself are not satisfied in this case and that Namibia's argument on acquisitive prescription therefore cannot be accepted.

The Court observes that it follows from its examination of the presence of the Masubia on the Island (see above) that even if links of allegiance may have existed between the Masubia and the Caprivi authorities, it has not been established that the members of this tribe occupied the Island *à titre de souverain*, i.e., that they were exercising functions of State authority there on behalf of those authorities. Indeed, the evidence shows that the Masubia used the Island intermittently, according to the seasons and their needs, for exclusively agricultural purposes; this use, which began prior to the establishment of any colonial administration in the Caprivi Strip, seems to have subsequently continued without being linked to territorial claims on the part of the Authority administering the Caprivi. Admittedly, when, in 1947-1948, the question of the boundary in the region arose for the first time between the local authorities of Bechuanaland Protectorate and of South Africa, the Chobe's "main channel" around the Island was said to be the northern channel, but the South African authorities relied on the presence of the Masubia on the Island in order to maintain that they had title based on prescription. However, from then on the Bechuanaland authorities took the position that the boundary was located in the northern channel and that the Island was part of the Protectorate; after some hesitation, they declined to satisfy South Africa's claims to the Island, while at the same time recognizing the need to protect the interests of the Caprivi tribes. The Court infers from this, first, that for Bechuanaland, the activities of the Masubia on the Island were an independent issue from that of title to the Island and, second, that, as soon as South Africa officially claimed title, Bechuanaland did not accept that claim, which precluded acquiescence on its part.

In the Court's view, Namibia has not established with the necessary degree of precision and certainty that acts of State authority capable of providing alternative justification for prescriptive title, in accordance with the conditions set out by Namibia, were carried out by its predecessors or by itself with regard to Kasikili/Sedudu Island.

The legal status of the Island and the two channels around it
(paras. 100-103)

The Court's interpretation of Article III (2) of the 1890 Treaty has led it to conclude that the boundary between Botswana and Namibia around Kasikili/Sedudu Island follows the line of deepest soundings in the northern channel of the Chobe. Since the Court has not accepted Namibia's argument on prescription, it follows that

Kasikili/Sedudu Island forms part of the territory of Botswana.

The Court observes, however, that the Kasane Communiqué of 24 May 1992 records that the Presidents of Namibia and Botswana agreed and resolved that:

"(*c*) existing social interaction between the people of Namibia and Botswana should continue;

(*d*) the economic activities such as fishing shall continue on the understanding that fishing nets should not be laid across the river;

(*e*) navigation should remain unimpeded including free movement of tourists".

The Court, which by the terms of the Joint Agreement between the Parties is empowered to determine the legal status of Kasikili/Sedudu Island concludes, in the light of the above-mentioned provisions of the Kasane Communiqué and in particular its subparagraph (*e*) and the interpretation of that subparagraph Botswana gave before the Court in this case, that the Parties have undertaken to one another that there shall be unimpeded navigation for craft of their nationals and flags in the channels of Kasikili/Sedudu Island. As a result, in the southern channel of Kasikili/Sedudu Island, the nationals of Namibia, and vessels flying its flag, are entitled to, and shall enjoy, a treatment equal to that accorded by Botswana to its own nationals and to vessels flying its own flag. Nationals of the two States, and vessels, whether flying the flag of Botswana or of Namibia, shall be subject to the same conditions as regards navigation and environmental protection. In the northern channel, each Party shall likewise accord the nationals of, and vessels flying the flag of, the other, equal national treatment.

Declaration of Judge Ranjeva

Judge Ranjeva explains how he interprets the reply to Article I of the Special Agreement concerning Articles II and III of the operative part of the Judgment relating to the status of Kasikili/Sedudu Island:

1. Given its effect, in terms of allocation of territory, the Judgment's choice of the northern channel as the main channel is the least improbable solution, in the absence of a systematic comparison of the two navigation channels; this is the reason for the finding that Kasikili/Sedudu Island forms part of Botswana territory.

2. The Kasane Communiqué created legal obligations for the two States parties to the dispute with regard to the enjoyment and exercise of rights by their nationals in the relevant area; in addition to navigation and fishing rights in the channel, there is a right of free access to the surrounding waters and to the territory of Kasikili/Sedudu Island.

Further, as regards the presence of the Masubia on Kasikili/Sedudu Island, the statement in paragraph 98 of the Judgment that:

"even if links of allegiance may have existed between the Masubia and the Caprivi authorities, it has not been established that the members of this tribe occupied the Island *à titre de souverain*, i.e., that they were exercising functions of State authority there on behalf of those authorities"

is not of general import and relates only to the particular circumstances of the present case.

Declaration of Judge Koroma

In his declaration Judge Koroma stated that the Governments of Namibia and Botswana should be commended for their decision to bring their dispute to the Court for peaceful settlement. He recalled that similar disputes have in the past given rise to serious armed conflicts, endangering the peace and security of the States involved.

He further stated that, given its task, it was inevitable that the Court would choose one of a possible number of interpretations of the 1890 Anglo-German Agreement as representing the shared intention of the Parties regarding the location of the boundary and the status of the Island. But that in so doing, the Court also took into consideration the principle of *uti possidetis*, a recognized principle of the African legal order regarding boundaries of African States.

The Judge added that, this notwithstanding, the Court had ruled that the nationals and boats flying the flags of the Republic of Botswana and the Republic of Namibia should enjoy equal treatment in the waters of each other's State in accordance with the contemporary principles of the law of international watercourses and the Kasane Communiqué.

In the Judge's view, the Judgment should invest the boundary between the two countries with the necessary legal validity and ensured equitable treatment of a shared natural resource.

Declaration of Judge Higgins

Judge Higgins states in her declaration that, contrary to what is stated in the Judgment, the Court is not engaged in an exercise of treaty interpretation of words in their ordinary meaning. Rather, the Court is applying, in 1997, to a river section well understood today, a general term selected by the Parties in 1890. In so doing, the Court must simultaneously have regard to the broad intentions of the Parties in 1890 and the state of contemporary knowledge about the area in question.

In her view no great weight should be placed upon criteria related to navigation, as we now know the hopes of the Parties regarding navigation to the Zambezi to be misplaced. Realism requires us rather to emphasize criteria relevant to the other intention of the Parties — to arrive at a clear frontier — that being an objective which is still obtainable through the decision of the Court.

The question of general physical appearance is thus important. Although the Chobe Ridge is the most dominant bank in both channels, year round the northern channel appears to be broader and more visible. For Judge Higgins, many of the factors, while educational and interesting in themselves, have little relevance to the task at hand.

Separate opinion of Judge Oda

Judge Oda voted in favour of the operative part of the Judgment because he supports the Court's determination that the northern channel of the Chobe River constitutes the boundary between Botswana and Namibia.

However, Judge Oda finds it difficult to understand properly the sequence of logic followed by the Court in the Judgment. In his view, the Judgment places excessive reliance on the Vienna Convention on the Law of Treaties, whereas, so Judge Oda believes, the case is not one involving the application of that Convention for the purpose of the Court's interpretation of the 1890 Anglo-German Treaty. In addition, he does not agree with the Court's approach of viewing the past practice primarily from the standpoint of whether this might constitute evidence of any "subsequent agreement" or "subsequent practice" within the meaning of the Vienna Convention.

Judge Oda accordingly sketches out the view that he takes of the case.

After looking at the background to the presentation of the case to the Court, Judge Oda takes the view that, as the *compromis* was not drafted with clarity, the Parties should have been asked to clarify their common position as to whether they regard the determination of the boundary, which would then result in the determination of the legal status of Kasikili/Sedudu Island, as a single issue or whether they regard these as two separate issues.

Judge Oda is of the view that the definition of the main channel and, in particular, the identification of its location, depends largely on scientific knowledge, which the Court should have obtained by seeking the assistance of experts appointed by it. That, however, the Court chose not to do.

Judge Oda, however, does not object to the conclusion the Court has reached in its choice on its own initiative, without the assistance of independent experts, of the northern channel as the main channel of the Chobe River; and hence, as the boundary along the River between the two States.

Judge Oda agrees with the Court in denying that the concept of "acquisitive prescription" has any role to play in this case.

Judge Oda concludes that the northern channel has, for the past several decades, as indicated by certain practices and in certain survey reports of the region, been regarded as the main channel separating the area of the northern and southern banks in the vicinity of Kasikili/Sedudu Island in the Chobe River. These factors would, in Judge Oda's view (which is contrary to the position taken by the Court), be the most pertinent in assisting the Court now to determine the boundary between the two States. Judge Oda believes that determination of the boundary was the original intention of the Parties in bringing this case by means of a *compromis* to the International Court of Justice.

Separate opinion of Judge Kooijmans

Judge Kooijmans has voted in favour of all parts of the *dispositif* of the Judgment. He disagrees, however, with the Court's view that the Special Agreement by referring to the "rules and principles of international law" allows the Court to apply these rules and principles independently of the Treaty and to examine Namibia's alternative claim that it has title to Kasikili/Sedudu on the basis of the doctrine of acquisitive prescription. According to Judge Kooijmans this part of Namibia's claim should have been declared inadmissible, since the Special Agreement precludes the Court from determining the status of the Island independently of the Treaty and that is exactly what the Court would have done if it had concluded that Namibia's claim is valid.

In the second part of his opinion Judge Kooijmans expresses the view that the mutual commitments the Parties have made in the Kasane Communiqué of 1992 with regard to the uses of the waters around Kasikili/Sedudu Island, clearly reflect recent developments in international law such as the principle of the equitable and reasonable utilization of shared water resources. The Chobe River around the Island undoubtedly is part of a "watercourse" in the sense of the 1997 Convention on the Non-Navigational Uses of International Watercourses, which defines a watercourse as a "system of surface waters and ground waters constituting by virtue of their physical relationship a unitary whole flowing into a common terminus". Although this Convention has not yet entered into force, it embodies certain rules and principles, such as the rule of equitable utilization, which have become well-established in international law. The present use of the waters around the Island for tourist purposes can hardly be identified as transport by river and is more similar to the uses for non-navigational purposes which are the subject of the 1997 Convention. In their future dealings concerning the uses of the waters around Kasikili/Sedudu Island the Parties, therefore, should let themselves be guided by the rules and principles contained in the 1997 Convention.

Dissenting opinion of Vice-President Weeramantry

Vice-President Weeramantry, in his dissenting opinion, took the view that since the expressions "main channel" and "*Thalweg des Hauptlaufes*" in the 1890 Treaty admitted of more than one interpretation, the sense in which they were understood contemporaneously by the Parties was an important aid to their interpretation.

The regular use of Kasikili/Sedudu Island by the Masubian people for over half a century after the Treaty, the absence of any acknowledgement by them of title in any other State, the absence of any objection to such use or of any assertion of claim by the predecessors in title of Botswana — all these pointed to a contemporaneous understanding, by the parties to the Treaty and their officials, that the Masubia were not crossing national boundaries. Consequently, this pointed to the southern channel of the Chobe as being the boundary indicated by the 1890 Treaty. The conduct of governments more than half a century later, when background circumstances and power configurations had drastically changed, was not evidence of contemporaneous understanding.

The word "agreement" in Article 31, paragraph 3 (*b*), of the Vienna Convention on the Law of Treaties is not confined to a verbal agreement, but covers common

understanding which may be indicated by action or inaction, affirmation or silence.

The opinion discusses the thalweg principle and the ambivalence of the scientific criteria and of navigability for determining the main channel.

The opinion points out the richness of Kasikili/Sedudu Island as a wildlife habitat and the legal principles that are attracted by this circumstance.

The opinion goes on to consider the equitable navigational use of boundary rivers, and judicial responses to a boundary demarcation which involves the dismantling or division of an ecologically integral unit.

It also discusses the scope for equity in boundary delimitation.

The differences between treaties dealing with spheres of influence and strictly boundary treaties are examined, as well as the significance of this distinction in the field of boundary delimitation.

The question of joint international regimes to safeguard the environment is discussed in some detail.

In the result, Vice-President Weeramantry's view, as expressed in the opinion, is that, while the Island belongs to Namibia, a joint international regime between the two countries should be set up to safeguard the environmental interests of the Island.

Dissenting opinion of Judge Fleischhauer

Judge Fleischhauer has voted against paragraphs 1 and 2 of the *dispositif* of the Court's Judgment; he dissents from the Court's interpretation of the term "main channel of that river"/ "*Hauptlauf dieses Flusses*" as meaning the northern rather than the southern channel of the Chobe River around Kasikili/Sedudu Island. As the Court does not accept Namibia's argument on prescriptive title to the Island, his dissent on the interpretation of the term "main channel of that river"/ "*Hauptlauf dieses Flusses*" affects not only his view on the location of the boundary but also his view on the territorial status of the Island. This explains why he voted not only against the first but also against the second paragraph of the *dispositif*. Judge Fleischhauer voted, however, in favour of the third paragraph.

While concurring with what the Court had to say about the role of prescription in the case, Judge Fleischhauer makes an additional remark on this subject.

Dissenting opinion of Judge Parra-Aranguren

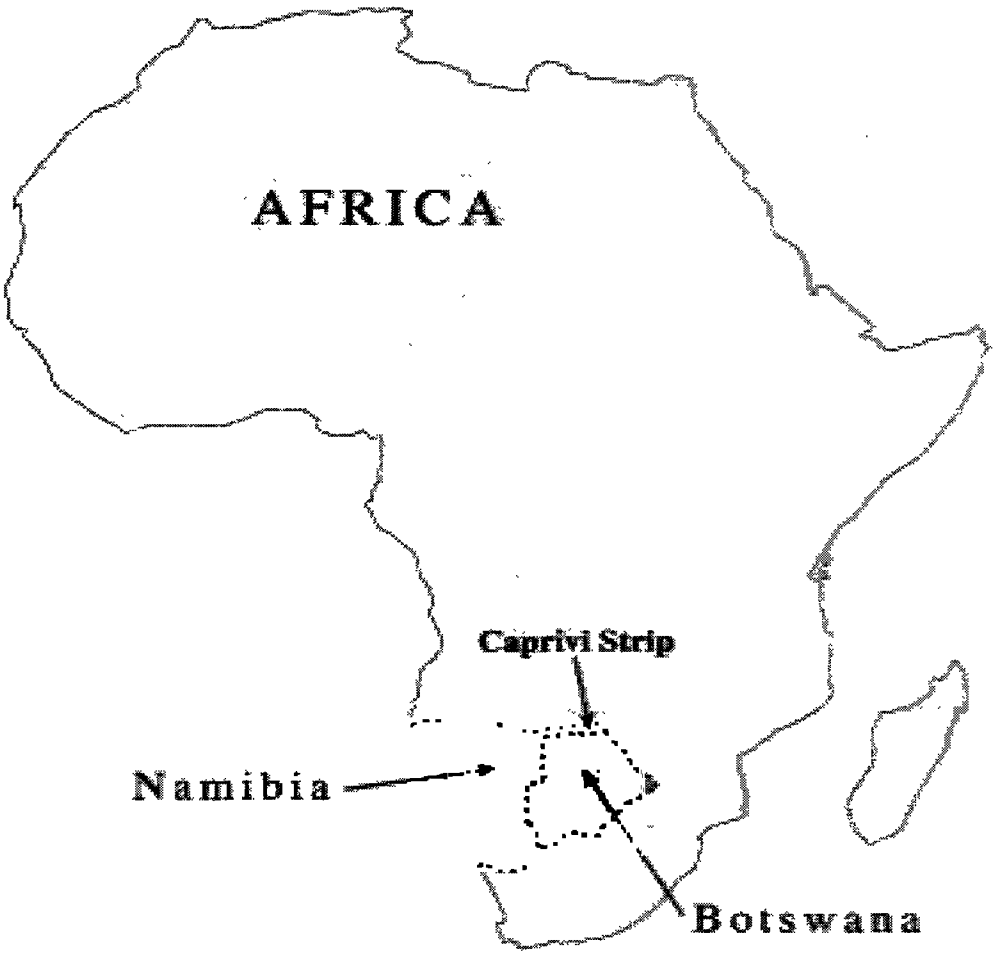
1. Judge Parra-Aranguren observes, as does the Judgment, that Botswana and Namibia are not in agreement as to the meaning of the phrase "the *centre of the main channel (der Thalweg des Hauptlaufes) of the Chobe River*" found in Article III, paragraph 2, of the 1890 Anglo-German Agreement; that the Treaty itself does not define it; that no other of its provisions provide by implication guidelines useful for this purpose; and that for this reason such expression has to be interpreted according to customary international law as expressed in Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969. Therefore, in accordance with letter (*b*) of said Article 31, it is necessary to examine "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation"; always keeping in mind that such agreement may be established not only through their joint or parallel conduct, but also through the activity of only one of the parties, where this is assented to or not objected to by the other party.

2. Judge Parra-Aranguren considers that the Report of Captain Eason (1912); the Joint Report prepared by Mr. Trollope and Mr. Redman (1948); the exchange of letters which followed between 1948 and 1951; and Mr. Renew's Report (1965) lead to the conclusion that the Masubia of the Eastern Caprivi were the only tribesmen who used Kasikili/Sedudu Island at least until 1914; that their occupation of Kasikili/Sedudu Island was peaceful and public; and that their chiefs "became *in a certain sense* agents of the colonial administration", as Botswana acknowledges (see paragraph 85 of his dissenting opinion). Therefore, in his opinion, the subsequent practice of Germany and Great Britain reflected their understanding that Kasikili/Sedudu Island formed part of German South West Africa and that the southern channel of the Chobe River was the "main channel" referred to in Article III, paragraph 2, of the 1890 Anglo-German Agreement.

3. Judge Parra-Aranguren states further that subsequent practice of the parties to the 1890 Anglo-German Agreement is only relevant up to the beginning of the First World War, when the Eastern Caprivi was occupied by Rhodesian forces in September 1914; that no subsequent practice of the parties to the Treaty was possible when British troops exercised de facto control over South West Africa; that in 1920 the League of Nations confirmed the establishment of the Mandate over South West Africa; and that during the existence of the Mandate over South West Africa (Namibia) neither of the parties to the 1890 Anglo-German Treaty had competence to recognize, either by express agreement or by subsequent practice, that the aforementioned "main channel" of the Chobe River was the northern channel and not the southern channel, since this new interpretation would have represented a modification of the territory submitted to the Mandate. Consequently, the original understanding was maintained and for this reason Judge Parra-Aranguren concludes that Kasikili/Sedudu Island forms part of Namibia and that the southern channel of the Chobe River is the "main channel" referred to in Article III, paragraph 2, of the 1890 Anglo-German Agreement.

Dissenting opinion of Judge Rezek

In his dissenting opinion Judge Rezek emphasizes the ambiguities in the geography of the Kasikili/Sedudu area. He criticizes the arguments based on navigability, visibility and the natural prolongation of the river at the bifurcation. He interprets the Anglo-German Treaty of 1890 in the light of history, taking into account the practice of the parties, the principle of the equitable apportionment of the resources of a watercourse, the cartography and the de facto occupation of the Island by the Caprivi Masubia. He finds that priority must go to those elements which place the boundary in the southern channel and accord Namibia sovereignty over Kasikili/Sedudu.

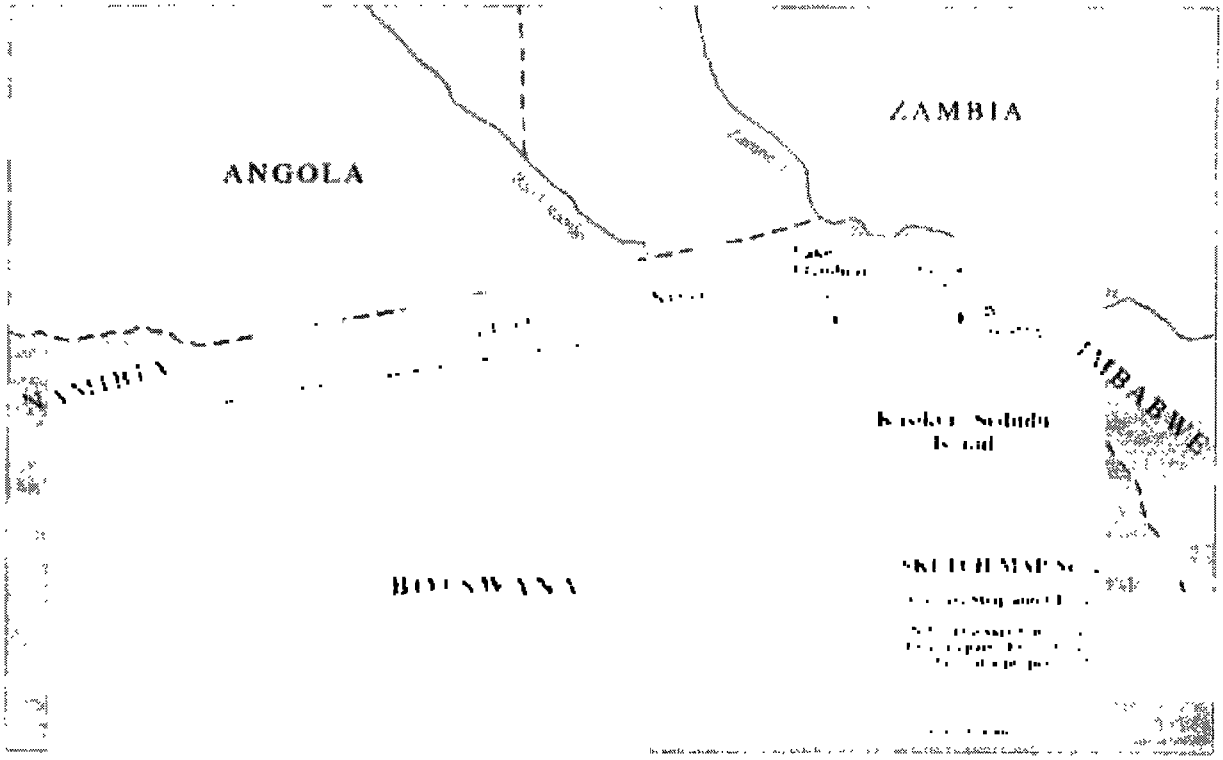


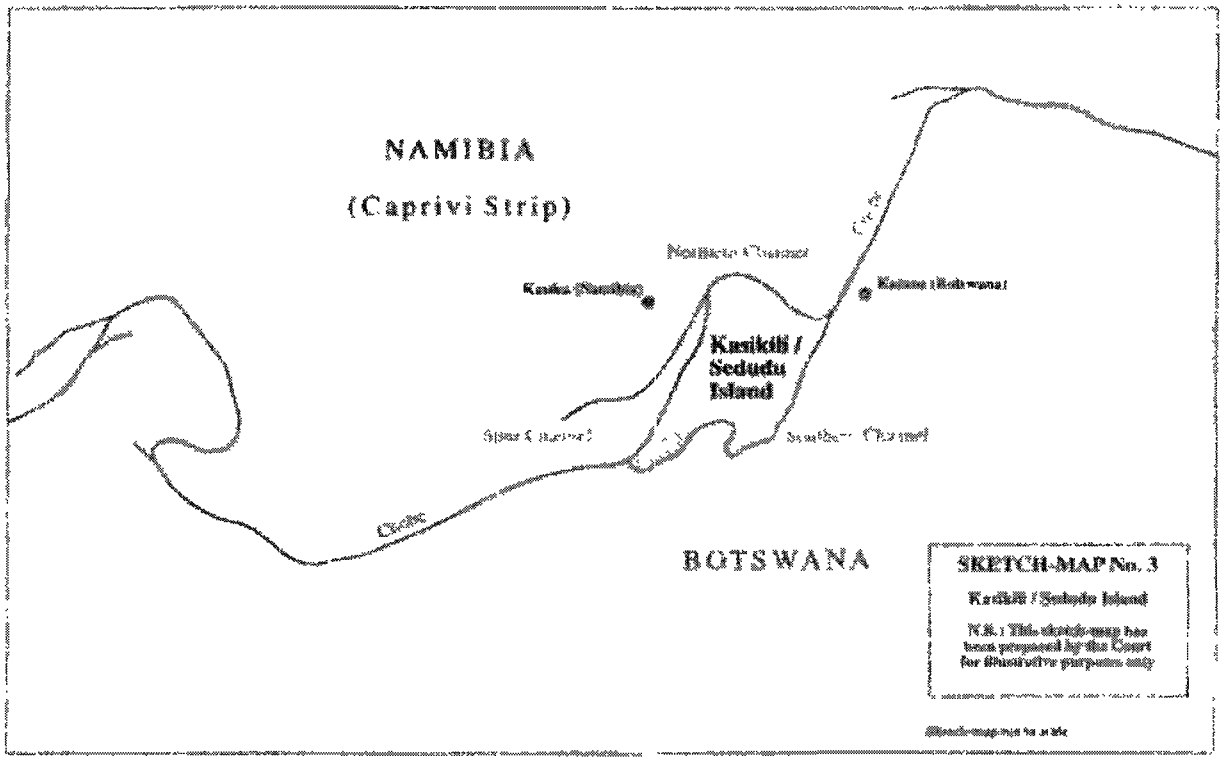
SKETCH-MAP No. 1

Botswana and Namibia

N.B.: This sketch-map has been prepared by the Court for illustrative purposes only

Sketch-map not to scale


ANGOLA
ZAMBIA
ZIMBABWE
BOTSWANA


NAMIBIA
(Caprivi Strip)
Kasikili / Sedudu Island
BOTSWANA
SKETCH-MAP No. 3
Kasikili / Sedudu Island

128. CASE CONCERNING THE AERIAL INCIDENT OF 10 AUGUST 1999 (PAKISTAN *v.* INDIA) (JURISDICTION OF THE COURT)

Judgment of 21 June 2000

In its judgment in the case concerning the Aerial Incident of 10 August 1999 (Pakistan v. India), by a vote of fourteen to two, the Court declared that it had no jurisdiction to adjudicate upon the dispute brought before it by Pakistan against India.

The Court was composed as follows: President Guillaume; Vice-President Shi; Judges Oda, Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Al-Khasawneh, Buergenthal; Judges ad hoc Pirzada, Reddy; Registrar Couvreur.

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

"56. For these reasons,

THE COURT,

By fourteen votes to two,

Finds that it has no jurisdiction to entertain the Application filed by the Islamic Republic of Pakistan on 21 September 1999.

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

AGAINST: Judge Al-Khasawneh; Judge ad hoc Pirzada."

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Judges Oda and Koroma and Judge ad hoc Reddy appended separate opinions to the Judgment of the Court. Judge Al-Khasawneh and Judge ad hoc Pirzada appended dissenting opinions to it.

*

* *

History of the proceedings and submissions of the Parties
(paras. 1-11)

On 21 September 1999, Pakistan filed in the Registry of the Court an Application instituting proceedings against India in respect of a dispute relating to the destruction, on 10 August 1999, of a Pakistani aircraft. In its Application, Pakistan founded the jurisdiction of the Court on Article 36, paragraphs 1 and 2, of the Statute and the declarations whereby the two Parties have recognized the compulsory jurisdiction of the Court.

By letter of 2 November 1999, the Agent of India notified the Court that his Government "wish[ed] to indicate its preliminary objections to the assumption of jurisdiction by the ... Court ... on the basis of Pakistan's Application". Those objections, set out in a note appended to the letter, were as follows:

"(i) That Pakistan's Application did not refer to any treaty or convention in force between India and Pakistan which confers jurisdiction upon the Court under Article 36 (1).

(ii) That Pakistan's Application fails to take into consideration the reservations to the Declaration of India dated 15 September, 1974 filed under Article 36 (2) of its Statute. In particular, Pakistan, being a Commonwealth country, is not entitled to invoke the jurisdiction of the Court as subparagraph 2 of paragraph 1 of that Declaration excludes all disputes involving India from the jurisdiction of this Court in respect of any State which 'is or has been a Member of the Commonwealth of Nations'.

(iii) The Government of India also submits that subparagraph 7 of paragraph 1 of its Declaration of 15 September, 1974 bars Pakistan from invoking the jurisdiction of this Court against India concerning any dispute arising from the interpretation or application of a multilateral treaty, unless at the same time all the parties to such a treaty are also joined as parties to the case before the Court. The reference to the UN Charter, which is a multilateral treaty, in the Application of Pakistan as a basis for its claim would clearly fall within the ambit of this reservation. India further asserts that it has not provided any consent or concluded any special agreement with Pakistan which waives this requirement."

After a meeting held on 10 November 1999 by the President of the Court with the Parties, the latter agreed to request the Court to determine separately the question of its jurisdiction in this case before any proceedings on the merits, on the understanding that Pakistan would first present a Memorial dealing exclusively with this question, to which India would have the opportunity of replying in a Counter-Memorial confined to the same question.

By Order of 19 November 1999, the Court, taking into account the agreement reached between the Parties, decided accordingly and fixed time limits for the filing of a Memorial by Pakistan and a Counter-Memorial by India on that question. Hearings were held from 3 to 6 April 2000.

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In the Application Pakistan requested the Court to judge and declare as follows:

"(*a*) that the acts of India (as stated above) constitute breaches of the various obligations under the Charter of the United Nations, customary international law and treaties specified in the body of this Application for which the Republic of India bears exclusive legal responsibility;

(*b*) that India is under an obligation to make reparations to the Islamic Republic of Pakistan for the loss of the aircraft and as compensation to the heirs of those killed as a result of the breaches of the obligations committed by it under the Charter of the United Nations and relevant rules of customary international law and treaty provisions."

In the note attached to its letter of 2 November 1999, India requested the Court:

(i) to adjudge and declare that Pakistan's Application is without any merit to invoke the jurisdiction of the Court against India in view of its status as a Member of the Commonwealth of Nations; and

(ii) to adjudge and declare that Pakistan cannot invoke the jurisdiction of the Court in respect of any claims concerning various provisions of the United Nations Charter, particularly Article 2 (4) as it is evident that all the States parties to the Charter have not been joined in the Application and that, under the circumstances, the reservation made by India in subparagraph 7 of paragraph 1 of its declaration would bar the jurisdiction of this Court."

At the close of the hearings Pakistan requested the Court:

"(i) to dismiss the preliminary objections raised by India;

(ii) to adjudge and declare that it has jurisdiction to decide on the Application filed by Pakistan on 21 September 1999; and

(iii) to fix time limits for the further proceedings in the case."

India submitted "that the Court adjudge and declare that it has no jurisdiction to consider the Application of the Government of Pakistan."

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The Court begins by recalling that, to found the jurisdiction of the Court in this case, Pakistan relied in its Memorial on:

(1) Article 17 of the General Act for Pacific Settlement of International Disputes, signed at Geneva on 26 September 1928 (hereinafter called "the General Act of 1928");

(2) the declarations made by the Parties pursuant to Article 36, paragraph 2, of the Statute of the Court;

(3) paragraph 1 of Article 36 of the said Statute;

and that India disputes each one of these bases of jurisdiction. The Court examines in turn each of these bases of jurisdiction relied on by Pakistan.

Article 17 of the General Act of 1928
(paras. 13-28)

Pakistan begins by citing Article 17 of the General Act of 1928, which provides:

"All disputes with regard to which the parties are in conflict as to their respective rights shall, subject to any reservations which may be made under Article 39, be submitted for decision to the Permanent Court of International Justice, unless the parties agree, in the manner hereinafter provided, to have resort to an arbitral tribunal.

It is understood that the disputes referred to above include in particular those mentioned in Article 36 of the Statute of the Permanent Court of International Justice."

Pakistan goes on to point out that, under Article 37 of the Statute of the International Court of Justice:

"Whenever a treaty or convention in force provides for reference of a matter to ... the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice."

Finally, Pakistan recalls that on 21 May 1931 British India had acceded to the General Act of 1928. It considers that India and Pakistan subsequently became parties to the General Act. It followed that the Court had jurisdiction to entertain Pakistan's Application on the basis of Article 17 of the General Act read with Article 37 of the Statute.

In reply, India contends, in the first place, that "the General Act of 1928 is no longer in force and that, even if it were, it could not be effectively invoked as a basis for the Court's jurisdiction". It argues that numerous provisions of the General Act, and in particular Articles 6, 7, 9 and 43 to 47 thereof, refer to organs of the League of Nations or to the Permanent Court of International Justice; that, in consequence of the demise of those institutions, the General Act has "lost its original efficacy"; that the United Nations General Assembly so found when in 1949 it adopted a new General Act; that "those parties to the old General Act which have not ratified the new act" cannot rely upon the old Act except "insofar as it might still be operative", that is, insofar ... as the amended provisions are not involved; that Article 17 is among those amended in 1949 and that, as a result, Pakistan cannot invoke it today.

Secondly, the Parties disagree on the conditions under which they succeeded in 1947 to the rights and obligations of British India, assuming, as Pakistan contends, that the General Act was then still in force and binding on British India. In this regard, India argues that the General Act was an agreement of a political character which, by its nature, was not transmissible. It adds that, in any event, it made no notification of succession. Furthermore, India points out that

it clearly stated in its communication of 18 September 1974 to the Secretary-General of the United Nations that

> "[t]he Government of India never regarded themselves as bound by the General Act of 1928 since her Independence in 1947, whether by succession or otherwise. Accordingly, India has never been and is not a party to the General Act of 1928 ever since her Independence."

Pakistan, recalling that up to 1947 British India was party to the General Act of 1928, argues on the contrary that, having become independent, India remained party to the Act, for in its case "there was no succession. There was continuity", and that consequently the "views on non-transmission of the so-called political treaties [were] not relevant here".

Thus the communication of 18 September 1974 was a subjective statement, which had no objective validity. Pakistan, for its part, is said to have acceded to the General Act in 1947 by automatic succession by virtue of international customary law. Further, according to Pakistan, the question was expressly settled in relation to both States by Article 4 of the Schedule to the Indian Independence (International Arrangements) Order issued by the Governor-General of India on 14 August 1947. That Article provided for the devolvement upon the Dominion of India and upon the Dominion of Pakistan of the rights and obligations under all international agreements to which British India was a party.

India disputes this interpretation of the Indian Independence (International Arrangements) Order of 14 August 1947 and of the agreement in the Schedule thereto. In support of this argument India relies on a judgment rendered by the Supreme Court of Pakistan on 6 June 1961, and on the report of Expert Committee No. IX on Foreign Relations, which in 1947 had been instructed, in connection with the preparation of the above-mentioned Order, "to examine and make recommendations on the effect of partition". Pakistan could not have, and did not, become party to the General Act of 1928. Each of the Parties further relies in support of its position on the practice since 1947.

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On this point, the Court observes in the first place that the question whether the General Act of 1928 is to be regarded as a convention in force for the purposes of Article 37 of the Statute of the Court has already been raised, but not settled, in previous proceedings before the Court. In the present case, as recalled above, the Parties have made lengthy submissions on this question, as well as on the question whether British India was bound in 1947 by the General Act and, if so, whether India and Pakistan became parties to the Act on their accession to independence. Further, relying on its communication to the United Nations Secretary-General of 18 September 1974 and on the British India reservations of 1931, India denies that the General Act can afford a basis of jurisdiction enabling the Court to entertain a dispute between the two Parties. Clearly, if the Court were to uphold India's position on any one of these grounds, it would no longer be necessary for it to rule on the others.

As the Court pointed out in the case concerning *Certain Norwegian Loans*, when its jurisdiction is challenged on diverse grounds, "the Court is free to base its decision on the ground which in its judgment is more direct and conclusive". Thus, in the *Aegean Sea Continental Shelf* case, the Court ruled on the effect of a reservation by Greece to the General Act of 1928 without deciding the issue whether that convention was still in force. In the communication addressed by India to the United Nations Secretary-General on 18 September 1974, the Minister for External Affairs of India declared that India considered that it had never been party to the General Act of 1928 as an independent State. The Court considers that India could not therefore have been expected formally to denounce the Act. Even if, *arguendo*, the General Act was binding on India, the communication of 18 September 1974 was to be considered in the circumstances of the present case as having served the same legal ends as the notification of denunciation provided for in Article 45 of the Act. It followed that India, in any event, would have ceased to be bound by the General Act of 1928 at the latest on 16 August 1979, the date on which a denunciation of the General Act under Article 45 thereof would have taken effect. India could not be regarded as party to the said Act at the date when the Application in the present case was filed by Pakistan. It followed that the Court had no jurisdiction to entertain the Application on the basis of the provisions of Article 17 of the General Act of 1928 and of Article 37 of the Statute.

Declarations of acceptance of the Court's jurisdiction by the Parties
(paras. 29-46)

Pakistan seeks, secondly, to found the jurisdiction of the Court on the declarations made by the Parties under Article 36, paragraph 2, of the Statute. Pakistan's current declaration was filed with the United Nations Secretary-General on 13 September 1960; India's current declaration was filed on 18 September 1974. India disputes that the Court has jurisdiction in this case on the basis of these declarations. It invokes, in support of its position, the reservations contained in subparagraphs (2) and (7) of the first paragraph of its declaration, with respect to "(2) disputes with the government of any State which is or has been a Member of the Commonwealth of Nations;" and "(7) disputes concerning the interpretation or application of a multilateral treaty unless all the parties to the treaty are also parties to the case before the Court or Government of India specially agree to jurisdiction".

The "Commonwealth reservation"
(paras. 30, 31 and 34-46)

With respect to the first of these reservations, relating to States which are or have been members of the Commonwealth (hereinafter called the "Commonwealth

reservation"), Pakistan contended in its written pleadings that it "ha[d] no legal effect", on the grounds that: it was in conflict with the "principle of sovereign equality" and the "universality of rights and obligations of members of the United Nations"; it was in breach of "good faith"; and that it was in breach of various provisions of the United Nations Charter and of the Statute of the Court. In its Memorial, Pakistan claimed in particular that the reservation in question "[was] in excess of the conditions permitted under Article 36 (3) of the Statute", under which, according to Pakistan, "the permissible conditions [to which a declaration may be made subject] have been exhaustively set out [...] as (i) on condition of reciprocity on the part of several or certain states or (ii) for a certain time".

In its oral pleadings, Pakistan developed its argument based on Article 36, paragraph 3, of the Statute, contending that reservations which, like the Commonwealth reservation, did not fall within the categories authorized by that provision, should be considered "extra-statutory". On this point it argued that: "an extra-statutory reservation made by a defendant State may be applied by the Court against a plaintiff State only if there is something in the case which allows the Court to conclude [...] that the plaintiff has accepted the reservation". Pakistan further claimed at the hearings that the reservation was "in any event inapplicable, not because it [was] extra-statutory and unopposable to Pakistan but because it [was] obsolete". Finally, Pakistan claimed that India's Commonwealth reservation, having thus lost its raison d'être, could today only be directed at Pakistan.

India rejects Pakistan's line of reasoning. In its pleadings, it stressed the particular importance to be attached, in its view, to ascertaining the intention of the declarant State. It contended that "there is no evidence whatsoever that the reservation [in question] is ultra vires Article 36, paragraph 3" of the Statute and referred to "[t]he fact [...] that it has for long been recognized that within the system of the optional clause a State can select its partners". India also queried the correctness of the theory of "extra-statutory" reservations put forward by Pakistan, pointing out that "[any] State against which the reservation [were] invoked, [could] escape from it by merely stating that it [was] extra-statutory in character". India also rejects Pakistan's alternative arguments based on estoppel in relation to the Simla Accord and on obsolescence.

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The Court first addresses Pakistan's contention that the Commonwealth reservation is an extra-statutory reservation going beyond the conditions allowed for under Article 36, paragraph 3, of the Statute. According to Pakistan, the reservation is neither applicable nor opposable to it in this case, in the absence of acceptance. The Court observes that paragraph 3 of Article 36 of its Statute has never been regarded as laying down in an exhaustive manner the conditions under which declarations might be made. Already in 1928, the Assembly of the League of Nations had indicated that "reservations conceivable may relate, either generally to certain aspects of any kind of dispute, or specifically to certain classes or lists of disputes, and ... these different kinds of reservation can be legitimately combined" (resolution adopted on 26 September 1928). Moreover, when the Statute of the present Court was being drafted, the right of a State to attach reservations to its declaration was confirmed, and this right has been recognized in the practice of States. The Court thus cannot accept Pakistan's argument that a reservation such as India's Commonwealth reservation might be regarded as "extra-statutory", because it contravened Article 36, paragraph 3, of the Statute. It considers that it need not therefore pursue further the matter of extra-statutory reservations.

Nor does the Court accept Pakistan's argument that India's reservation was a discriminatory act constituting an abuse of right because the only purpose of this reservation was to prevent Pakistan from bringing an action against India before the Court. It notes in the first place that the reservation refers generally to States which are or have been members of the Commonwealth. It adds that States are in any event free to limit the scope ratione personae which they wish to give to their acceptance of the compulsory jurisdiction of the Court.

The Court addresses, secondly, Pakistan's contention that the Commonwealth reservation was obsolete, because members of the Commonwealth of Nations were no longer united by a common allegiance to the Crown, and the modes of dispute settlement originally contemplated had never come into being. The Court recalls that it "will ... interpret the relevant words of a declaration including a reservation contained therein in a natural and reasonable way, having due regard to the intention of the State concerned at the time when it accepted the compulsory jurisdiction of the Court" (*I.C.J. Reports 1998*, p. 454, para. 49). While the historical reasons for the initial appearance of the Commonwealth reservation in the declarations of certain States under the optional clause might have changed or disappeared, such considerations could not, however, prevail over the intention of a declarant State, as expressed in the actual text of its declaration. India had in the four declarations whereby, since its independence in 1947, it had accepted the compulsory jurisdiction of the Court made clear that it wished to limit in this manner the scope ratione personae of its acceptance of the Court's jurisdiction. Whatever might have been the reasons for this limitation, the Court was bound to apply it.

The Court further regards Article 1 of the Simla Accord, paragraph (ii) of which provides, inter alia, that "the two countries are resolved to settle their differences by peaceful means through bilateral negotiations or by any other peaceful means mutually agreed upon between them ..." as an obligation, generally, on the two States to settle their differences by peaceful means, to be mutually agreed by them. The said provision in no way modifies the specific rules governing recourse to any such means, including judicial settlement. The Court cannot therefore accept Pakistan's argument in the present case based on estoppel.

In the Court's view, it follows from the foregoing that the Commonwealth reservation contained in subparagraph (2) of the first paragraph of India's declaration of 18 September 1974 may validly be invoked in the present case. Since Pakistan "is ... a member of the Commonwealth of Nations", the Court finds that it has no jurisdiction to entertain the Application under Article 36, paragraph 2, of the Statute. Hence the Court considers it unnecessary to examine India's objection based on the reservation concerning multilateral treaties contained in subparagraph (7) of the first paragraph of its declaration.

Article 36, paragraph 1, of the Statute
(paras. 47-50)

Finally, Pakistan has sought to found the jurisdiction of the Court on paragraph 1 of Article 36 of the Statute. The Court observes that the United Nations Charter contains no specific provision of itself conferring compulsory jurisdiction on the Court. In particular, there is no such provision in Articles 1, paragraph 1, 2, paragraphs 3 and 4, 33, 36, paragraph 3, and 92 of the Charter, relied on by Pakistan. The Court also observes that paragraph (i) of Article 1 of the Simla Accord represents an obligation entered into by the two States to respect the principles and purposes of the Charter in their mutual relations. It does not as such entail any obligation on India and Pakistan to submit their disputes to the Court. It follows that the Court has no jurisdiction to entertain the Application on the basis of Article 36, paragraph 1, of the Statute.

Obligation to settle disputes by peaceful means
(paras. 51-55)

Finally, the Court recalls that its lack of jurisdiction does not relieve States of their obligation to settle their disputes by peaceful means. The choice of those means admittedly rests with the parties under Article 33 of the United Nations Charter. They are nonetheless under an obligation to seek such a settlement, and to do so in good faith in accordance with Article 2, paragraph 2, of the Charter. As regards India and Pakistan, that obligation was restated more particularly in the Simla Accord of 2 July 1972. Moreover, the Lahore Declaration of 21 February 1999 reiterated "the determination of both countries to implementing the Simla Agreement". Accordingly, the Court reminds the Parties of their obligation to settle their disputes by peaceful means, and in particular the dispute arising out of the aerial incident of 10 August 1999, in conformity with the obligations which they have undertaken.

Separate opinion of Judge Oda

Judge Oda fully supports the decisions reached by the Court in concluding that the Court has no jurisdiction to entertain the Application filed by Pakistan.

The Court rejects the 1928 General Act which Pakistan asserts as one basis for the Court's jurisdiction. The Court, after having analysed India's accession to the Act, India's denunciation of the Act, and the possibility of Pakistan's succession as a party to the Act, based its rejection on the ground that India was not, in any event, a party to the Act on the date of Pakistan's Application in 1999.

Judge Oda does not disagree with the Court's reasoning on this point. After conducting an analysis of the manner in which the 1928 General Act was drafted and of the development in the 1920s of the issues concerning the compulsory jurisdiction of the Permanent Court in the League of Nations era, he suggests that the Act itself cannot be considered a document that would confer compulsory jurisdiction upon the Court independently from or in addition to the "optional clause" under Article 36, paragraph 2, of the Statute of either the Permanent Court or of the present Court. He also points out the fact that all States which acceded to the General Act had already accepted the compulsory jurisdiction of the Court by making declarations under the "optional clause" pursuant to Article 36, paragraph 2, of the Court's Statute and did not intend to assume any new obligation as far as the Court's jurisdiction was concerned.

Judge Oda asserts that the Court's jurisdiction is conferred *only* pursuant to Article 36, paragraphs 1 or 2, of its Statute and therefore could *not* have been conferred by the 1928 General Act.

Separate opinion of Judge Koroma

In his separate opinion Judge Koroma stated that, although he entirely agreed with the Court's findings and the reasoning underlying them, he felt the Judgment should have responded to the issues of justiciability and jurisdiction which were raised in the course of the proceedings, given the importance of the case.

He acknowledged that the acts complained of by Pakistan, and their consequences, raised legal issues involving a conflict of the rights and obligations of the Parties. He, however, observed that for a matter to be brought before the Court, the parties must have given their consent either prior to the institution of proceedings or in the course of such proceedings.

He elaborated on this by pointing out that the question whether there is a conflict of legal rights and obligations between parties to a dispute and whether international law applies (justiciability) is different from whether the Court has been vested with the necessary authority by the parties to a dispute to apply and interpret the law in relation to that dispute (jurisdiction). He stated that where the parties have not given their consent the Court is forbidden by its Statute and jurisprudence from exercising its jurisdiction.

Judge Koroma also stated that the Judgment thus rendered should not be seen as an abdication of the Court's role but rather a reflection of the system within which the Court had been called upon to render justice. On the other hand, the Court, as an integral part of the United Nations system entitled to contribute to the peaceful settlement of disputes, guided by the Charter and its jurisprudence, acted judiciously in reminding the Parties of their obligation to settle their disputes by peaceful means.

Separate opinion of Judge ad hoc B. P. Jeevan Reddy

Judge ad hoc Jeevan Reddy has voted in favour of all parts of the *dispositif* of the Judgment. He has, however, emphasized, in his separate concurring opinion, the observation contained in paragraphs 47 to 51 of the Judgment. In particular, he stressed the element of "good faith" required of States wishing to settle their disputes by peaceful means. In this connection, he referred to the Simla Agreement and the Lahore Declaration whereunder both India and Pakistan have agreed to settle all their differences by peaceful means bilaterally. They have also condemned "terrorism in all its forms and manifestations" and reiterated "their determination to combat this menace". The Parties are under an obligation, Judge Reddy said, "to create an atmosphere" where bilateral negotiations can be conducted meaningfully. He concluded by expressing the hope that both countries would settle all their differences in the above spirit and devote their energies to developing their economies as well as friendly relations between them.

Dissenting opinion of Judge Al-Khasawneh

In his dissenting opinion, Judge Al-Khasawneh, reiterating that lack of jurisdiction did not in itself mean that the dispute was not justiciable, joined the call made by the Court on the two States to settle this, and other disputes, through peaceful means. He felt that such a call was urgent in view of the possibility of dangerous escalation, and pertinent in view of the rejection by India of any other modes of peaceful settlement before the case was brought to the Court.

He agreed with the majority that there is no comprehensive system of jurisdiction deriving from the United Nations Charter. He also agreed, but with considerable hesitation, with the majority view that the 1928 General Act did not provide a basis for jurisdiction in view of the 1974 Indian communication, which, while not a formal denunciation of the Act, was treated as a "notification" by the Secretary-General, there being, moreover, no reaction from other parties to the Act including Pakistan — assuming that the latter was itself a party.

He nevertheless thought that, by not addressing pertinent and interrelated issues such as India and Pakistan's status as parties to the General Act, the transmittability of the General Act and the question whether it is still in force, the Court's decision, though justifiable under the circumstances, did not attain the certainty necessary to fortify it against recurring doubts.

Moving on to the next ground of jurisdiction, the optional clause system, Judge Al-Khasawneh noted that the declarations made by India and Pakistan contained a number of reservations and conditions, two of which concerned the present case:

(1) The multilateral treaty reservation;

(2) The Commonwealth reservation.

The first of these two reservations was irrelevant, since the actions complained of were also breaches under customary international law.

The Commonwealth reservation was alleged to be (*a*) obsolete and (*b*) discriminatory. Regarding the first point, Judge Al-Khasawneh, while acknowledging that doubts in this regard were justifiable considering the fundamental changes in the Commonwealth that had taken place since 1930, when such a reservation was first introduced, thought nevertheless that the case for obsolescence was not conclusively made. Two reasons accounted for this. Firstly, a small number of Commonwealth States had included the reservation — in one form or another — in their declarations and, secondly, India had maintained the reservation with modifications in its successive declarations — a practice from which the existence of a conscious will, as well as a degree of importance for India, could be firmly inferred.

However, the reservation had undergone a change in wording that led to the inescapable conclusion that it was meant to operate against one State only, Pakistan. This was confirmed also by analysing the circumstances that had led to this change.

While not all reservations that were extra-statutory were invalid, it was nonetheless open to the Court to pronounce on the validity of a reservation allegedly tainted by arbitrariness or discrimination. Judge Al-Khasawneh felt that the Indian declaration fell outside the purview of permissibility because it was directed against one State only, thereby denying that State the benefits of reasonable expectations of adjudication, and also because, unlike other reservations ratione personae, the Indian reservation had no rationale or reasonably defensible justification. He therefore came to the conclusion that the Indian reservation was invalid.

Dealing with the consequential issue of separability, Judge Al-Khasawneh felt that not much guidance could be gained from the precedents, both because of their paucity and because they had not been followed. Agreeing that concepts from major systems of law were relevant, he went on to analyse a case decided by the Indian Supreme Court in 1957, which revealed a complex and less severe test for separability than was suggested to the Court by India. He noted in this regard that India could not adduce any supporting evidence that the Commonwealth reservation was a crucial element of its acceptance of compulsory jurisdiction; nor could this conclusion be reached from the terms of the reservation, which related to a group of States. Unlike the French reservation on domestic jurisdiction in the *Norwegian Loans* case, which defined a general attitude to the very concept of jurisdiction, India's reservation could not be said to define such an attitude.

Other major legal systems also admitted of separability. Thus, under Islamic law, the concept would seem to be reflected in the maxim: that which cannot be attained in its entirety should not be substantially abandoned. Analogies from the law of treaties were also relevant, and Article 44 of the Vienna Conventions of 1969 and 1986 admitted of separability arising out of invalidation, albeit in suitably

guarded terms. Applying the test of Article 44, Judge Al-Khasawneh came to the conclusion that the Indian Commonwealth reservation was both invalid and separable from India's declaration.

Dissenting opinion of Judge ad hoc Pirzada

In his dissenting opinion Judge Pirzada regretted that he found himself obliged to dissent from the reasoning in the Judgment of the Court and its conclusion. However, he is in agreement with paragraphs 51 to 55 thereof.

In his view, the effect of the Indian Independence Act and the Indian Independence (International Arrangements) Order 1947 was that British India was divided into two independent States, India and Pakistan. The British Prime Minister, Mr. Atlee, stated: "With regard to the status of the two Dominions, the names were not meant to make any difference between them. They were two successor States." The list of treaties mentioned in Volume III of the Partition Proceedings was not exhaustive (*Right of Passage over Indian Territory, I.C.J. Reports 1960*). The case of *Yangtze* (1961) relied upon by India is distinguishable. In a later decision, in the case of *Zewar Khan* (1969), it was held by the Supreme Court of Pakistan that apart from the statement of the Secretary of State for Commonwealth Relations, in international law too Pakistan was accepted and recognized as a successor government. The Pacific Settlement of International Disputes and the General Act 1928 devolved upon and continues to apply to India and Pakistan.

In June 1948, India and Pakistan signed an Air Services Agreement, which provided for recourse to the International Court of Justice if no tribunal was competent to decide disputes, though both were dominions at that time. As regards the water dispute, Mr. Liaquat Ali Khan, the then Prime Minister of Pakistan, stated in his letter of 23 August 1950:

> "Under the optional clause the Government of India agreed to accept the jurisdiction of the International Court on the Applications of countries which are not members of the Commonwealth. The exception doubtless contemplated that there would be Commonwealth machinery equally suited to the judicial settlement of disputes. While such Commonwealth machinery is lacking, it would be anomalous to deny to a sister member of the British Commonwealth the friendly means of judicial settlement that is offered by India to countries outside the Commonwealth."

Pandit Nehru, the then Prime Minister of India, in his letter of 27 October 1950, stated that India preferred to refer the dispute to a tribunal; if there was deadlock, India proposed to settle those parts of the disputes through negotiation, failing that, to submit them to arbitration or even to the International Court of Justice. In fact, between 1947 and 1999 India and Pakistan settled their disputes (i) by negotiations, (ii) through mediation of third parties, (iii) through judicial tribunals and, (iv) had access to the International Court of Justice through Appeal or Applications. In the circumstances, India's conduct is covered by the doctrine of estoppel.

India, in its communication of 18 September 1974, asserted that it never regarded itself as bound by the General Act of 1928. The said communication was sent to counter the declaration of Pakistan of 30 May 1974 whereby, to dispel all doubts, Pakistan notified that it continues to be bound by the General Act. Such pleas had already been raised by Pakistan before the International Court of Justice in the *Trial of Pakistani Prisoners of War* case. The Indian communication was not sent in good faith and cannot be treated or be deemed to be a denunciation of the General Act and, among others, it did not comply with Article 45 of the General Act of 1928. Mere affirmation by India that it was not bound by the General Act, which is denied by Pakistan, is unilateral and its validity cannot be determined at the preliminary stage in view of the finding of the International Court in the appeal by India against Pakistan in the *ICAO* case, which is *res judicata*.

India's Commonwealth reservation is obsolete, having regard to the view of Judge Ago in the *Nauru* case, since the expectation of the Commonwealth Court could not be fulfilled. The Indian Commonwealth reservation is aimed at Pakistan only, and is discriminatory and arbitrary. It does not fall under the permissible reservations exhaustively set out in Article 39 of the General Act and is invalid.

In any case the Indian Commonwealth reservation is severable from the Indian declaration, having regard to Article 44 of the Vienna Convention on the Law of Treaties, the opinions of President Klaestad and Judge Armand-Ugon in the *Interhandel* case and the opinion of Judge Bedjaoui in the *Fisheries Jurisdiction* case. Reference was also made by Judge Pirzada to the rules of interpretation laid down by the Indian Supreme Court in the *RMDC* (1957) and *Harakchad* (1970) cases: The International Court of Justice is competent to exercise jurisdiction under Articles 17 and 41 of the General Act.

Though the International Court, in the *Nicaragua* case (1984), had held that the declarations of acceptance of the compulsory jurisdiction of the Court are facultative and unilateral engagements, it further held in that very case: "Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration." These principles will be applicable to the Indian declaration as well.

Judge Pirzada considered that, in view of the allegations by Pakistan that India, by its incursion into Pakistan's airspace and by shooting down the Pakistan naval aircraft *Atlantique* on 10 August 1999 when 16 persons were killed, committed breaches of obligations of customary international law — (i) not to use force against another State, (ii) not to violate the sovereignty of another State — therefore the International Court has jurisdiction regarding the claim of Pakistan. Judge Pirzada relied upon the findings of the Court in the *Nicaragua* case (1984). He also referred to the separate and dissenting opinions of Judge Weeramantry, Judge Vereshchetin and Judge Bedjaoui in the *Fisheries Jurisdiction* case (1998). Judge Pirzada observed that the Court's task is to ensure respect for

international law. It is its principal guardian (Judge Lachs in his separate opinion in the *Lockerbie* case in 1992).

Judge Pirzada stated that, in view of the consensual nature of its jurisdiction, the Court generally shows judicial caution and restraint. However, in due course of time, principles of constructive creativity and progressive realism could be evolved by the Court.

Judge Pirzada, for the reasons set out in his dissenting opinion, concluded that the Court ought to have rejected India's preliminary objections to the jurisdiction of the Court and ought to have entertained Pakistan's Application.

Judge Pirzada emphasized that the Parties are under an obligation to settle in good faith their disputes, including the dispute regarding the State of Jammu and Kashmir and in particular the dispute arising out of the aerial incident of 10 August 1999. Let India and Pakistan keep in view the ideals of Quaid-e-Azam Mohamed Ali Jinnah and Mahatma Gandhi and take effective measures to secure peace, security and justice in South Asia.

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129. ARMED ACTIVITIES ON THE TERRITORY OF THE CONGO (DEMOCRATIC REPUBLIC OF THE CONGO *v.* UGANDA) (PROVISIONAL MEASURES)

Order of 1 July 2000

In an order issued in the case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), the Court unanimously held that "both Parties must, forthwith, prevent and refrain from any action, and in particular any armed action, which might prejudice the rights of the other Party in respect of whatever judgment the Court may render in the case, or which might aggravate or extend the dispute before the Court or make it more difficult to resolve".

The Court unanimously added that "both Parties must, forthwith, take all measures necessary to comply with all of their obligations under international law, in particular those under the United Nations Charter and the Charter of the Organization of African Unity, and with United Nations Security Council resolution 1304 (2000) of 16 June 2000".

Finally, it unanimously stated that "both Parties must, forthwith, take all measures necessary to ensure full respect within the zone of conflict for fundamental human rights and for the applicable provisions of humanitarian law".

The Court was composed as follows: President Guillaume; Judges Oda, Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; Registrar Couvreur.

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

"47. For these reasons,

THE COURT,

Indicates, pending a decision in the proceedings instituted by the Democratic Republic of the Congo against the Republic of Uganda, the following provisional measures:

(1) Unanimously,

Both Parties must, forthwith, prevent and refrain from any action, and in particular any armed action, which might prejudice the rights of the other Party in respect of whatever judgment the Court may render in the case, or which might aggravate or extend the dispute before the Court or make it more difficult to resolve;

(2) Unanimously,

Both Parties must, forthwith, take all measures necessary to comply with all of their obligations under international law, in particular those under the United Nations Charter and the Charter of the Organization of African Unity, and with United Nations Security Council resolution 1304 (2000) of 16 June 2000;

(3) Unanimously,

Both Parties must, forthwith, take all measures necessary to ensure full respect within the zone of conflict for fundamental human rights and for the applicable provisions of humanitarian law."

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Judges Oda and Koroma appended declarations to the Order.

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History of the proceedings and submissions of the Parties
(paras. 1-17)

On 23 June 1999, the Congo instituted proceedings against Uganda in respect of a dispute concerning "acts of *armed aggression* perpetrated by Uganda on the territory of the Democratic Republic of the Congo, in flagrant violation of the United Nations Charter and of the Charter of the Organization of African Unity";

In the Application the Congo founds the jurisdiction of the Court on the declarations made by the two States under Article 36, paragraph 2, of the Statute. It requests the Court to:

"*Adjudge and declare that*:

(*a*) Uganda is guilty of an act of aggression within the meaning of Article 1 of resolution 3314 of the General Assembly of the United Nations of 14 December 1974 and of the jurisprudence of the International Court of Justice, contrary to Article 2, paragraph 4, of the United Nations Charter;

(*b*) further, Uganda is committing repeated violations of the Geneva Conventions of 1949 and their Additional Protocols of 1977, in flagrant disregard of the elementary rules of international humanitarian law in conflict zones, and is also guilty of massive human rights violations in defiance of the most basic customary law;

(*c*) more specifically, by taking forcible possession of the Inga hydroelectric dam, and deliberately and regularly causing massive electrical power cuts, in violation of the provisions of Article 56 of the Additional Protocol of 1977, Uganda has rendered itself responsible for very heavy losses of life among the 5 million inhabitants of the city of Kinshasa and the surrounding area;

(*d*) by shooting down, on 9 October 1998 at Kindu, a Boeing 727 the property of Congo Airlines, thereby causing the death of 40 civilians, Uganda has also violated the Convention on International Civil Aviation signed at Chicago on 7 December 1944, the Hague Convention of 16 December 1970 for the Suppression of Unlawful Seizure of Aircraft and the Montreal Convention of 23 September 1971 for the Suppression of Unlawful Acts against the Safety of Civil Aviation.

Consequently, and pursuant to the aforementioned international legal obligations, to adjudge and declare that:

(1) all Ugandan armed forces participating in acts of aggression shall forthwith vacate the territory of the Democratic Republic of the Congo;

(2) Uganda shall secure the immediate and unconditional withdrawal from Congolese territory of its nationals, both natural and legal persons;

(3) the Democratic Republic of the Congo is entitled to compensation from Uganda in respect of all acts of looting, destruction, removal of property and persons and other unlawful acts attributable to Uganda, in respect of which the Democratic Republic of the Congo reserves the right to determine at a later date the precise amount of the damage suffered, in addition to its claim for the restitution of all property removed".

On 19 June 2000 the Congo submitted to the Court a request for the indication of provisional measures by which it asked the Court to indicate as a matter of urgency the following provisional measures:

"(1) the Government of the Republic of Uganda must order its army to withdraw immediately and completely from Kisangani;

(2) the Government of the Republic of Uganda must order its army to cease forthwith all fighting or military activity on the territory of the Democratic Republic of the Congo and to withdraw immediately and completely from that territory, and must forthwith desist from providing any direct or indirect support to any State, group, organization, movement or individual engaged or preparing to engage in military activities on the territory of the Democratic Republic of the Congo;

(3) the Government of the Republic of Uganda must take all measures in its power to ensure that units, forces or agents which are or could be under its authority, or which enjoy or could enjoy its support, together with organizations or persons which could be under its control, authority or influence, desist forthwith from committing or inciting the commission of war crimes or any other oppressive or unlawful act against all persons on the territory of the Democratic Republic of the Congo;

(4) the Government of the Republic of Uganda must forthwith discontinue any act having the aim or effect of disrupting, interfering with or hampering actions intended to give the population of the occupied zones the benefit of their fundamental human rights, and in particular their rights to health and education;

(5) the Government of the Republic of Uganda must cease forthwith all illegal exploitation of the natural resources of the Democratic Republic of the Congo and all illegal transfer of assets, equipment or persons to its territory;

(6) the Government of the Republic of Uganda must henceforth respect in full the right of the Democratic Republic of the Congo to sovereignty, political independence and territorial integrity, and the fundamental rights and freedoms of all persons on the territory of the Democratic Republic of the Congo.

The Democratic Republic of the Congo would, at all events, respectfully remind the Court of the powers conferred upon it by Article 41 of its Statute and Article 75 of the Rules of Court, which authorize it in the present case to indicate all such provisional measures as it may deem necessary in order to bring to an end the intolerable situation which continues to obtain in the Democratic Republic of the Congo, and in particular in the Kisangani region".

By letters dated 19 June 2000, the President of the Court addressed the Parties in the following terms.

"Acting in conformity with Article 74, paragraph 4, of the Rules of Court, I hereby draw the attention of both Parties to the need to act in such a way as to enable any Order the Court will make on the request for provisional measures to have its appropriate effects".

Hearings were held on 26 and 28 June 2000.

Arguments of the Parties
(paras. 18-31)

The Court observes that at the hearings the Congo essentially reiterated the line of argument developed in its Application and in its request for the indication of provisional measures; citing the Court's jurisprudence, it argued more particularly that the requirements of urgency and of the risk of irreparable damage, conditions precedent for the indication of provisional measures, were satisfied in the present cases; adding that "[w]hen an armed conflict develops and endangers not only the rights and interests of the State but also the lives of its inhabitants, the urgency of provisional measures and the irreparable nature of the damage cannot be in doubt". The Congo further observed that "the fact that certain Ugandan high authorities have officially stated that they agree to withdraw their forces from the Kisangani region and that the beginnings of a withdrawal have in fact taken place can ... in no way call into question" the need for the indication of measures as a matter of urgency, and that "these statements [did not] concern ... the whole of Congolese territory"; the Congo also contended that there was "a sufficient connection between the measures requested and the rights protected"; it stated, on the basis of a comparison of the text for the request of the indication of provisional measures with that of the Application instituting the proceedings, that the "categories of act referred to are similar" and that the "rules of law applicable are similar"; the Congo further contended that the Court has prima facie jurisdiction "to entertain the dispute which is the subject matter of the Application", having regard to the declarations of acceptance of its compulsory jurisdiction deposited by the two Parties. The Congo stated finally that "[t]here is nothing in the political and diplomatic context of the present case which might prevent the Court from taking the measures which the circumstances require"; it pointed out that "the Security Council has adopted a resolution — resolution 1304 of 16 June 2000 — in which it was demanded that Uganda withdraw its forces not only from Kisangani but from all Congolese territory, without further delay"; and, referring to the Court's jurisprudence, it argued that "[i]t is not ... possible to derive from [the] parallel powers of the Security Council and of the Court any bar to the exercise by the latter of its jurisdiction".

Uganda, at the hearings, pointed out that Ugandan forces entered Eastern Congo in May 1997 at the invitation of Mr. Kabila, to work in collaboration with his forces to arrest the activities of the anti-Uganda rebels. Ugandan forces remained in Eastern Congo after Mr. Kabila became President, again at his invitation. This arrangement with President Kabila was formalized by written agreement dated 27 April 1998; Uganda added that it "has no territorial interests in the Democratic Republic of the Congo", that "[t]here is a complete political vacuum in Eastern Congo" and that "[t]here is no one else to restrain the anti-Uganda rebels or guarantee the security of Uganda's border"; Uganda further explained that "on its part, [it] has endeavoured to fulfil all its obligations laid down in the Lusaka Agreement", concluded between the parties to the conflict and aimed at resolving the conflict and establishing a framework for peace in the region; that "both the Application and the request for provisional measures are based on preposterous allegations that are not backed by any evidence whatsoever before this Court"; and that "in the circumstances the request of the Democratic Republic of the Congo is inadmissible, this for the reason that as a matter of law the Court is prevented from exercising its powers under Article 41 of the Statute", because "the subject matter of the request for interim measures is essentially the same as the matters addressed by ... Security Council resolution [1304] of 16 June [2000]". Uganda argued in the alternative that "even if the Court had a prima facie competence by virtue of Article 41, there are concerns of propriety and judicial prudence which strongly militate against the exercise of the discretion which the Court has in the indication of interim measures". Uganda further argued that there was an "absence of any clear link between the request and the original claim", and that "the [Congo's] request [fails to satisfy] the requirement of urgency or the risk of irreparable damage" and that there cannot "be an element of urgency after the Congo has waited for almost a year before making a complaint".

Uganda finally stated that "the Lusaka Agreement is a comprehensive system of public order", "a binding international agreement that constitutes the governing law between and among the parties to the conflict"; that "[t]he Security Council and the Secretary-General have repeatedly declared that [this] Agreement is the only viable process for achieving peace within the Democratic Republic of the Congo and for achieving peace between the Democratic Republic of the Congo and its neighbours"; and that "the specific interim measures requested by Congo directly conflict with the Lusaka Agreement, and with the Security Council resolutions — including resolution 1304 ... — calling for implementation of the Agreement".

The Court's reasoning
(paras. 32-46)

The Court notes that the two Parties have each made a declaration recognizing the jurisdiction of the Court in accordance with Article 36, paragraph 2, of the Statute; Uganda on 3 October 1963 and the Congo on 8 February 1989; neither of the two declarations includes any reservation. The Court therefore considers that those declarations constitute a prima facie basis upon which its jurisdiction in the present case might be founded.

The Court takes note that in its request for the indication of provisional measures, the Congo refers to resolution 1304 (2000), adopted by the Security Council under Chapter VII of the United Nations Charter on 16 June 2000; the text of the said resolution is then quoted in full. The Court further notes Uganda's argument that the Congo's request for the indication of provisional measures concerns essentially the same issues as this resolution; that the said request is accordingly inadmissible; and that the request is, moreover, moot, since Uganda fully accepts the resolution in question

and is complying with it. It observes, however, that Security Council resolution 1304 (2000), and the measures taken in its implementation, do not preclude the Court from acting in accordance with its Statute and with the Rules of Court, recalling that

"while there is in the Charter

"a provision for a clear demarcation of functions between the General Assembly and the Security Council, in respect of any dispute or situation, that the former should not make any recommendation with regard to that dispute or situation unless the Security Council so requires, there is no similar provision anywhere in the Charter with respect to the Security Council and the Court. The Council has functions of a political nature; assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events".

The Court then observes that in the present case the Security Council has taken no decision which would prima facie preclude the rights claimed by the Congo from "be[ing] regarded as appropriate for protection by the indication of provisional measures"; nor does the Lusaka Agreement, to which Security Council resolution 1304 (2000) refers and which constitutes an international agreement binding upon the Parties, preclude the Court from acting in accordance with its Statute and with the Rules of Court. Neither is the Court precluded from indicating provisional measures in a case merely because a State which has simultaneously brought a number of similar cases before the Court seeks such measures in only one of them; and pursuant to Article 75, paragraph 1, of its Rules, the Court may in any event decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures.

The Court then observes that its power to indicate provisional measures under Article 41 of the Statute has as its object to preserve the respective rights of the parties pending the decision of the Court, and presupposes that irreparable prejudice shall not be caused to rights which are the subject of dispute in judicial proceedings; and that the rights which, according to the Congo's Application, are the subject of the dispute are essentially its rights to sovereignty and territorial integrity and to the integrity of its assets and natural resources, and its rights to respect for the rules of international humanitarian law and for the instruments relating to the protection of human rights.

The Court notes that, it is not disputed that Ugandan forces are present on the territory of the Congo, that fighting has taken place on that territory between those forces and the forces of a neighbouring State, that the fighting has caused a large number of civilian casualties in addition to substantial material damage, and that the humanitarian situation remains of profound concern; and that it is also not disputed that grave and repeated violations of human rights and international humanitarian law, including massacres and other atrocities, have been committed on the territory of the Democratic Republic of the Congo. In the circumstances, the Court is of the opinion that persons, assets and resources present on the territory of the Congo, particularly in the area of conflict, remain extremely vulnerable, and that there is a serious risk that the rights at issue in this case may suffer irreparable prejudice. The Court consequently considers that provisional measures must be indicated as a matter of urgency in order to protect those rights; it observes that Article 75, paragraph 2, of the Rules of Court empowers the Court to indicate measures that are in whole or in part other than those requested. Having regard to the information at its disposal, and in particular the fact that the Security Council has determined, in its resolution 1304 (2000), that the situation in the Congo "continues to constitute a threat to international peace and security in the region", the Court is of the opinion that there exists a serious risk of events occurring which might aggravate or extend the dispute or make it more difficult to resolve.

Declaration of Judge Oda

Judge Oda voted in favour of the Court's Order only because he could not but agree that, in order to restore peace in the region, the measures indicated by the Court in this Order should be taken by the Parties — measures on which few would ever disagree. He believes, however, that the Court is *not* in a position at this time to grant provisional measures for the reason that the present case, brought unilaterally against Uganda on 23 June 1999, is — and has from the outset been — *inadmissible.*

Judge Oda suggests that the mere allegation by the Applicant that there has been "armed aggression" perpetrated by the Respondent in its territory does not mean that *legal disputes* exist between these Parties concerning (i) the alleged breach of the Applicant's rights by the Respondent or the alleged failure of the Respondent to observe its international legal obligations to the Applicant, and (ii) the denial by the Respondent of the Applicant's allegations. The Applicant in this case did not, in its Application, show us that both Parties had attempted to identify the *legal disputes* existing between them and to resolve those disputes by negotiation. Without such a mutual effort by the Parties, a mere allegation of armed aggression cannot be deemed suitable for judicial settlement by the Court.

Judge Oda points out that the United Nations Charter provides for the settlement, through the Security Council, of disputes raising issues of armed aggression and threats to international peace of the type seen in the present case. In fact, the Security Council, as well as the Secretary-General acting on its instructions, has made every effort over the past several years to ease the situation and restore peace in the region.

Judge Oda contends that the Application in the present case is inadmissible and believes that the present case lacks, even prima facie, the element of admissibility. The jurisprudence of the Court shows that judgments rendered by the Court and provisional measures indicated by it in advance of the merits phase have not necessarily been complied with by the respondent States or by the parties. If

the Court agrees to be seized of the application or request for the indication of provisional measures of one State in such circumstances, then the repeated disregard of the judgments or orders of the Court by the parties will inevitably impair the dignity of the Court and raise doubt as to the judicial role to be played by the Court in the international community.

Judge Oda recalls that it is a principle that the Court's jurisdiction is founded on the consent of the States parties to the dispute and that declarations under the optional clause accepting the Court's compulsory jurisdiction may be made only if they arise from the bona fide will of the State. If the Court admits applications or grants requests for provisional measures, he is afraid that States that have accepted the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Court's Statute will be inclined to withdraw their declarations, and fewer States will accede to the compromissory clauses of multilateral treaties.

The fact that a State appearing before the Court in this case is not represented by a person holding high office in the Government acting as Agent (and such a situation has rarely been encountered in the history of the Court) reinforces Judge Oda's feeling that a question arises here as to whether the case is brought to the Court in the interest of the State involved or for some other reason.

Declaration of Judge Koroma

In his declaration Judge Koroma stated that the Court had recognized and taken judicial notice that since the latest outbreak of conflict in the area between foreign troops, hundreds of Congolese have been killed and thousands wounded and the destruction of national assets had also taken place on a massive scale. It was, therefore, considered that unless urgent measures were taken the rights of the population might be further imperilled. He further stated that while the Order acknowledged that Security Council resolution 1304 (2000) of 16 June 2000 had called on *all* parties to cease hostilities, the Court, as a court of law, had to make its own determination of the events to see whether an order was warranted which should be cast in accordance with judicial norms. He then stated that the Order must, therefore, be seen in the light of Article 59 of the Statute of the Court and Article 94 of the United Nations Charter. He also considered the Order as part of the process of the judicial settlement of the dispute and of special significance to the Parties, who should refrain from any action which might aggravate or extend the dispute. He concluded by stating that the Order in no way prejudged the facts or merits of the case.

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130. CASE CONCERNING THE ARREST WARRANT OF 11 APRIL 2000 (DEMOCRATIC REPUBLIC OF THE CONGO *v.* BELGIUM) (PROVISIONAL MEASURES)

Order of 8 December 2000

In the case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), the Court unanimously rejected the request of Belgium that the case be removed from the List, and found by fifteen votes to two that the circumstances, as they now presented themselves to the Court, were not such as to require the exercise of its power to indicate provisional measures, as the DRC had wished.

The merits of the dispute concerned an international arrest warrant issued on 11 April 2000 by a Belgian investigating judge against Mr. Yerodia Abdoulaye Ndombasi — Minister for Foreign Affairs of the DRC at the time, then Minister of Education — seeking his provisional detention pending a request for extradition to Belgium for "serious violations of international humanitarian law". In its request for the indication of provisional measures, the DRC had inter alia asked the Court to make an order for the immediate discharge of the disputed arrest warrant.

The Court was composed as follows: President Guillaume; Vice-President Shi; Judges Oda, Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; Judges ad hoc Bula-Bula, Van den Wyngaert; Registrar Couvreur.

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The full text of the operative paragraph of the order read as follows:

"78. For these reasons,

THE COURT,

(1) Unanimously,

Rejects the request of the Kingdom of Belgium that the case be removed from the List;

(2) By fifteen votes to two,

Finds that the circumstances, as they now present themselves to the Court, are not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures.

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Oda, Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-

Aranguren, Kooijmans, Al-Khasawneh, Buergenthal; Judge ad hoc Van den Wyngaert;

AGAINST: Judge Rezek; Judge ad hoc Bula-Bula."

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* *

Judges Oda and Ranjeva appended declarations to the Order. Judges Koroma and Parra-Aranguren appended separate opinions to the Order. Judge Rezek and Judge ad hoc Bula-Bula appended dissenting opinions to the Order. Judge ad hoc Van den Wyngaert appended a declaration to the Order.

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* *

The Court starts by recalling that, in the course of the hearings, it was informed by Belgium that on 20 November 2000 a Cabinet reshuffle had taken place in the Congo, as a result of which Mr. Yerodia Ndombasi had ceased to exercise the functions of Minister for Foreign Affairs and had been charged with those of Minister of Education; and that this information was confirmed by the Congo.

Belgium had maintained that, as a result of the Cabinet reshuffle, the Congo's Application on the merits had been deprived of its object and should therefore be removed from the List. In this regard, the Court observes that, "to date", the arrest warrant issued against Mr. Yerodia Ndombasi "has not been withdrawn and still relates to the same individual, notwithstanding the new ministerial duties that he is performing" and that "at the hearings the Congo maintained its claim on the merits". It accordingly concludes that "the Congo's Application has not at the present time been deprived of its object" and that "it cannot therefore accede to Belgium's request for the case to be removed from the List".

As regards the request for the indication of provisional measures, the Court finds that it too still has an object, despite the Cabinet reshuffle, since inter alia the arrest warrant continues to be in the name of Mr. Yerodia Ndombasi and the Congo contends that Mr. Yerodia Ndombasi continues to enjoy immunities which render the arrest warrant unlawful.

The Court then turns to the issue of its jurisdiction. In the course of the hearings Belgium had contended that the Court could not at this stage of the proceedings take account of the declarations of acceptance of its compulsory jurisdiction made by the Parties because the Congo had not invoked those declarations until a late stage. The Court observes that the said declarations are within the knowledge both of itself and of the Parties to the present case and that Belgium could readily expect that they would be taken into consideration as a basis for the jurisdiction of the Court in the present case. Belgium had also pointed out that its declaration excluded the compulsory jurisdiction of the Court concerning situations or facts "in regard to which the parties have agreed or may agree to have recourse to another method of pacific settlement", and that negotiations at the highest level regarding the arrest warrant were in fact in progress when the Congo seized the Court. The Court states that Belgium has not provided the Court with any further details of those negotiations, or of the consequences which it considered they would have in regard to the Court's jurisdiction, in particular its jurisdiction to indicate provisional measures. The Court concludes that the declarations made by the Parties constitute prima facie a basis on which its jurisdiction could be founded in the present case.

After having recalled that the power of the Court to indicate provisional measures "has as its object to preserve the respective rights of the parties pending the decision of the Court", that it "presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute" and that "such measures are justified solely if there is urgency", the Court notes that, following the Cabinet reshuffle of 20 November 2000, "Mr. Yerodia Ndombasi ceased to exercise the functions of Minister for Foreign Affairs and was charged with those of Minister of Education, involving less frequent foreign travel. It concludes that "it has accordingly not been established that irreparable prejudice might be caused in the immediate future to the Congo's rights nor that the degree of urgency is such that those rights need to be protected by the indication of provisional measures".

The Court adds that, "while the Parties appear to be willing to consider seeking a friendly settlement of their dispute, their positions as set out before [it] regarding their respective rights are still a long way apart". It points out that, "while any bilateral negotiations with a view to achieving a direct and friendly settlement will continue to be welcomed, the outcome of such negotiations cannot be foreseen"; that "it is desirable that the issues before the Court should be determined as soon as possible" and that "it is therefore appropriate to ensure that a decision on the Congo's Application be reached with all expedition". The Court further states that the Order made 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 with any questions relating to the admissibility of the Application or to the merits themselves.

Declaration of Judge Oda

Judge Oda supports the Court's decision (Order of 8 December 2000, paragraph 78 (2)) to dismiss Congo's request for a provisional measure. However, he differs from the Court in that he believes that the request has become moot because of the Cabinet reshuffle in the Congo. (He is of the view that the Application itself had been moot from the outset, since there was no breach of the Congo's legitimate rights and interests by the issuance of the arrest warrant by a Belgian judge.)

Judge Oda regrets that the Court refrained from pronouncing on the argument advanced by Belgium that the measure relating to the discharge of the arrest warrant, sought by the Congo on a provisional basis, is identical to that sought by it on the merits, since he believes that that

reason in itself would be sufficient ground for the Court to reject the request for the indication of a provisional measure.

Judge Oda is unable to share the Court's view that "it is ... appropriate to ensure that the decision on the Congo's Application be reached with all expedition" and is critical of the Court's position, believing that the Court reached its conclusion as a compromise to make up for the dismissal of the Congo's request for the indication of a provisional measure.

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With some reluctance, Judge Oda voted in favour of paragraph 78 (1) and did so only from a sense of judicial solidarity. It is still his belief that this case should have been removed from the Court's General List, since, in his view, there is in this instance no legal dispute susceptible to the Court's jurisdiction. A simple and unfounded apprehension that Mr. Yerodia Ndombasi would, as a result of the issuance of the arrest warrant, be held by the authorities of any third State cannot entitle the Congo to bring a claim of alleged breach of its rights and interests.

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In Judge Oda's view the issue concerning whether or not there is a justiciable dispute is *not* the same as a preliminary objection raised by a respondent State concerning the issue of whether a State may be compulsorily brought to the Court in consequence of its voluntary acceptance in advance of the Court's jurisdiction, in circumstances where, in principle, the consent of the parties is essential. That issue is, theoretically, a matter to be dealt with prior to a decision on whether the Court has jurisdiction over the case with which the Court is seized.

Judge Oda accepts that this issue may generally be dealt with at the jurisdictional phase once the case is registered with the Court (see "Preliminary Objections" under Section D (Incidental Proceedings) of the Rules of Court). He nonetheless believes that, if by chance the Court finds itself in a position (as has been seen in certain recent cases) to face this question much earlier, namely prior to the jurisdictional phase, it should not hesitate to do so. Interim Protection (Section D (Incidental Proceedings) of the Rules of Court) presents an ideal opportunity to deal with this question as a "pre-preliminary" question. The Court could, in Judge Oda's view, make a decision to remove a case from its General List at that stage or to continue to be seized of it, after examining whether there had existed from the outset a "legal dispute" or a "dispute".

Judge Oda takes the view that, if the Court had to wait until the jurisdictional phase before dealing with the question of whether or not there actually existed a justiciable dispute, there would be an excessive number of similar cases brought to the Court simply for the reason that a State believed that another State had acted contrary to international law. He fears that many States would then withdraw their acceptance of the Court's compulsory jurisdiction in order to avoid such a distortion in the presentation of cases brought by other States.

Declaration of Judge Ranjeva

[Translation]

I voted in favour of the operative part of the Order on account of paragraph 76: a final determination of all the issues before the Court, to be reached with all expedition and with the Parties' full cooperation to that end in the proceedings, is the most appropriate of provisional measures.

Separate opinion of Judge Koroma

In his separate opinion, Judge Koroma stated that he had voted for the Order not without some doubts and misgivings, because of the legal principles involved, the wider ramifications of the case, as well as the national and wider community interests it involved. Given such competing interests and legal principles, the request for provisional measures to preserve the rights of the Parties — the Democratic Republic of the Congo in this case — cannot be judged to be without merit, let alone "moot", without object or frivolous. The serious issues involved would have to be adjudicated should the matter reach the merits phase.

He agreed that the issuance and execution of the international arrest warrant had posed a risk for the then Foreign Minister of the Democratic Republic of the Congo, but that this risk had dissipated following the Cabinet reshuffle in Kinshasa when Mr. Ndombasi ceased to be Foreign Minister. In his view the Court was right to take judicial notice of this change of circumstance, which in turn had an influence on its decision. He was not at this stage in a position to determine definitively the effect of the arrest warrant on the rights of the Democratic Republic of the Congo.

In his view the Court should not only have acknowledged the willingness of the Parties to achieve a resolution of the dispute, if called upon to do so by the Court, but should have embodied that plea within the confines of the Order in accordance with its jurisprudence.

Finally, in the light of the circumstances of the case, he considered the decision of the Court to deal with the case with utmost despatch to be both judicious and appropriate.

Separate opinion of Judge Parra-Aranguren

In spite of his vote for the operative part of the Order, Judge Parra-Aranguren considers that the Court should have upheld the objection of Belgium not to take into account the Democratic Republic of the Congo's optional clause declaration as a prima facie ground of jurisdiction because it had been invoked at a very late stage of the proceedings, in the second round of public argument. In his opinion Belgium's objection should have been upheld as the Court did in two previous similar cases (*Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2*

June 1999, I.C.J. Reports 1999, paras. 42-44) and *Legality of Use of Force (Yugoslavia* v. *Netherlands). Provisional Measures. Order of 2 June 1999. I.C.J. Reports 1999,* paras. 42-44).

Judge Parra-Aranguren examines and finds inconclusive the various arguments advanced by the Court to support its new position. Moreover, he recalls that the Democratic Republic of the Congo indicated its optional clause declaration as a ground for the jurisdiction of the Court in three separate Applications filed by it in the Registry on 23 June 1999 (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), (Democratic Republic of the Congo* v. *Burundi)* and *(Democratic Republic of the Congo* v. *Rwanda)*).

Judge Parra-Aranguren also indicated that the Democratic Republic of the Congo did not proceed in the same way in the present case and gave no explanation for invoking its optional clause declaration as a ground for the jurisdiction of the Court in the second round of oral argument. Therefore, in his opinion, it cannot be taken into account by the Court to decide whether it has prima facie jurisdiction to entertain the request for provisional measures presented by the Democratic Republic of the Congo.

Dissenting opinion of Judge Rezek

Judge Rezek considers that the two requirements of any provisional measure are met here. He acknowledges the soundness, prima facie, of the argument that a violation of the principle of the equality of States occurs when a domestic forum seeks to order the arrest of a member of a foreign government on the sole basis of the principle of universal jurisdiction, and without the accused being physically present in the territory of the forum State.

He further believes that the continuance of such a situation, which is both restrictive of the full exercise of the public function of the Congolese Minister and vexatious with respect to the sovereignty of the applicant State, justifies the indication of a provisional measure which, without major prejudice to the other Party, would suspend the effects of the arrest warrant, or rather the international character which the Belgian Government has accorded to it, pending the Court's definitive ruling on the matter.

Dissenting opinion of Judge Bula-Bula

[Translation]

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Introduction

1. It was with regret that I voted against the main clause of the operative part of the Order of 8 December 2000 concerning the indication of provisional measures. I understand that the Court was sharply divided over the question. It thus appeared wise to seek a compromise among the Members of the Court.

2. Such a reason may be acceptable, particularly since the present case is at a purely procedural stage which does not prejudge the rights of either Party.

3. It is precisely the interlocutory nature of the Order which prompts me to believe that the compromise ultimately adopted by the Court lacks balance. Thus, I am of the opinion that the Court should have clearly indicated a minimal provisional measure which I find justified under the circumstances. Without necessarily following the terms of the request, the Court could have prescribed this measure *proprio motu*, as permitted by its Statute (Art. 41) and Rules (Art. 75).

4. I believe that the Court should give a certain, clear and precise response, whether affirmative or negative, to the Congo's request. In other words, it should either deny it or grant it. The statement "the circumstances, as they now present themselves to the Court, are not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures" (paragraph 2 of the operative part of the Order) does not appear, on first view, to be without ambiguity. We have become accustomed to the circumlocutions of a principal political organ of the United Nations when called upon to take difficult decisions. We must now get used to similar pronouncements from the principal judicial organ of the United Nations. Do the teachings, in the broad sense, of the jurisprudence benefit from this?

5. That is one of the main reasons for my dissent [I], but I do agree with the majority of the Court on certain points [II]. Finally, I shall describe the solution which I find appropriate [III].

I. *Points of concurrence*

6. I will briefly raise three points which the Court has considered and with which I am in agreement. Like the majority of the Members of the Court, I believe that the Court has prima facie jurisdiction (see paragraph 68 of the Order) pursuant to the Parties' respective declarations accepting its compulsory jurisdiction (see paragraphs 61 and 64 of the Order). But the Applicant failed to specify with mathematical precision the basis of the Court's jurisdiction. I also share the conclusion set out in the Order finding that "the request by the Congo for the indication of provisional measures has not been deprived of its object by reason of Mr. Yerodia Ndombasi's appointment as Minister of Education on 20 November 2000" (paragraph 60 of the Order). Finally, I voted with the majority of the Court in favour of the first paragraph of the operative part of the Order. The Court rightly "*Reject[ed]* the request of the Kingdom of Belgium that the case be removed from the

List". This request, possibly justified in the eyes of the Respondent, is in keeping with its extravagant claim to universal jurisdiction, as the Respondent conceives it. The Court intends to consider it on the merits "with all expedition" (paragraph 76 of the Order). This is a crucial point of the judicial compromise embodied in the decision and one which limits the inequitable consequences of the polite denial of the Congo's request.

7. Thus, I shall not address the very important issue, in this phase of the proceedings, of the legal relationship between universal jurisdiction and State immunities.

II. *Points of dissent*

8. I shall now justify the minimal provisional measure which, in my view, the Court should have prescribed. For this purpose, I have to show that the conditions for the indication of such a measure, as laid down in a generally consistent manner in the jurisprudence, i.e., urgency, irreparable prejudice and the preservation of the rights of the parties, have been and remain satisfied (for the doctrine, see in particular P. M. Martin, "Renouveau des mesures conservatoires : les ordonnances récentes de la Cour internationale de Justice", *JDI* Vol. 102, 1975, pp. 45-59; J. Peter A. Bernhard, "The Provisional Measures Procedure of the International Court of Justice through U.S. Staff in Teheran: Fiat Justitia, Pereat Curia", *Virginia Journal of International Law*, Vol. 20, No. 3, 1980, pp. 592-602).

A. *Urgency*

9. I believe that urgency must be assessed in the light of the sphere of human endeavour in question. It may be regarded as a circumstance calling for the expeditious handling of the case. Within that position there may be degrees of urgency, so that it is possible to establish a hierarchy among urgent situations: extreme urgency, great urgency, urgency (see the Order of 3 March 1999 in the *LaGrand Case*, "the greatest urgency" (*I.C.J. Reports 1999*, p. 12, para. 9)). In all of these various cases, there is always urgency.

10. I therefore reaffirm that the urgency characterizing the present case has its own particular features. It is neither urgency in the medical sense of the term nor urgency as understood directly from the humanitarian standpoint. It is urgency in the general legal sense of the term. It cannot be assessed either in the absolute or in the light of individual precedents. In the case under consideration, the criterion of time must be measured in the light of the tragic events afflicting the Congo and the quickening rate at which international conferences concerning the country are being held. The Court has already taken cognizance of the facts, concerning which it has indicated provisional measures (case concerning *Armed Activities on the Territory of the Congo, Order of 1 July 2000*).

11. If it were true that, as the Congo alleges and Belgium does not dispute, "more than half the members of the Congolese Government might be prosecuted and might be named on international arrest warrants and requests for extradition, including the President of the Republic himself" (see the oral argument by Mr. Ntumba Luaba Lumu, verbatim record of the public hearing on 22 November 2000, CR 2000/34, p. 16 [English translation]), and that, as the Congo contends, the "complainants" include "a political party in opposition to the Congolese Government and operating on Belgian territory", or that "security reasons" prevent counsel for Belgium from revealing the identity of the complainants of Congolese nationality who were behind the warrant of 11 April 2000 (see the oral argument by Mr. Eric David, verbatim record of the public hearing on 21 November 2000, CR 2000/33, p. 20 [English translation]), would there not be an urgent need for some form of provisional ruling? Does not the need to safeguard the efficacy of the international judicial function require that such a situation be prevented from arising in the case pending before the Court?

12. I am further led to reflect on this situation when I consider a comment by Mr. Ntumba Luaba Lumu, one of the Congo's counsel and a member of that country's Government. Belgium did not challenge that comment. The speaker asked in the following terms whether the reshuffling of the Congolese Government on 20 November 2000 was not in response to Belgium's desire:

> "The question may be raised whether this warrant was not intended as a means to force the lawful authorities of the Democratic Republic of the Congo to make certain political changes which Belgium desired and which, moreover, have been welcomed." (See the verbatim record of the public hearing of 22 November 2000, CR 2000/34, p. 6 [English translation].)

13. While I cannot establish a definite causal relationship between certain facts, I can also reasonably question the closeness in time of the visit to Kinshasa by a member of the Belgian Government on 18 November 2000, the reshuffling of the Congolese Government on 20 November 2000 and the opening of the hearings by the Court on 20 November 2000. Was it mere chance that these events coincided?

14. I am therefore of the opinion that there is an urgent need, albeit an attenuated one, to order provisional measures. And I believe so even more strongly because I have one fear: that, regardless of the Court's good intentions, a judicial decision on the merits may be a long time in coming, and that during that time there is a risk that the case could be removed from the List. Barring unforeseen developments.

B. *Irreparable prejudice*

15. I would be inclined to believe that the Congo has suffered irreparable prejudice, directly from the standpoint of moral damage and indirectly from the standpoints of material and physical damage and human injury, from Belgium's unilateral act against the Congolese Minister for Foreign Affairs. Such a criterion has been repeatedly upheld in the Court's abundant jurisprudence, notably in the cases concerning *Nuclear Tests (Australia* v. *France) (I.C.J. Reports 1973,* p. 103*); United States Diplomatic and*

Consular Staff in Tehran (United States of America v. *Iran) (I.C.J. Reports 1979,* p. 19*); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)) (I.C.J. Reports 1993,* p. 19*);* and *Vienna Convention on Consular Relations (Paraguay* v. *United States of America) (I.C.J. Reports 1998,* p. 36*); the LaGrand Case (I.C.J. Reports 1999,* p. 15*);* and the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda) (I.C.J. Reports 2000,* para. 39*).* But, as far as the Applicant is concerned, it remains the case that *actori incumbit probatio.* Nor do I deny that the magnitude of the prejudice suffered by the Congo has changed since Mr. Yerodia Ndombasi moved from the Ministry of Foreign Affairs to the Ministry of Education. In other words, that State continues to suffer harm but in lesser proportions than that previously suffered from the standpoint of international relations.

16. Specifically, I believe that the arrest warrant of 11 April 2000 caused prejudice to Congolese diplomacy, since the head of the diplomatic corps, who did nevertheless take numerous trips abroad — in the southern hemisphere — was unable for several months to take part in all the international meetings held throughout the world where the question of foreign armed activities on the territory of the Congo was addressed. Thus, when it found itself being represented by lower-level officials at meetings of Foreign Ministers, the Congolese State suffered the loss of the benefit of diplomatic precedence. The result was that the substance of talks, especially discussions aimed at ending the armed conflict, was adversely affected. The Congo's international sovereign prerogatives therefore suffered. This, I believe, is a type of irreparable prejudice (see Ewa Stanislawa Alicja Salkiewicz: *Les mesures conservatoires dans la procédure des deux Cours de La Haye*, Geneva, IUHEI, 1984, p. 69, concerning "damage not capable of any reparation"). Although unfortunately no irrebutable evidence was offered, this situation could have had *indirect consequences* on the life of the civilian population victim of the armed conflict in progress (according to the International Rescue Committee (United States), *Mortality Study Eastern Democratic Republic of Congo, "of the 1.7 million excess deaths, 200,000 were attributable to acts of violence"* (sources: www.theirc.org/mortality.htm).

17. I would also argue that Belgium's conduct has cast discredit, and continues to cast discredit, on the Government of the Congo, already weakened by the armed conflict in progress. That conduct is likely, as the result of a summary decision, to burden one of the Parties to the conflict from the outset with accusations that degrade it in the eyes of the international community and to characterize the aggressed as the aggressor (see Security Council resolution 1234 of 9 April 1999 and resolution 1304 of 16 June 2000). Has not the fact that Belgium, through Interpol, circulated its warrant to Interpol member States complicated the search for a peaceful resolution to the international armed conflict? I believe that the Congo's rights to international respect have been prejudiced thereby. These are moral rights to honour and dignity of the Congolese people, as represented by their State.

18. In sum, Belgium's actions have in the first place caused injury to the sovereign rights of the Congolese people, as organized in an independent State: "deprival of the State's sovereignty ... is a sure test of the irreparability of the prejudice" (El-Kosheri, dissenting opinion 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), I.C.J. Reports 1992,* p. 215). In the words of Judge Oda, the object of provisional measures is "to preserve *rights of States* exposed to an imminent breach which is irreparable" (declaration in the *LaGrand Case, I.C.J. Reports 1999*, p. 19, para. 5). Secondly, Belgium's actions have violated that people's rights to dignity and honour within the international community, including indirect injury in the form of other prejudice, albeit collateral.

19. I do not disagree, however, that it is very difficult to place a precise value on the injury caused to the Congo. But that is a problem which may arise in the practical application of the principle. I would point out once again that the absence over several months of the head of the Congolese diplomatic corps from international meetings held in the capitals of countries at the centre of world events, as opposed to those playing more peripheral roles, may in all likelihood have resulted in indirect damage to Congolese citizens and assets currently situated on territories where hostilities are taking place. The presence of the Congolese Minister for Foreign Affairs in person at those meetings might have saved lives. The Minister might have succeeded in convincing other parties to the armed conflict to respect international humanitarian law and human rights (see Judge Oda's declarations in the *Breard* and *LaGrand* cases: "the rights of victims of violent crimes (a point which has often been overlooked) should be taken into consideration" (*Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 260, para. 2, and *LaGrand Case (Germany* v. *United States of America), Order of 3 March 1999, I.C.J. Reports 1999*, p. 18, para. 2).

20. I believe it even more difficult to make a precise estimate of the moral prejudice. But that does not make that prejudice any less real. When considering the merits of the case, the Court will be in a position to observe this. Under current international law, the act of issuing an arrest warrant against an organ of a foreign State is itself highly questionable. Let us imagine the converse situation, in which Congolese courts were to issue similar warrants against Belgian organs concerning acts committed in the Congo post-Nuremberg, during which period this new law came into being, according to counsel for Belgium. For, as Antonio Cassese states, European colonization caused "the destruction of entire ethnic groups" (Antonio Cassese, "La communauté internationale et le génocide", *Le droit international au service de la paix, de la justice et du*

développement, Mélanges Virally, Paris, Pedone, 1991, p. 183).

21. Nevertheless, I am of the view that the irreparable prejudice suffered by the *Congo* has diminished in magnitude since Mr. Yerodia Ndombasi was entrusted with the education portfolio on 20 November 2000, because he has *at present* been assigned the duties of Minister of Education and most of those activities are carried out on the national territory. The fact remains that, in a world in which an increasing number of matters take on an international dimension, a minor part of those duties, in the classic, division of labour sense, involves international relations. Is it acceptable that, because that part is small, it should be subject to such restrictions?

22. Moreover, international law recognizes the constitutional autonomy of States and, pursuant to that autonomy, States may freely appoint, without impediment or outside interference, any member of the Government to fulfil missions abroad, without regard to that member's nominal office. This would appear to be a common practice of the Congo, among other States. This is all the more important because the armed conflict confronting the Congo requires participation, both individual and collective, by members of its Government in bilateral and multilateral negotiations aimed at ending the war. It is therefore possible that the Congo is deprived *de facto* of the full exercise of its sovereign prerogatives internationally if Mr. Yerodia Ndombasi is prevented, because of his recent experience in this area or for any other reason, from freely accomplishing a mission on behalf of his Government in certain foreign countries.

23. In the final analysis, it appears to me that, as long as the former Minister for Foreign Affairs of the Congo remains a member of the Congolese Government, his change in position does not drastically alter the *circumstances* which called for the submission of the request for the indication of provisional measures. I do not, however, deny that there is a substantial difference between the functions of a Minister for Foreign Affairs and those of a Minister of Education, and between the legal bases of the immunities attaching to one or the other of those government posts.

C. *Preservation of the Parties' respective rights*

24. Much argument was devoted to the Parties' respective rights to be preserved. It was thus alleged that the Congo was making the same claims in the request for provisional measures as in the Application concerning the merits. Fortunately, the Court did not accept this argument. I continue to believe that the Applicant's *sovereign rights* and its *rights to honour and dignity* must be safeguarded in a balanced manner with the Respondent's rights pending the judgment on the merits. Under the present circumstances, these respective rights are not evenly balanced. There is a real risk that one of the States will continue to be subject to the will of the other.

25. The Respondent justifies its singular conduct as follows:

> "33. Quite the contrary: the issue of the arrest warrant is a means of helping the Congo to exercise a right which — it should be recalled — is also an obligation for the Congo, namely that of arresting and prosecuting Mr. Yerodia Ndombasi in the Congolese courts on account of the acts with which he is charged." (See the oral argument by Mr. Eric David, CR 2000/33, p. 28 [English translation].)

I interpret this conception as "[r]eliance by a State on a novel right or an unprecedented exception to the principle" [of non-intervention] which "if shared in principle by other States" would "tend towards a modification of customary international law" (case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 109, para. 207). Does a subjective right not have the effect of excluding third-party claims and obliging third parties to respect the right of another?

> "In other words," continued counsel for Belgium, "the arrest warrant issued by the Belgian judicial authority, far from violating the Congo's rights, on the contrary assists that country in exercising them" (*ibid.*, p. 29 [English translation]). Are these the consequences of lingering memories of historical legal ties that enabled the colonizing Power to promulgate legal provisions with overseas effect?

Thus what we find being put forward here is the notion of "judicial intervention" (see Mario Bettati, *Le droit d'ingérence — Mutation de l'ordre international*, Paris, éditions Odile Jacob, 1996, *contra* S. Bula-Bula, "L'idée d'ingérence à la lumière du Nouvel Ordre Mondial", *Revue africaine de droit international et comparé*, Vol. IV, No. 1, March 1994, "La doctrine d'ingérence humanitaire revisitée", *ibid.*, Vol. 9, No. 3, September 1997).

And Belgium goes so far as to assert that: "In these circumstances, to indicate the provisional measures requested by the Congo in this case would be tantamount to violating the rights which international law itself has conferred on Belgium." (Oral argument by Mr. Eric David, *op cit.*, p. 32 [English translation].)

26. I persist in believing that the analysis set out in points A and B above shows that there is *relative urgency* in indicating provisional measures. It also demonstrates the *irreparable prejudice* already suffered and continuing to be suffered by a decolonized State, caused by an erstwhile colonial Power convinced — some would say — of its "sacred civilizing mission". The Applicant is not relying on a "'ghost' right" (oral argument by Mr. Eric David, *ibid.*, p. 32). It is apparent that the Congo's accusations against Belgium in this case, which, as shown above, Belgium has implicitly admitted, do indeed concern Belgium's violation of the sovereignty and political independence of the Congo. I believe that those rights fall within the scope of the present legal dispute.

Those rights demand safeguarding, at the risk otherwise that one of the Parties will impose its political and legal order on the other, thereby rendering moot any consideration of the case on the merits (see above the

reference to the Belgian judge's "waiting list" of arrest warrants for several Congolese ministers and the reference by counsel for the Congo, a member of the Congolese Government, to Belgium's desire for a Cabinet reshuffle and to the simultaneous occurrence of certain events, etc.).

27. The rights to be preserved also include the sovereign prerogative (see paragraph 40 of the Order of 1 July 2000 in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*: it is upon "[the] rights to sovereignty ... that the Court must focus its attention in its consideration of this request for the indication of provisional measures") which each State is recognized to enjoy in exercising its full powers in the legislative, executive and judicial spheres without outside interference. No State can impose on another State, by means of *coercive* measures, whether administrative, judicial or others, the manner in which domestic affairs are to be conducted on its territory (see Judge Bedjaoui, 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), I.C.J. Reports 1992*, p. 148, and S. A. El-Kosheri, *op cit.*, p. 215). The allegation of any fact which might engage the responsibility of a State must be communicated through appropriate diplomatic channels to that State, because "international law requires political integrity also to be respected" (case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 106, para. 202).

28. It is to be hoped that the dispute between the two States is neither *aggravated* nor *extended*, given that the Congo's ambassador to Brussels returned to his post in late November 2000, after having been recalled in response to the issue of the disputed warrant in April 2000. Nevertheless, relations between Belgium and the Congo, historically characterized by highs and lows ever since decolonization, could have benefited had the Court been less pusillanimous.

III. *Conclusion*

29. In short, I consider that it would have been appropriate and legitimate for the Court to indicate a provisional measure ordering the *suspension of the warrant* of 11 April 2000 pending the Court's decision on the merits, to be rendered with all expedition in light of the importance of the case.

30. I therefore find the Respondent's request that the Court deny all provisional measures to be altogether excessive. Also, I do not agree with the Court's analysis of the current circumstances, which, in its view, do not require it to exercise its power as defined in Article 41 of the Statute.

31. Failing the minimal provisional measure set out above, the Court could have included my amendment, worded as follows, in the operative part of the draft Order:

"2. (*a*) *Finds* that the Kingdom of Belgium, which has knowledge of the nature of the claim by the Democratic Republic of the Congo, should consider the impact that a judgment upholding that claim could have on the execution of the warrant of 11 April 2000 and should decide whether and to what extent it ought therefore to reconsider its warrant;

(*b*) *Finds* that the Democratic Republic of the Congo, which has knowledge of the nature of the claim by the Kingdom of Belgium, should consider the impact that a judgment upholding that claim could have on the execution of the arrest warrant of 11 April 2000 and should decide whether and to what extent it ought therefore to reconsider its position."

As Judge Oda has recalled:

"through the Court's jurisprudence it is established that, if the Court appears prima facie to possess jurisdiction, it may (if it thinks fit) indicate provisional measures, and this rule has always been interpreted most generously in favour of the applicant, lest a denial be needlessly prejudicial to the continuation of the case. Thus the possibility of indicating provisional measures may be denied *in limine* only in a case where the lack of jurisdiction is so obvious as to require no further examination of the existence of jurisdiction in a later phase." (Declaration of Acting President Oda, appended to the Order of 14 April 1992 concerning provisional measures 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), I.C.J. Reports 1992*, p. 130.)

33. The doctrine is in general agreement in acknowledging that the Court's power to indicate provisional measures aims to "prevent its decisions from being stultified" (G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. II, p. 542, 1986, quoted by Judge Ajibola in his dissenting opinion 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), I.C.J. Reports 1992*, p. 194).

34. Can I consider that the Court in the present case has interpreted the request generously? Can it be asserted that there is no reason to fear that the case could be removed from the Court's List? Is there any doubt as to the very high importance of this case on the merits? Yet a very wide majority of the Members of the Court agree that the Court has prima facie jurisdiction in this case.

35. It is to be hoped that the Court's attitude, apparently dictated by the institution's own considerations of judicial policy, is not seen by certain litigants, first and foremost the Applicant in the present proceedings, as a denial of justice. What is at stake is promotion of the rule of law. For, as Lacordaire said, as between the weak and the strong, freedom oppresses and the law protects. Is not the "freedom" found in dealings between a former colonial

Power, now an industrialized country, and its weakened, former colony an example of this?

36. Admittedly, the Applicant appears not to have made an entirely coherent case before the Court. It is undeniably true that a litigant bringing judicial proceedings is under an obligation, pursuant to the rules of procedure, to act in a manner calculated to maximize its chances of prevailing, even within the relatively short time limits for incidental proceedings.

37. No one, moreover, can be ignorant of the role played, especially lately, by public opinion. It is however sometimes important to cast an objective eye on the "hasty judgments of public opinion or the mass media" (dissenting opinion of Judge Bedjaoui 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), I.C.J. Reports 1992*, p. 148).

Declaration of Judge Van den Wyngaert

In her declaration, Judge Van den Wyngaert emphasizes the importance of the case for the development of modern international criminal law. The international community undoubtedly agrees in principle with the proposition that the "core crimes" of international criminal law (war crimes, genocide and crimes against humanity) should not remain unpunished. However, *how* this should be realized in practice is still the subject of much discussion and debate. Ideally, such crimes should be prosecuted before *international* criminal courts. Not *all* cases will be justiciable before such courts. Meanwhile, *national* criminal prosecution before domestic courts is the only means of enforcing international criminal law. States have not only a moral, but also a legal obligation under international law to ensure that they are able to prosecute international core crimes domestically.

Judge Van den Wyngaert draws attention to the growing support for the idea that traditional limitations on criminal prosecution (territorial jurisdiction, immunities) cannot be applied to international core crimes. This idea is gaining support, not only in legal doctrine but also in national courts' decisions such as the judgment of the House of Lords in the Pinochet case.

The case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium*) is the first case in which the ICJ will consider these points. It is indeed the first modern case which confronts two States on the issues of extraterritorial jurisdiction and immunity arising from the application of a domestic statute to international core crimes.

Judge Van den Wyngaert feels that times have changed since the Permanent Court of International Justice decided the "*Lotus*" case in 1927. For the sake of legal certainty, it is important that the International Court of Justice decides on the merits of the present case with expedition.

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131. CASE CONCERNING ARMED ACTIVITIES ON THE TERRITORY OF THE CONGO (DEMOCRATIC REPUBLIC OF THE CONGO *v.* BURUNDI) (DISCONTINUANCE)

Order of 30 January 2001

In an order issued in the case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo *v.* Burundi) the Court decided to remove the case from the Court's List at the request of the Democratic Republic of Congo.

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The full text of the Order reads as follows:

"The President of the International Court of Justice,

Having regard to Article 48 of the Statute of the Court and to Article 89, paragraphs 2 and 3, of the Rules of Court,

Having regard to the Application filed in the Registry of the Court on 23 June 1999, whereby the Democratic Republic of the Congo instituted proceedings against the Republic of Burundi in respect of a dispute concerning "acts of *armed aggression* perpetrated by Burundi on the territory of the Democratic Republic of the Congo, in flagrant violation of the United Nations Charter and of the Charter of the Organization of African Unity",

Having regard to the Order of 21 October 1999, whereby the Court, taking into account the agreement concerning the procedure reached between the Parties, and their views regarding the time limits to be fixed, decided that the written proceedings would first be addressed to the questions of the jurisdiction of the Court to entertain the Application and of its admissibility, and fixed 21 April 2000 and 23 October 2000 respectively as the time limits for the filing of the Memorial of the Republic of Burundi and the Counter-Memorial of the Democratic Republic of the Congo on those questions,

Having regard to the Memorial of the Republic of Burundi, which was filed within the time limit thus fixed,

Having regard to the Order of 19 October 2000, whereby the President of the Court extended to 23 January 2001 the time limit for the filing of the Counter-Memorial of the Democratic Republic of the Congo;

Whereas, by a letter dated 15 January 2001, received in the Registry on the same day by facsimile, the Agent of the Democratic Republic of the Congo, referring to Article 89, paragraph 2, of the Rules of Court, notified the Court that the Government of the Democratic Republic of the Congo wished to discontinue the proceedings and stated that it "reserve[d] the right to invoke subsequently new grounds of jurisdiction of the Court";

Whereas a copy of that letter was immediately communicated to the Government of the Republic of Burundi, which was informed that the President of the Court, acting pursuant to Article 89, paragraphs 2 and 3, of the Rules of Court, had fixed 23 January 2001 as the time limit within which Burundi could state whether it opposed the discontinuance;

Whereas, by a letter dated 19 January 2001, received in the Registry on the same day by facsimile, the Agent of Burundi informed the Court that his Government concurred in the Democratic Republic of the Congo's discontinuance of the proceedings,

Places on record the discontinuance by the Democratic Republic of the Congo of the proceedings instituted by the Application filed on 23 June 1999; and

Orders that the case be removed from the List."

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132. CASE CONCERNING ARMED ACTIVITIES ON THE TERRITORY OF THE CONGO (DEMOCRATIC REPUBLIC OF THE CONGO *v.* RWANDA) (DISCONTINUANCE)

Order of 30 January 2001

In an order issued in the case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda) the Court decided to remove the case from the Court's List at the request of the Democratic Republic of Congo.

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The full text of the order reads as follows:

"The President of the International Court of Justice,

Having regard to Article 48 of the Statute of the Court and to Article 89, paragraphs 2 and 3, of the Rules of Court,

Having regard to the Application filed in the Registry of the Court on 23 June 1999, whereby the Democratic Republic of the Congo instituted proceedings against the Rwandese Republic in respect of a dispute concerning "acts of *armed aggression* perpetrated by Rwanda on the territory of the Democratic Republic of the Congo, in flagrant violation of the United Nations Charter and of the Charter of the Organization of African Unity",

Having regard to the Order of 21 October 1999, whereby the Court, taking into account the agreement concerning the procedure reached between the Parties, and their views regarding the time limits to be fixed, decided that the written proceedings would first be addressed to the questions of the jurisdiction of the Court to entertain the Application and of its admissibility, and fixed 21 April 2000 and 23 October 2000 respectively as the time limits for the filing of the Memorial of the Rwandese Republic and the Counter-Memorial of the Democratic Republic of the Congo on those questions,

Having regard to the Memorial of the Rwandese Republic, which was filed within the time limit thus fixed,

Having regard to the Order of 19 October 2000, whereby the President of the Court extended to 23 January 2001 the time limit for the filing of the Counter-Memorial of the Democratic Republic of the Congo;

Whereas, by a letter dated 15 January 2001, received in the Registry on the same day by facsimile, the Agent of the Democratic Republic of the Congo, referring to Article 89, paragraph 2, of the Rules of Court, notified the Court that the Government of the Democratic Republic of the Congo wished to discontinue the proceedings and stated that it "reserve[d] the right to invoke subsequently new grounds of jurisdiction of the Court";

Whereas a copy of that letter was immediately communicated to the Government of the Rwandese Republic, which was informed that the President of the Court, acting pursuant to Article 89, paragraphs 2 and 3, of the Rules of Court, had fixed 23 January 2001 as the time limit within which Rwanda could state whether it opposed the discontinuance;

Whereas, by a letter dated 22 January 2001, received in the Registry on the same day by facsimile, the Agent of Rwanda informed the Court that his Government concurred in the Democratic Republic of the Congo's discontinuance of the proceedings,

Places on record the discontinuance by the Democratic Republic of the Congo of the proceedings instituted by the Application filed on 23 June 1999; and

Orders that the case be removed from the List."

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133. MARITIME DELIMITATION AND TERRITORIAL QUESTIONS BETWEEN QATAR AND BAHRAIN (QATAR *v.* BAHRAIN) (MERITS)

Judgment of 16 March 2001

In its Judgment on the case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), the Court: unanimously found that Qatar has sovereignty over Zubarah; found by twelve votes to five that Bahrain has sovereignty over the Hawar Islands; unanimously recalled that vessels of Qatar enjoy in the territorial sea of Bahrain separating the Hawar Islands from the other Bahraini islands the right of innocent passage accorded by customary international law; found by thirteen votes to four that Qatar has sovereignty over Janan Island, including Hadd Janan; found by twelve votes to five that Bahrain has sovereignty over the island of Qit'at Jaradah; unanimously found that the low-tide elevation of Fasht ad Dibal falls under the sovereignty of Qatar; decided by thirteen votes to four that the single maritime boundary that divides the various maritime zones of Qatar and Bahrain shall be drawn as indicated in paragraph 250 of the Judgment.

In this latter paragraph, the Court listed the coordinates of the points that have to be joined, in a specified order, by geodesic lines in order to form the following single maritime boundary:

- in the southern part, from the point of intersection of the respective maritime limits of Saudi Arabia on the one hand and of Bahrain and Qatar on the other, which cannot be fixed, the boundary follows a north-easterly direction, then immediately turns in an easterly direction, after which it passes between Jazirat Hawar and Janan; it subsequently turns to the north and passes between the Hawar Islands and the Qatar peninsula and continues in a northerly direction, leaving the low-tide elevation of Fasht Bu Thur, and Fasht al Azm, on the Bahraini side, and the low-tide elevations of Qita'a el Erge et de Qit'at ash Shajarah on the Qatari side; finally it passes between Qit'at Jaradah and Fasht ad Dibal, leaving Qit'at Jaradah on the Bahraini side and Fasht ad Dibal on the Qatari side (see paragraph 222 of the Judgment);
- in the northern part, the single maritime boundary is formed by a line which, from a point situated to the north-west of Fasht ad Dibal, meets the equidistance line as adjusted to take account of the absence of effect given to Fasht al Jarim. The boundary then follows this adjusted equidistance line until it meets the delimitation between the respective maritime zones of Iran on the one hand and of Bahrain and Qatar on the other (see paragraph 249 of the Judgment).

The Court was composed as follows: President Guillaume; Vice-President Shi; Judges Oda, Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; Judges ad hoc Torres Bernárdez, Fortier; Registrar Couvreur.

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

"252. For these reasons,

THE COURT,

(1) Unanimously,

Finds that the State of Qatar has sovereignty over Zubarah;

(2) (*a*) By twelve votes to five,

Finds that the State of Bahrain has sovereignty over the Hawar Islands;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Oda, Herczegh, Fleischhauer, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; Judge ad hoc Fortier;

AGAINST: Judges Bedjaoui, Ranjeva, Koroma, Vereshchetin; Judge ad hoc Torres Bernárdez;

(*b*) Unanimously,

Recalls that vessels of the State of Qatar enjoy in the territorial sea of Bahrain separating the Hawar Islands from the other Bahraini islands the right of innocent passage accorded by customary international law;

(3) By thirteen votes to four,

Finds that the State of Qatar has sovereignty over Janan Island, including Hadd Janan;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Rezek, Al-Khasawneh, Buergenthal; Judge ad hoc Torres Bernárdez;

AGAINST: Judges Oda, Higgins, Kooijmans; Judge ad hoc Fortier;

(4) By twelve votes to five,

Finds that the State of Bahrain has sovereignty over the island of Qit'at Jaradah;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Oda, Herczegh, Fleischhauer, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; Judge ad hoc Fortier;

AGAINST: Judges Bedjaoui, Ranjeva, Koroma, Vereshchetin; Judge ad hoc Torres Bernárdez;

(5) Unanimously,

Finds that the low-tide elevation of Fasht ad Dibal falls under the sovereignty of the State of Qatar;

(6) By thirteen votes to four,

Decides that the single maritime boundary that divides the various maritime zones of the State of Qatar and the State of Bahrain shall be drawn as indicated in paragraph 250 of the present Judgment;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Oda, Herczegh, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; Judge ad hoc Fortier;

AGAINST: Judges Bedjaoui, Ranjeva, Koroma; Judge ad hoc Torres Bernárdez.

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Judge Oda appended a separate opinion to the Judgment. Judges Bedjaoui, Ranjeva and Koroma appended a joint dissenting opinion to the Judgment. Judges Herczegh, Vereshchetin and Higgins appended declarations to the Judgment. Judges Parra-Aranguren, Kooijmans and Al-Khasawneh appended separate opinions to the Judgment. Judge ad hoc Torres Bernárdez appended a dissenting opinion to the Judgment. Judge ad hoc Fortier appended a separate opinion to the Judgment.

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History of the proceedings and submissions of the Parties
(paras. 1-34)

On 8 July 1991 Qatar filed in the Registry of the Court 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". In this Application, Qatar contended that the Court had jurisdiction to entertain the dispute by virtue of two "agreements" concluded between the Parties in December 1987 and December 1990 respectively, the subject and scope of the commitment to the Court's 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 (hereinafter referred to as the "Bahraini formula"). By letters of 14 July and 18 August 1991, Bahrain contested the basis of jurisdiction invoked by Qatar.

By a Judgment of 1 July 1994, the Court found that the exchanges of letters between the King of Saudi Arabia and the Amir of Qatar of 19 and 21 December 1987, and between the King of Saudi Arabia and the Amir of Bahrain of 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. After each of the Parties had filed a document on the question within the time limit fixed, the Court, by a Judgment of 15 February 1995, found that it had jurisdiction to adjudicate upon the dispute between Qatar and Bahrain which had been submitted to it; that it was now seized of the whole of the dispute; and that the Application of the State of Qatar as formulated on 30 November 1994 was admissible.

In the course of the written proceedings on the merits, Bahrain challenged the authenticity of 82 documents produced by Qatar as annexed to its pleadings. Each of the Parties submitted a number of expert reports on the issue; the Court made several Orders. By its last Order on the issue, of 17 February 1999, the Court, taking into account the concordant views of the Parties on the treatment of the disputed documents and their agreement on the extension of time limits for the filing of Replies, placed on record the decision of Qatar to disregard, for the purposes of the present case, the 82 documents whose authenticity had been challenged by Bahrain, and decided that the Replies would not rely on those documents. Following the filing of those Replies, the Court decided to permit the Parties to file supplemental documents. Public hearings were held from 29 May to 29 June 2000.

The final submissions as presented by each of the Parties at the conclusion of those hearings were as follows:

On behalf of the Government of Qatar,

"The State of Qatar respectfully requests the Court, rejecting all contrary claims and submissions:

I. To adjudge and declare in accordance with international law:

A. (1) That the State of Qatar has sovereignty over the Hawar islands;

(2) That Dibal and Qit'at Jaradah shoals are low-tide elevations which are under Qatar's sovereignty;

B. (1) That the State of Bahrain has no sovereignty over the island of Janan;

(2) That the State of Bahrain has no sovereignty over Zubarah;

(3) 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;

II. To draw a single maritime boundary between the maritime areas of sea-bed, subsoil and superjacent waters appertaining respectively to the State of Qatar and the State of Bahrain on the basis that Zubarah, the Hawar islands and the island of Janan appertain to the State of Qatar and not to the State of Bahrain, that boundary starting from point 2 of the delimitation agreement concluded between Bahrain and Iran in 1971 (51°05'54" E and 27°02'47" N), thence proceeding in a southerly direction up to BLV (50°57'30" E and 26°33'35" N), then following the line of the British decision of 23 December 1947 up to NSLB (50°49'48" E and 26°21'24" N) and up to point L (50°43'00" E and 25°47'27" N), thence proceeding to point S1 of the delimitation agreement concluded by Bahrain and Saudi Arabia in 1958 (50°31'45" E and 25°35'38" N)."

On behalf of the Government of Bahrain,

"*Having regard* to the facts and arguments set forth in Bahrain's Memorial, Counter-Memorial, and Reply, and in the present hearings;

May it please the Court, rejecting all contrary claims and submissions, to adjudge and declare that:

1. Bahrain is sovereign over Zubarah.

2. Bahrain is sovereign over the Hawar Islands, including Janan and Hadd Janan.

3. In view of Bahrain's sovereignty over all the insular and other features, including Fasht ad Dibal and Qit'at Jaradah, comprising the Bahraini archipelago, the maritime boundary between Bahrain and Qatar is as described in Part Two of Bahrain's Memorial."

[For the delimitation lines proposed by each of the Parties, see sketch-map No. 2 of the Judgment, which is attached.]

Geographical setting
(para. 35)

The Court notes that the State of Qatar and the State of Bahrain are both located in the southern part of the Arabian/Persian Gulf (hereinafter referred to as "the Gulf"), almost halfway between the mouth of the Shatt al Arab, to the north-west, and the Strait of Hormuz, at the Gulf's eastern end, to the north of Oman. The mainland to the west and south of the main island of Bahrain and to the south of the Qatar peninsula is part of the Kingdom of Saudi Arabia. The mainland on the northern shore of the Gulf is part of Iran. The Qatar peninsula projects northward into the Gulf, on the west from the bay called Dawhat Salwah, and on the east from the region lying to the south of Khor al-Udaid. The capital of the State of Qatar, Doha, is situated on the eastern coast of the peninsula.

Bahrain is composed of a number of islands, islets and shoals situated off the eastern and western coasts of its main island, which is also called al-Awal Island. The capital of the State of Bahrain, Manama, is situated in the north-eastern part of al-Awal Island. Zubarah is located on the north-west coast of the Qatar peninsula, opposite the main island of Bahrain.

The Hawar Islands are located in the immediate vicinity of the central part of the west coast of the Qatar peninsula, to the south-east of the main island of Bahrain and at a distance of approximately 10 nautical miles from the latter.

Janan is located off the south-western tip of Hawar Island proper.

Fasht ad Dibal and Qit'at Jaradah are two maritime features located off the north-western coast of the Qatar peninsula and to the north-east of the main island of Bahrain.

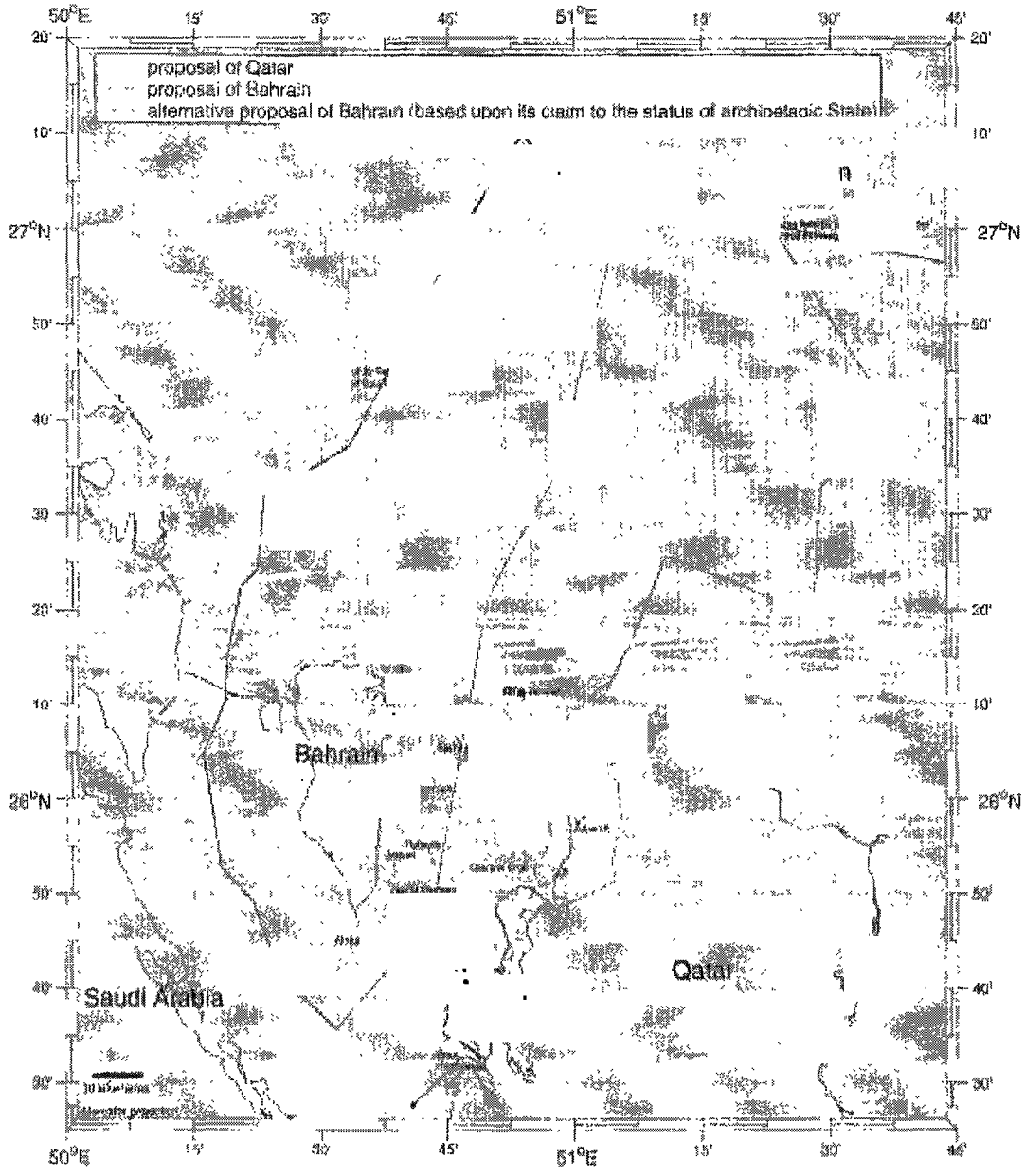
Historical context
(paras. 36-69)

The Court then gives a brief account of the complex history which forms the background to the dispute between the Parties (only parts of which are referred to below).

Navigation in the Gulf was traditionally in the hands of the inhabitants of the region. From the beginning of the sixteenth century, European powers began to show interest in the area, which lay along one of the trading routes with India. Portugal's virtual monopoly of trade was not challenged until the beginning of the seventeenth century. Great Britain was then anxious to consolidate its presence in the Gulf to protect the growing commercial interests of the East India Company.

Between 1797 and 1819 Great Britain despatched numerous punitive expeditions in response to acts of plunder and piracy by Arab tribes led by the Qawasim against British and local ships. In 1819, Great Britain took control of Ras al Khaimah, headquarters of the Qawasim, and signed separate agreements with the various sheikhs of the region. These sheikhs undertook to enter into a General Treaty of Peace. By this Treaty, signed in January 1820, these sheikhs and chiefs undertook on behalf of themselves and their subjects inter alia to abstain for the future from plunder and piracy. It was only towards the end of the nineteenth century that Great Britain would adopt a general policy of protection in the Gulf, concluding "exclusive agreements" with most sheikhdoms, including those of Bahrain, Abu Dhabi, Sharjah and Dubai. Representation of British interests in the region was entrusted to a British Political Resident in the Gulf, installed in Bushire (Persia), to whom British Political Agents were subsequently subordinated in various sheikhdoms with which Great Britain had concluded agreements.

SKETCH-MAP No. 2
Lines proposed by Qatar and Bahrain



This sketch-map, on which maritime features are shown in simplified form, has been prepared for illustrative purposes only.
It is without prejudice to the nature or extent of these features.
Sources: Submissions of the Parties; Exercise of Qatar, Vol. 17, Map 34; Memorial of Bahrain, Vol. 3, Maps 10, 11, 13 and 18.

On 31 May 1861 the British Government signed a "Perpetual treaty of peace and friendship" with Sheikh Mahomed bin Khalifah, referred to in the treaty as independent Ruler of Bahrain. Under this treaty, Bahrain undertook inter alia to refrain from all maritime aggression of every description, while Great Britain undertook to provide Bahrain with the necessary support in the maintenance of security of its possessions against aggression. There was no provision in this treaty defining the extent of these possessions.

Following hostilities on the Qatar peninsula in 1867, the British Political Resident in the Gulf approached Sheikh Ali bin Khalifah, Chief of Bahrain, and Sheikh Mohamed Al-Thani, Chief of Qatar, and, on 6 and 12 September 1868

respectively, occasioned each to sign an agreement with Great Britain. By these agreements, the Chief of Bahrain recognized inter alia that certain acts of piracy had been committed by Mahomed bin Khalifah, his predecessor, and, "[i]n view of preserving the peace at sea, and precluding the occurrence of further disturbance and in order to keep the Political Resident informed of what happens", he promised to appoint an agent with the Political Resident; for his part, the Chief of Qatar undertook inter alia to return to and reside peacefully in Doha, not to put to sea with hostile intention, and, in the event of disputes or misunderstanding arising, invariably to refer to the Political Resident. According to Bahrain, the "events of 1867-1868" demonstrate that Qatar was not independent from Bahrain. According to Qatar, on the contrary, the 1868 Agreements formally recognized for the first time the separate identity of Qatar.

While Great Britain had become the dominant maritime Power in the Gulf by this time, the Ottoman Empire, for its part, had re-established its authority over extensive areas of the land on the southern side of the Gulf. In the years following the arrival of the Ottomans on the Qatar peninsula, Great Britain further increased its influence over Bahrain. On 29 July 1913, an Anglo-Ottoman "Convention relating to the Persian Gulf and surrounding territories" was signed, but it was never ratified. Section II of this Convention dealt with Qatar. Article 11 described the course of the line which, according to the agreement between the parties, was to separate the Ottoman *Sanjak* of Nejd from the "peninsula of al-Qatar". Qatar points out that the Ottomans and the British had also signed, on 9 March 1914, a treaty concerning the frontiers of Aden, which was ratified that same year and whose Article III provided that the line separating Qatar from the *Sanjak* of Nejd would be "in accordance with Article 11 of the Anglo-Ottoman Convention of 29 July 1913 relating to the Persian Gulf and the surrounding territories". Under a treaty concluded on 3 November 1916 between Great Britain and the Sheikh of Qatar, the Sheikh of Qatar bound himself inter alia not to "have relations nor correspond with, nor receive the agent of, any other Power without the consent of the High British Government"; nor, without such consent, to cede to any other Power or its subjects, land; nor, without such consent, to grant any monopolies or concessions. In return, the British Government undertook to protect the Sheikh of Qatar and to grant its "good offices" should the Sheikh or his subjects be assailed by land within the territories of Qatar. There was no provision in this treaty defining the extent of those territories.

On 29 April 1936 the representative of Petroleum Concessions Ltd. wrote to the British India Office, which had responsibility for relations with the protected States in the Gulf, drawing its attention to a Qatar oil concession of 17 May 1935 and observing that the Ruler of Bahrain, in his negotiations with Petroleum Concessions Ltd., had laid claim to Hawar; he accordingly enquired to which of the two Sheikhdoms (Bahrain or Qatar) Hawar belonged. On 14 July 1936, Petroleum Concessions Ltd. was informed by the India Office that it appeared to the British Government that Hawar belonged to the Sheikh of Bahrain. The content of those communications was not conveyed to the Sheikh of Qatar.

In 1937, Qatar attempted to impose taxation on the Naim tribe inhabiting the Zubarah region; Bahrain opposed this as it claimed rights over this region. Relations between Qatar and Bahrain deteriorated. Negotiations between the two States started in spring of 1937 and were broken off in July of that year.

Qatar alleges that Bahrain clandestinely and illegally occupied the Hawar Islands in 1937. Bahrain maintains that its Ruler was simply performing legitimate acts of continuing administration in his own territory. By a letter dated 10 May 1938, the Ruler of Qatar protested to the British Government against what he called "the irregular action taken by Bahrain against Qatar", to which he had already referred in February 1938 in a conversation in Doha with the British Political Agent in Bahrain. On 20 May 1938, the latter wrote to the Ruler of Qatar, inviting him to state his case on Hawar at the earliest possible moment. The Ruler of Qatar responded by a letter dated 27 May 1938. Some months later, on 3 January 1939, Bahrain submitted a counter-claim. In a letter of 30 March 1939, the Ruler of Qatar presented his comments on Bahrain's counter-claim to the British Political Agent in Bahrain. The Rulers of Qatar and Bahrain were informed on 11 July 1939 that the British Government had decided that the Hawar Islands belonged to Bahrain.

In May 1946, the Bahrain Petroleum Company Ltd. sought permission to drill in certain areas of the continental shelf, some of which the British considered might belong to Qatar. The British Government decided that this permission could not be granted until there had been a division of the sea-bed between Bahrain and Qatar. It studied the matter and, on 23 December 1947, the British Political Agent in Bahrain sent the Rulers of Qatar and Bahrain two letters, in the same terms, showing the line which, the British Government considered divided "in accordance with equitable principles the sea-bed aforesaid". The letter indicated further that the Shaik of Bahrain had sovereign rights in the areas of the Dibal and Jaradah shoals (which should not be considered to be islands having territorial waters), as well as over the islands Hawar group while noting that Janan Island was not regarded as being included in the islands of the Hawar group.

In 1971 Qatar and Bahrain ceased to be British protected States. On 21 September 1971, they were both admitted to the United Nations.

Beginning in 1976, mediation, also referred to as "good offices", was conducted by the King of Saudi Arabia with the agreement of the Amirs of Bahrain and Qatar. The good offices of King Fahd did not lead to the desired outcome and on 8 July 1991 Qatar instituted proceedings before the Court against Bahrain.

Sovereignty over Zubarah
(paras. 70-97)

The Court notes that both Parties agree that the Al-Khalifah occupied Zubarah in the 1760s and that, some years later, they settled in Bahrain, but that they disagree as to the legal situation which prevailed thereafter and which culminated in the events of 1937. In the Court's view, the terms of the 1868 Agreement between Great Britain and the Sheikh of Bahrain (see above) show that any attempt by Bahrain to pursue its claims to Zubarah through military action at sea would not be tolerated by the British. The Court finds that thereafter, the new rulers of Bahrain were never in a position to engage in direct acts of authority in Zubarah. Bahrain maintains, however, that the Al-Khalifah continued to exercise control over Zubarah through a Naim-led tribal confederation loyal to them, notwithstanding that at the end of the eighteenth century they had moved the seat of their government to the islands of Bahrain. The Court does not accept this contention.

The Court considers that, in view of the role played by Great Britain and the Ottoman Empire in the region, it is significant to note Article 11 of the Anglo-Ottoman Convention signed on 29 July 1913, which states inter alia: "it is agreed between the two Governments that the said peninsula will, as in the past, be governed by the Sheikh Jasim-bin-Sani and his successors". Thus Great Britain and the Ottoman Empire did not recognize Bahrain's sovereignty over the peninsula, including Zubarah. In their opinion the whole Qatar peninsula would continue to be governed by Sheikh Jassim Al-Thani, who had formerly been nominated *kaimakam* by the Ottomans, and by his successors.

Both Parties agree that the 1913 Anglo-Ottoman Convention was never ratified; they differ on the other hand as to its value as evidence of Qatar's sovereignty over the peninsula. The Court observes that signed but unratified treaties may constitute an accurate expression of the understanding of the parties at the time of signature. In the circumstances of this case the Court has come to the conclusion that the Anglo-Ottoman Convention does represent evidence of the views of Great Britain and the Ottoman Empire as to the factual extent of the authority of the Al-Thani Ruler in Qatar up to 1913. The Court also observes that Article 11 of the 1913 Convention is referred to by Article III of the subsequent Anglo-Ottoman treaty of 9 March 1914, duly ratified that same year. The parties to that treaty therefore did not contemplate any authority over the peninsula other than that of Qatar.

The Court then examines certain events which took place in Zubarah in 1937, after the Sheikh of Qatar had attempted to impose taxation on the Naim. It notes, inter alia, that on 5 May 1937, the Political Resident reported on those incidents to the Secretary of State for India, stating that he was "[p]ersonally, therefore, ... of the opinion that juridically the Bahrain claim to Zubarah must fail". In a telegram of 15 July 1937 to the Political Resident, the British Secretary of State indicated that the Sheikh of Bahrain should be informed that the British Government regretted that it was "not prepared to intervene between Sheikh of Qatar and Naim tribe".

In view of the foregoing, the Court finds that it cannot accept Bahrain's contention that Great Britain had always regarded Zubarah as belonging to Bahrain. The terms of the 1868 agreement between the British Government and the Sheikh of Bahrain, of the 1913 and 1914 conventions and of the letters in 1937 from the British Political Resident to the Secretary of State for India, and from the Secretary of State to the Political Resident, all show otherwise. In effect, in 1937 the British Government did not consider that Bahrain had sovereignty over Zubarah; it is for this reason that it refused to provide Bahrain with the assistance which it requested on the basis of the agreements in force between the two countries. In the period after 1868, the authority of the Sheikh of Qatar over the territory of Zubarah was gradually consolidated; it was acknowledged in the 1913 Anglo-Ottoman Convention and was definitively established in 1937. The actions of the Sheikh of Qatar in Zubarah that year were an exercise of his authority on his territory and, contrary to what Bahrain has alleged, were not an unlawful use of force against Bahrain. For all these reasons, the Court concludes that the first submission made by Bahrain cannot be upheld and that Qatar has sovereignty over Zubarah.

Sovereignty over the Hawar Islands
(paras. 98-148)

The Court then turns to the question of sovereignty over the Hawar Islands, leaving aside the question of Janan for the moment.

The Court observes that the Parties' lengthy arguments on the issue of sovereignty over the Hawar Islands raise several legal issues: the nature and validity of the 1939 decision by Great Britain; the existence of an original title; *effectivités*; and the applicability of the principle of *uti possidetis juris* to the present case. The Court begins by considering the nature and validity of the 1939 British decision. Bahrain maintains that the British decision of 1939 must be considered primarily as an arbitral award, which is *res judicata*.

It claims that the Court does not have jurisdiction to review the award of another tribunal, basing its proposition on decisions of the Permanent Court of International Justice and the present Court. Qatar denies the relevance of the judgments cited by Bahrain. It contends that

> "[N]one of them are in the slightest degree relevant to the issue which the Court has to determine in the present case, namely, whether the procedures followed by the British Government in 1938 and 1939 amounted to a process of arbitration which could result in an arbitral award binding upon the parties".

The Court first considers the question whether the 1939 British decision must be deemed to constitute an arbitral award. It observes in this respect that the word arbitration, for purposes of public international law, usually refers to "the settlement of differences between States by judges of

their own choice, and on the basis of respect for law" and that this wording was reaffirmed in the work of the International Law Commission, which reserved the case where the parties might have decided that the requested decision should be taken *ex æquo et bono*. The Court observes that in the present case no agreement existed between the Parties to submit their case to an arbitral tribunal made up of judges chosen by them, who would rule either on the basis of law or *ex æquo et bono*. The Parties had only agreed that the issue would be decided by "His Majesty's Government", but left it to the latter to determine how that decision would be arrived at, and by which officials. It follows that the decision whereby, in 1939, the British Government held that the Hawar Islands belonged to Bahrain, did not constitute an international arbitral award. The Court finds that it does not therefore need to consider Bahrain's argument concerning the Court's jurisdiction to examine the validity of arbitral awards.

The Court observes, however, that the fact that a decision is not an arbitral award does not mean that the decision is devoid of legal effect. In order to determine the legal effect of the 1939 British decision, it then recalls the events which preceded and immediately followed its adoption. Having done so, the Court considers Qatar's argument challenging the validity of the 1939 British decision.

Qatar first contends that it never gave its consent to have the question of the Hawar Islands decided by the British Government.

The Court observes, however, that following the Exchange of Letters of 10 and 20 May 1938, the Ruler of Qatar consented on 27 May 1938 to entrust decision of the Hawar Islands question to the British Government. On that day he had submitted his complaint to the British Political Agent. Finally, like the Ruler of Bahrain, he had consented to participate in the proceedings that were to lead to the 1939 decision. The jurisdiction of the British Government to take the decision concerning the Hawar Islands derived from these two consents; the Court therefore has no need to examine whether, in the absence of such consent, the British Government would have had the authority to do so under the treaties making Bahrain and Qatar protected States of Great Britain.

Qatar maintains in the second place that the British officials responsible for the Hawar Islands question were biased and had prejudged the matter. The procedure followed is accordingly alleged to have violated "the rule which prohibits bias in a decision-maker on the international plane". It is also claimed that the parties were not given an equal and fair opportunity to present their arguments and that the decision was not reasoned.

The Court begins by recalling that the 1939 decision is not an arbitral award made upon completion of arbitral proceedings. This does not, however, mean that it was devoid of all legal effect. Quite to the contrary, the pleadings, and in particular the Exchange of Letters referred to above, shows that Bahrain and Qatar consented to the British Government settling their dispute over the Hawar Islands. The 1939 decision must therefore be regarded as a decision that was binding from the outset on both States and continued to be binding on those same States after 1971, when they ceased to be British protected States. The Court further observes that while it is true that the competent British officials proceeded on the premise that Bahrain possessed prima facie title to the islands and that the burden of proving the opposite lay on the Ruler of Qatar, Qatar cannot maintain that it was contrary to justice to proceed on the basis of this premise when Qatar had been informed before agreeing to the procedure that this would occur and had consented to the proceedings being conducted on that basis. During those proceedings the two Rulers were able to present their arguments and each of them was afforded an amount of time which the Court considers was sufficient for this purpose; Qatar's contention that it was subjected to unequal treatment therefore cannot be upheld. The Court also notes that, while the reasoning supporting the 1939 decision was not communicated to the Rulers of Bahrain and Qatar, this lack of reasons has no influence on the validity of the decision taken, because no obligation to state reasons had been imposed on the British Government when it was entrusted with the settlement of the matter. Therefore, Qatar's contention that the 1939 British decision is invalid for lack of reasons cannot be upheld. Finally, the fact that the Sheikh of Qatar had protested on several occasions against the content of the British decision of 1939 after he had been informed of it is not such as to render the decision unopposable to him, contrary to what Qatar maintains. The Court accordingly concludes that the decision taken by the British Government on 11 July 1939 is binding on the parties. For all of these reasons, the Court concludes that Bahrain has sovereignty over the Hawar Islands, and that the submissions of Qatar on this question cannot be upheld. The Court finally observes that the conclusion thus reached by it on the basis of the British decision of 1939 makes it unnecessary for the Court to rule on the arguments of the Parties based on the existence of an original title, *effectivités*, and the applicability of the principle of *uti possidetis juris* to the present case.

Sovereignty over Janan Island
(paras. 149-165)

The Court then considers the Parties' claims to Janan Island. It begins by observing that Qatar and Bahrain have differing ideas of what should be understood by the expression "Janan Island". According to Qatar, "Janan is an island approximately 700 metres long and 175 metres wide situated off the southwestern tip of the main Hawar island ...". For Bahrain, the term covers "two islands, situated between one and two nautical miles off the southern coast of Jazirat Hawar, which merge into a single island at low tide ...". After examination of the arguments of the Parties, the Court considers itself entitled to treat Janan and Hadd Janan as one island.

The Court then, as it has done in regard to the Parties' claims to the Hawar Islands, begins by considering the effects of the British decision of 1939 on the question of

sovereignty over Janan Island. As has already been stated, in that decision the British Government concluded that the Hawar Islands "belong[ed] to the State of Bahrain and not to the State of Qatar". No mention was made of Janan Island. Nor was it specified what was to be understood by the expression "Hawar Islands". The Parties have accordingly debated at length over the issue of whether Janan fell to be regarded as part of the Hawar Islands and whether, as a result, it pertained to Bahrain's sovereignty by virtue of the 1939 decision or whether, on the contrary, it was not covered by that decision.

In support of their respective arguments, Qatar and Bahrain have each cited documents both anterior and posterior to the British decision of 1939. Qatar has in particular relied on a "decision" by the British Government in 1947 relating to the seabed delimitation between the two States. Bahrain recalled that it had submitted four lists to the British Government — in April 1936, August 1937, May 1938 and July 1946 — with regard to the composition of the Hawar Islands.

The Court notes that the three lists submitted prior to 1939 by Bahrain to the British Government with regard to the composition of the Hawar group are not identical. In particular, Janan Island appears by name in only one of those three lists. As to the fourth list, which is different from the three previous ones, it does make express reference to Janan Island, but it was submitted to the British Government only in 1946, several years after the adoption of the 1939 decision. Thus, no definite conclusion may be drawn from these various lists.

The Court then considers the letters sent on 23 December 1947 by the British Political Agent in Bahrain to the Rulers of Qatar and Bahrain. By those letters the Political Agent acting on behalf of the British Government informed the two States of the delimitation of their seabeds effected by the British Government. This Government, which had been responsible for the 1939 decision on the Hawar Islands, sought, in the last sentence of subparagraph 4 (ii) of these letters, to make it clear that "Janan Island is not regarded as being included in the islands of the Hawar group". The British Government accordingly did not "recognize" the Sheikh of Bahrain as having "sovereign rights" over that island and, in determining the points fixed in paragraph 5 of those letters, as well as in drawing the map enclosed with those letters, it regarded Janan as belonging to Qatar. The Court considers that the British Government, in thus proceeding, provided an authoritative interpretation of the 1939 decision and of the situation resulting from it. Having regard to all of the foregoing, the Court does not accept Bahrain's argument that in 1939 the British Government recognized "Bahrain's sovereignty over Janan as part of the Hawars". It finds that Qatar has sovereignty over Janan Island including Hadd Janan, on the basis of the decision taken by the British Government in 1939, as interpreted in 1947.

Maritime Delimitation
(paras. 166-250)

The Court then turns to the question of the maritime delimitation.

It begins by taking note that the Parties are in agreement that the Court should render its decision on the maritime delimitation in accordance with international law. Neither Bahrain nor Qatar is party to the Geneva Conventions on the Law of the Sea of 29 April 1958; Bahrain has ratified the United Nations Convention on the Law of the Sea of 10 December 1982 but Qatar is only a signatory to it. The Court indicates that customary international law, therefore, is the applicable law. Both Parties, however, agree that most of the provisions of the 1982 Convention which are relevant for the present case reflect customary law.

- *A single maritime boundary*
(paras. 168-173)

The Court notes that, under the terms of the "Bahraini formula", the Parties requested the Court, in December 1990, "to draw a single maritime boundary between their respective maritime areas of seabed, subsoil and superjacent waters".

The Court observes that it should be kept in mind, that the concept of "single maritime boundary" may encompass a number of functions. In the present case the single maritime boundary will be the result of the delimitation of various jurisdictions. In the southern part of the delimitation area, which is situated where the coasts of the Parties are opposite to each other, the distance between these coasts is nowhere more than 24 nautical miles. The boundary the Court is expected to draw will, therefore, delimit exclusively their territorial seas and, consequently, an area over which they enjoy territorial sovereignty.

More to the north, however, where the coasts of the two States are no longer opposite to each other but are rather comparable to adjacent coasts, the delimitation to be carried out will be one between the continental shelf and exclusive economic zone belonging to each of the Parties, areas in which States have only sovereign rights and functional jurisdiction. Thus both Parties have differentiated between a southern and a northern sector.

The Court further observes that the concept of a single maritime boundary does not stem from multilateral treaty law but from State practice, and that it finds its explanation in the wish of States to establish one uninterrupted boundary line delimiting the various — partially coincident — zones of maritime jurisdiction appertaining to them. In the case of coincident jurisdictional zones, the determination of a single boundary for the different objects of delimitation

> "can only be carried out by the application of a criterion, or combination of criteria, which does not give preferential treatment to one of these ... objects to the detriment of the other and at the same time is such as to be equally suitable to the division of either of them",

as was stated by the Chamber of the Court in the *Gulf of Maine* case. In that case, the Chamber was asked to draw a

single line which would delimit both the continental shelf and the superjacent water column.

- *Delimitation of the territorial sea*
  (paras. 174-223)

Delimitation of territorial seas does not present comparable problems, since the rights of the coastal State in the area concerned are not functional but territorial, and entail sovereignty over the sea-bed and the superjacent waters and air column. Therefore, when carrying out that part of its task, the Court has to apply in the present case first and foremost the principles and rules of international customary law which refer to the delimitation of the territorial sea, while taking into account that its ultimate task is to draw a single maritime boundary that serves other purposes as well. The Parties agree that the provisions of Article 15 of the 1982 Convention on the Law of the Sea, headed "Delimitation of the territorial sea between States with opposite or adjacent coasts", are part of customary law. This Article provides:

> "Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest point on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith."

The Court notes that Article 15 of the 1982 Convention is virtually identical to Article 12, paragraph 1, of the 1958 Convention on the Territorial Sea and the Contiguous Zone, and is to be regarded as having a customary character. It is often referred to as the "equidistance/special circumstances" rule. The most logical and widely practised approach is first to draw provisionally an equidistance line and then to consider whether that line must be adjusted in the light of the existence of special circumstances.

The Court explains that once it has delimited the territorial seas belonging to the Parties, it will determine the rules and principles of customary law to be applied to the delimitation of the Parties' continental shelves and their exclusive economic zones or fishery zones. The Court will further decide whether the method to be chosen for this delimitation differs from or is similar to the approach just outlined.

- *The equidistance line*
  (paras. 177-216)

The Court begins by noting that the equidistance line is the line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. This line can only be drawn when the baselines are known. Neither of the Parties has as yet specified the baselines which are to be used for the determination of the breadth of the territorial sea, nor have they produced official maps or charts which reflect such baselines. Only during the present proceedings have they provided the Court with approximate basepoints which in their view could be used by the Court for the determination of the maritime boundary.

- *The relevant coasts*
  (paras. 178-216)

The Court indicates that it will therefore first determine the relevant coasts of the Parties, from which will be determined the location of the baselines, and the pertinent basepoints from which enable the equidistance line to be measured.

Qatar has argued that, for purposes of this delimitation, it is the mainland-to-mainland method which should be applied in order to construct the equidistance line. It claims that the notion of "mainland" applies both to the Qatar peninsula, which should be understood as including the main Hawar island, and to Bahrain, of which the islands to be taken into consideration are al-Awal (also called Bahrain Island), together with al-Muharraq and Sitrah. For Qatar, application of the mainland-to-mainland method has two main consequences. First, it takes no account of the islands (except for the above-mentioned islands, Hawar on the Qatar side and al-Awal, al-Muharraq and Sitrah on the Bahrain side), islets, rocks, reefs or low-tide elevations lying in the relevant area. Second, in Qatar's view, application of the mainland-to-mainland method of calculation would also mean that the equidistance line has to be constructed by reference to the high-water line.

Bahrain contends that it is a de facto archipelago or multiple-island State, characterized by a variety of maritime features of diverse character and size. All these features are closely interlinked and together they constitute the State of Bahrain; reducing that State to a limited number of so-called "principal" islands would be a distortion of reality and a refashioning of geography. Since it is the land which determines maritime rights, the relevant basepoints are situated on all those maritime features over which Bahrain has sovereignty. Bahrain further contends that, according to conventional and customary international law, it is the low-water line which is determinative for the breadth of the territorial sea and for the delimitation of overlapping territorial waters. Finally, Bahrain has stated that, as a de facto archipelagic State, it is entitled to declare itself an archipelagic State under Part IV of the 1982 Law of the Sea Convention and to draw the permissive baselines of Article 47 of that Convention, i.e., "straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago". Qatar has contested Bahrain's claim that it is entitled to declare itself an archipelagic State under Part IV of the 1982 Convention.

With regard to Bahrain's claim the Court observes that Bahrain has not made this claim one of its formal submissions and that the Court is therefore not requested to take a position on this issue. What the Court, however, is called upon to do is to draw a single maritime boundary in

accordance with international law. The Court can carry out this delimitation only by applying those rules and principles of customary law which are pertinent under the prevailing circumstances. It emphasizes that its decision will have binding force between the Parties, in accordance with Article 59 of the Statute of the Court, and consequently could not be put in issue by the unilateral action of either of the Parties, and in particular, by any decision of Bahrain to declare itself an archipelagic State.

The Court, therefore, turns to the determination of the relevant coasts from which the breadth of the territorial seas of the Parties is measured. In this respect the Court recalls that under the applicable rules of international law the normal baseline for measuring this breadth is the low-water line along the coast (Art. 5, 1982 Convention on the Law of the Sea).

In previous cases the Court has made clear that maritime rights derive from the coastal State's sovereignty over the land, a principle which can be summarized as "the land dominates the sea". It is thus the terrestrial territorial situation that must be taken as starting point for the determination of the maritime rights of a coastal State. In order to determine what constitutes Bahrain's relevant coasts and what are the relevant baselines on the Bahraini side, the Court must first establish which islands come under Bahraini sovereignty. The Court recalls that it has concluded that the Hawar Islands belong to Bahrain and that Janan belongs to Qatar. It observes that other islands which can be identified in the delimitation area which are relevant for delimitation purposes in the southern sector are Jazirat Mashtan and Umm Jalid, islands which are at high tide very small in size, but at low tide have a surface which is considerably larger. Bahrain claims to have sovereignty over these islands, a claim which is not contested by Qatar.

- *Fasht al Azm*
  (paras. 188-190)

However, the Parties are divided on the issue of whether Fasht al Azm must be deemed to be part of the island of Sitrah or whether it is a low-tide elevation which is not naturally connected to Sitrah Island. In 1982 Bahrain undertook reclamation works for the construction of a petrochemical plant, during which an artificial channel was dredged connecting the waters on both sides of Fasht al Azm. After careful analysis of the various reports, documents and charts submitted by the Parties, the Court has been unable to establish whether a permanent passage separating Sitrah Island from Fasht al Azm existed before the reclamation works of 1982 were undertaken. For the reasons explained below, the Court is nonetheless able to undertake the requested delimitation in this sector without determining the question whether Fasht al Azm is to be regarded as part of the island of Sitrah or as a low-tide elevation.

- *Qit'at Jaradah*
  (paras. 191-198)

Another issue on which the Parties have totally opposing views is whether Qit'at Jaradah is an island or a low-tide elevation. The Court recalls that the legal definition of an island is "a naturally formed area of land, surrounded by water, which is above water at high tide" (1958 Convention on the Territorial Sea and Contiguous Zone, Art. 10, para. 1; 1982 Convention on the Law of the Sea, Art. 121, para. 1). The Court has carefully analysed the evidence submitted by the Parties and weighed the conclusions of the experts referred to above, in particular the fact that the experts appointed by Qatar did not themselves maintain that it was scientifically proven that Qit'at Jaradah is a low-tide elevation. On these bases, the Court concludes that the maritime feature of Qit'at Jaradah satisfies the above-mentioned criteria and that it is an island which should as such be taken into consideration for the drawing of the equidistance line. In the present case, taking into account the size of Qit'at Jaradah, the activities carried out by Bahrain on that island must be considered sufficient to support Bahrain's claim that it has sovereignty over it.

- *Fasht ad Dibal*
  (paras. 199-209)

Both Parties agree that Fasht ad Dibal is a low-tide elevation. Whereas Qatar maintains — just as it did with regard to Qit'at Jaradah — that Fasht ad Dibal as a low-tide elevation cannot be appropriated, Bahrain contends that low-tide elevations by their very nature are territory, and therefore can be appropriated in accordance with the criteria which pertain to the acquisition of territory. "Whatever their location, low-tide elevations are always subject to the law which governs the acquisition and preservation of territorial sovereignty, with its subtle dialectic of title and *effectivités*."

The Court observes that according to the relevant provisions of the Conventions on the Law of the Sea, which reflect customary international law, a low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide (1958 Convention on the Territorial Sea and the Contiguous Zone, Art. 11, para. 1; 1982 Convention on the Law of the Sea, Art. 13, para. 1). When a low-tide elevation is situated in the overlapping area of the territorial sea of two States, whether with opposite or with adjacent coasts, both States in principle are entitled to use its low-water line for the measuring of the breadth of their territorial sea. The same low-tide elevation then forms part of the coastal configuration of the two States. That is so even if the low-tide elevation is nearer to the coast of one State than that of the other, or nearer to an island belonging to one party than it is to the mainland coast of the other. For delimitation purposes the competing rights derived by both coastal States from the relevant provisions of the law of the sea would by necessity seem to neutralize each other. In Bahrain's view, however, it depends upon the *effectivités* presented by the two coastal States which of them has a superior title to the low-tide elevation in question and is therefore entitled to

exercise the right attributed by the relevant provisions of the law of the sea, just as in the case of islands which are situated within the limits of the breadth of the territorial sea of more than one State. In the view of the Court the decisive question for the present case is whether a State can acquire sovereignty by appropriation over a low-tide elevation situated within the breadth of its territorial sea when that same low-tide elevation lies also within the breadth of the territorial sea of another State.

International treaty law is silent on the question whether low-tide elevations can be considered to be "territory". Nor is the Court aware of a uniform and widespread State practice which might have given rise to a customary rule which unequivocally permits or excludes appropriation of low-tide elevations. It is only in the context of the law of the sea that a number of permissive rules have been established with regard to low-tide elevations which are situated at a relatively short distance from a coast. The few existing rules do not justify a general assumption that low-tide elevations are territory in the same sense as islands. It has never been disputed that islands constitute terra firma, and are subject to the rules and principles of territorial acquisition; the difference in effects which the law of the sea attributes to islands and low-tide elevations is considerable. It is thus not established that in the absence of other rules and legal principles, low-tide elevations can, from the viewpoint of the acquisition of sovereignty, be fully assimilated with islands or other land territory. In this respect the Court recalls the rule that a low-tide elevation which is situated beyond the limits of the territorial sea does not have a territorial sea of its own. A low-tide elevation, therefore, as such does not generate the same rights as islands or other territory. The Court, consequently, is of the view that in the present case there is no ground for recognizing the right of Bahrain to use as a baseline the low-water line of those low-tide elevations which are situated in the zone of overlapping claims, or for recognizing Qatar as having such a right. The Court accordingly concludes that for the purposes of drawing the equidistance line, such low-tide elevations must be disregarded.

- *Method of straight baselines*
  (paras. 210-216)

The Court further observes that the method of straight baselines, which Bahrain applied in its reasoning and in the maps provided to the Court, is an exception to the normal rules for the determination of baselines and may only be applied if a number of conditions are met. This method must be applied restrictively. Such conditions are primarily that either the coastline is deeply indented and cut into, or that there is a fringe of islands along the coast in its immediate vicinity. The fact that a State considers itself a multiple-island State or a de facto archipelagic State does not allow it to deviate from the normal rules for the determination of baselines unless the relevant conditions are met. The coasts of Bahrain's main islands do not form a deeply indented coast, nor does Bahrain claim this. It contends, however, that the maritime features off the coast of the main islands may be assimilated to a fringe of islands which constitute a whole with the mainland. The Court does not deny that the maritime features east of Bahrain's main islands are part of the overall geographical configuration; it would be going too far, however, to qualify them as a fringe of islands along the coast. The Court, therefore, concludes that Bahrain is not entitled to apply the method of straight baselines. Thus each maritime feature has its own effect for the determination of the baselines, on the understanding that, on the grounds set out before, the low-tide elevations situated in the overlapping zone of territorial seas will be disregarded. It is on this basis that the equidistance line must be drawn. The Court notes, however, that Fasht al Azm requires special mention. If this feature were to be regarded as part of the island of Sitrah, the basepoints for the purposes of determining the equidistance line would be situated on Fasht al Azm's eastern low-water line. If it were not to be regarded as part of the island of Sitrah, Fasht al Azm could not provide such basepoints. As the Court has not determined whether this feature does form part of the island of Sitrah, it has drawn two equidistance lines reflecting each of these hypotheses.

- *Special circumstances*
  (paras. 217-223)

The Court then turns to the question of whether there are special circumstances which make it necessary to adjust the equidistance line as provisionally drawn in order to obtain an equitable result in relation to this part of the single maritime boundary to be fixed.

With regard to the question of Fasht al Azm, the Court considers that on either of the above-mentioned hypotheses there are special circumstances which justify choosing a delimitation line passing between Fasht al Azm and Qit'at ash Shajarah. With regard to the question of Qit'at Jaradah, the Court observes that it is a very small island, uninhabited and without any vegetation. This tiny island, which — as the Court has determined — comes under Bahraini sovereignty, is situated about midway between the main island of Bahrain and the Qatar peninsula. Consequently, if its low-water line were to be used for determining a basepoint in the construction of the equidistance line, and this line taken as the delimitation line, a disproportionate effect would be given to an insignificant maritime feature. The Court thus finds that there is a special circumstance in this case warranting the choice of a delimitation line passing immediately to the east of Qit'at Jaradah.

The Court observed earlier that, since it did not determine whether Fasht al Azm is part of Sitrah island or a separate low-tide elevation, it is necessary to draw provisionally two equidistance lines. If no effect is given to Qit'at Jaradah and in the event that Fasht al Azm is considered to be part of Sitrah island, the equidistance line thus adjusted cuts through Fasht ad Dibal leaving the greater part of it on the Qatari side. If, however, Fasht al Azm is seen as a low-tide elevation, the adjusted equidistance line runs west of Fasht ad Dibal. In view of the fact that under both hypotheses, Fasht ad Dibal is largely or totally on the

Qatari side of the adjusted equidistance line, the Court considers it appropriate to draw the boundary line between Qit'at Jaradah and Fasht ad Dibal. As Fasht ad Dibal thus is situated in the territorial sea of Qatar, it falls under the sovereignty of that State.

On these considerations the Court finds that it is in a position to determine the course of that part of the single maritime boundary which will delimit the territorial seas of the Parties. Before doing so the Court notes, however, that it cannot fix the boundary's southern-most point, since its definitive location is dependent upon the limits of the respective maritime zones of Saudi Arabia and of the Parties. The Court also considers it appropriate, in accordance with common practice, to simplify what would otherwise be a very complex delimitation line in the region of the Hawar Islands.

Taking account of all of the foregoing, the Court decides that, from the point of intersection of the respective maritime limits of Saudi Arabia on the one hand and of Bahrain and Qatar on the other, which cannot be fixed, the boundary will follow a north-easterly direction, then immediately turn in an easterly direction, after which it will pass between Jazirat Hawar and Janan; it will subsequently turn to the north and pass between the Hawar Islands and the Qatar peninsula and continue in a northerly direction, leaving the low-tide elevation of Fasht Bu Thur, and Fasht al Azm, on the Bahraini side, and the low-tide elevations of Qita 'a el Erge and Qit'at ash Shajarah on the Qatari side; finally it will pass between Qit'at Jaradah and Fasht ad Dibal, leaving Qit'at Jaradah on the Bahraini side and Fasht ad Dibal on the Qatari side.

With reference to the question of navigation, the Court notes that the channel connecting Qatar's maritime zones situated to the south of the Hawar Islands and those situated to the north of those islands, is narrow and shallow, and little suited to navigation. It emphasizes that the waters lying between the Hawar Islands and the other Bahraini islands are not internal waters of Bahrain, but the territorial sea of that State. Consequently, Qatari vessels, like those of all other States, shall enjoy in these waters the right of innocent passage accorded by customary international law. In the same way, Bahraini vessels, like those of all other States, enjoy the same right of innocent passage in the territorial sea of Qatar.

- *Delimitation of the continental shelf and exclusive economic zone*
  (paras. 224-249)

The Court then deals with the drawing of the single maritime boundary in that part of the delimitation area which covers both the continental shelf and the exclusive economic zone. Referring to its earlier case-law on the drawing of a single maritime boundary the Court observes that it will follow the same approach in the present case. For the delimitation of the maritime zones beyond the 12-mile zone it will first provisionally draw an equidistance line and then consider whether there are circumstances which must lead to an adjustment of that line. The Court further notes that the equidistance/special circumstances rule, which is applicable in particular to the delimitation of the territorial sea, and the equitable principles/relevant circumstances rule, as it has been developed since 1958 in case-law and State practice with regard to the delimitation of the continental shelf and the exclusive economic zone, are closely interrelated.

The Court then examines whether there are circumstances which might make it necessary to adjust the equidistance line in order to achieve an equitable result. With regard to Bahrain's claim concerning the pearling industry, the Court first takes note of the fact that that industry effectively ceased to exist a considerable time ago. It further observes that, from the evidence submitted to it, it is clear that pearl diving in the Gulf area traditionally was considered as a right which was common to the coastal population. The Court, therefore, does not consider the existence of pearling banks, though predominantly exploited in the past by Bahraini fishermen, as forming a circumstance which would justify an eastward shifting of the equidistance line as requested by Bahrain. The Court also considers that it does not need to determine the legal character of the "decision" contained in the letters of 23 December 1947 of the British Political Agent to the Rulers of Bahrain and Qatar with respect to the division of the sea-bed, which Qatar claims as a special circumstance. It suffices for it to note that neither of the Parties has accepted it as a binding decision and that they have invoked only parts of it to support their arguments.

Taking into account the fact that it has decided that Bahrain has sovereignty over the Hawar Islands, the Court finds that the disparity in length of the coastal fronts of the Parties cannot, as Qatar claims, be considered such as to necessitate an adjustment of the equidistance line.

The Court finally recalls that in the northern sector the coasts of the Parties are comparable to adjacent coasts abutting on the same maritime areas extending seawards into the Gulf. The northern coasts of the territories belonging to the Parties are not markedly different in character or extent; both are flat and have a very gentle slope. The only noticeable element is Fasht al Jarim as a remote projection of Bahrain's coastline in the Gulf area, which, if given full effect, would "distort the boundary and have disproportionate effects". In the view of the Court such a distortion, due to a maritime feature located well out to sea and of which at most a minute part is above water at high tide, would not lead to an equitable solution which would be in accord with all other relevant factors referred to above. In the circumstances of the case considerations of equity require that Fasht al Jarim should have no effect in determining the boundary line in the northern sector.

The Court accordingly decides that the single maritime boundary in this sector shall be formed in the first place by a line which, from a point situated to the north-west of Fasht ad Dibal, shall meet the equidistance line as adjusted to take account of the absence of effect given to Fasht al Jarim. The boundary shall then follow this adjusted equidistance line until it meets the delimitation line between the respective

maritime zones of Iran on the one hand and of Bahrain and Qatar on the other.

*

The Court concludes from all of the foregoing that the single maritime boundary that divides the various maritime zones of the State of Qatar and the State of Bahrain shall be formed by a series of geodesic lines joining, in the order specified, the points with the following coordinates:

(World Geodetic System, 1984)

Point	*Latitude North*	*Longitude East*
1	25° 34' 34"	50° 34' 3"
2	25° 35' 10"	50° 34' 48"
3	25° 34' 53"	50° 41' 22"
4	25° 34' 50"	50° 41' 35"
5	25° 34' 21"	50° 44' 5"
6	25° 33' 29"	50° 45' 49"
7	25° 32' 49"	50° 46' 11"
8	25° 32' 55"	50° 46' 48"
9	25° 32' 43"	50° 47' 46"
10	25° 32' 6"	50° 48' 36"
11	25° 32' 40"	50° 48' 54"
12	25° 32' 55"	50° 48' 48"
13	25° 33' 44"	50° 49' 4"
14	25° 33' 49"	50° 48' 32"
15	25° 34' 33"	50° 47' 37"
16	25° 35' 33"	50° 46' 49"
17	25° 37' 21"	50° 47' 54"
18	25° 37' 45"	50° 49' 44"
19	25° 38' 19"	50° 50' 22"
20	25° 38' 43"	50° 50' 26"
21	25° 39' 31"	50° 50' 6"
22	25° 40' 10"	50° 50' 30"
23	25° 41' 27"	50° 51' 43"
24	25° 42' 27"	50° 51' 9"
25	25° 44' 7"	50° 51' 58"
26	25° 44' 58"	50° 52' 5"
27	25° 45' 35"	50° 51' 53"
28	25° 46' 0"	50° 51' 40"
29	25° 46' 57"	50° 51' 23"
30	25° 48' 43"	50° 50' 32"
31	25° 51' 40"	50° 49' 53"
32	25° 52' 26"	50° 49' 12"
33	25° 53' 42"	50° 48' 57"
34	26° 0' 40"	50° 51' 00"
35	26° 4' 38"	50° 54' 27"
36	26° 11' 2"	50° 55' 3"
37	26° 15' 55"	50° 55' 22"
38	26° 17' 58"	50° 55' 58"
39	26° 20' 2"	50° 57' 16"
40	26° 26' 11"	50° 59' 12"
41	26° 43' 58"	51° 3' 16"
42	27° 2' 0"	51° 7' 11"

Below point 1, the single maritime boundary shall follow, in a south-westerly direction, a loxodrome having an azimuth of 234°16'53", until it meets the delimitation line between the respective maritime zones of Saudi Arabia on the one hand and of Bahrain and Qatar on the other. Beyond point 42, the single maritime boundary shall follow, in a north-north-easterly direction, a loxodrome having an azimuth of 12°15'12", until it meets the delimitation line between the respective maritime zones of Iran on the one hand and of Bahrain and Qatar on the other.

The course of this boundary has been indicated, for illustrative purposes only, on sketch-map No. 7 attached to the Judgment.

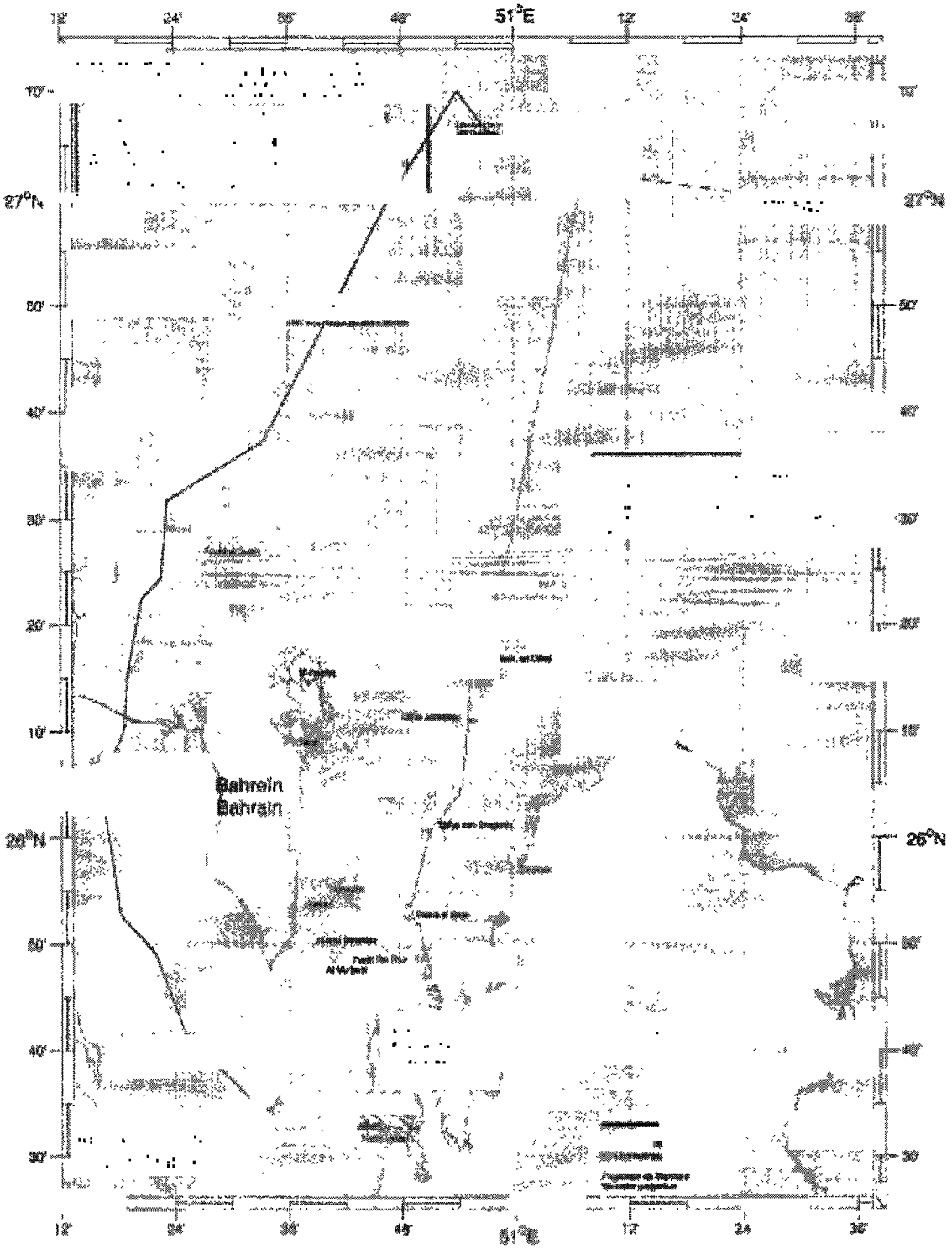
Separate opinion of Judge Oda

Judge Oda voted in favour of the Court's delimitation of a maritime boundary between the Parties in the hope that they — in the spirit of co-operation between friendly, neighbouring States — will find it mutually acceptable. Judge Oda disagrees, however, with the Court's methods for determination of the maritime boundary and, further, with the Court's decision to demarcate the boundary's precise geographic coordinates. Accordingly, he sets out his views in a separate opinion.

Judge Oda first notes that the region of Zubarah occupies a procedurally distinct place in the present proceedings. He expresses his pleasure that the Court reaches a unanimous decision as to the sovereignty of Qatar over this territory. Further, Judge Oda remarks upon the relevance of the exploitation of oil reserves to many aspects of the dispute, including the Parties' joint decision (via their Special Agreement) to place certain land masses and maritime features within the Court's jurisdiction and the expectations of the Parties with regard to the types of boundary they expect the Court to delimit.

Judge Oda makes special mention of the Court's treatment of low-tide elevations and islets. He revisits at length the negotiating history of the law of the sea in order to demonstrate nuances of the issue not fully dealt with by the Court. In particular, Judge Oda notes the incongruity between the expansion of the territorial sea from 3 to 12 miles and the régime under which low-tide elevations and islets are accorded territorial seas of their own; he further expresses the view that such a régime, addressed only indirectly by the relevant provisions of the 1982 United Nations Convention on the Law of the Sea, might not be considered customary international law.

Judge Oda disagrees with the Court's use of the phrase "single maritime boundary" and notes the distinction between the régimes governing the exclusive economic zone (EEZ) and the continental shelf on the one hand and the territorial sea on the other. Accordingly, the Court's use of a "single maritime boundary" is inappropriate. Judge Oda also objects to the Court's decision to delimit the southern sector as a territorial sea. He states further that, even if the Court's


51°E
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26°N
Bahrein
Bahrain

approach to the southern sector is appropriate, the Court nonetheless misinterprets and misapplies the rules and principles governing the territorial sea. In this regard, Judge Oda notes that the "equidistance/special circumstances" rule mistakenly employed by the Court for purposes of territorial sea delimitation instead pertains to the continental shelf régime. Judge Oda approves of the Court's attempt to determine a continental shelf boundary in the northern sector, but he feels that the Court does not adequately explain the methods by which it arrives at its final line of demarcation in this sector. He concludes his criticism of the Court's approach to this case by noting that the Court should have indicated principles to guide the drawing of a maritime boundary without actually indicating the precise contours of the boundary itself. Judge Oda recalls in this regard his separate opinion in the case concerning *Maritime Delimitation in the Area between Greenland and Jan Mayen* (1993), wherein he noted that the application of equitable principles affords an infinite variety of possible boundaries; the Court should exercise moderation and self-restraint and avoid unjustifiable precision in its decisions on maritime boundaries. Precise demarcation of the boundary can be left to a panel of experts to be appointed jointly by the parties for such purpose.

Having identified the flaws in the Court's approach, Judge Oda then presents his own views. Noting the region's political history and the importance therein of oil exploitation, Judge Oda opines that this case should concern demarcation only of continental shelf boundaries and not those of territorial seas. After an extensive review of the development of the régime of the continental shelf (by reference to the negotiating history of the relevant provisions of the 1958 and 1982 treaties on the law of the sea and their attendant United Nations conferences), Judge Oda reiterates his preference for an equitable solution to the dispute. Judge Oda notes that his stance accords with positions taken consistently throughout his judicial career, as evidenced for example in his argument as counsel for the Federal Republic of Germany before this Court in the *North Sea Continental Shelf* cases (1969). He prefers modesty in the face of a geographically complex situation and suggests principles to guide delimitation based on a *macrogeographical* approach. In order to make clear the direction of his thinking, Judge Oda appends two sketch maps representing "one line from among the many lines that may reasonably be proposed".

Joint dissenting opinion of Judges Bedjaoui, Ranjeva and Koroma

In the introduction to their opinion, Judges Bedjaoui, Ranjeva and Koroma, who regret that they had no other choice than to distance themselves from the majority, point out that the dispute is a recurring one of long standing and that the case involves special difficulties. They call on the Parties to draw upon the infinite resources offered by their common genius to find the will to transcend their frustrations through cooperation.

Judges Bedjaoui, Ranjeva and Koroma hope in this connection that the judicial settlement will have met all the conditions necessary to make the solutions it has arrived at socially acceptable, and that it will thus be capable of performing to the full its calming, peace-making function.

Turning to the question of the respective judicial strategies adopted by the Parties before the Court, Judges Bedjaoui, Ranjeva and Koroma set out the whole range of legal grounds put forward by the Parties and regret that the Court applied itself to considering only one of those grounds, the British decision of 1939, which served as virtually the sole basis of the Court's Judgment. Judges Bedjaoui, Ranjeva and Koroma fear that the Court is thus today handing down only an *infra petita* ruling, as it has ignored all of the other grounds relied on by the Parties. Moreover, the Court's analysis of the formal validity of the 1939 British decision is incomplete and questionable. However, Judges Bedjaoui, Ranjeva and Koroma do agree with the Court that that 1939 decision was a political decision and not an arbitral award having the authority of *res judicata*. They agree also that the first condition for the validity of the 1939 decision is the consent of the Parties. But they are of the opinion that the circumstances of the case and the historical context clearly demonstrate that the consent given by one of the Parties, which should have been express, informed and freely given, as in the case of any territorial dispute, was tainted here with elements of fraud. Thus, restricting themselves to an examination of the purely formal validity of the British decision of 1939, Judges Bedjaoui, Ranjeva and Koroma find that that decision cannot properly serve as a valid legal title for an award of the Hawar Islands.

Further, that decision was not binding upon the Parties, for the consent of one of them, which was moreover fundamentally flawed, was only a consent to the proceedings and in no sense a consent to the decision on the merits.

The co-authors of the opinion regret, moreover, that the Court failed to examine the substantive validity of the British decision of 1939, which, in their view, prevented the Court from taking its consideration of the case to its logical conclusion and reaching a compromise, or *"a minima"* solution, consisting in sharing the Hawar Islands on the basis of Bahrain's *effectivités*. The true signification and construction of the Bahraini formula need to be determined, so that its internal coherence may be restored. In passing, the co-authors note that there is a manifest incompatibility between the application of the Bahraini formula to the case and the application of the principle of *uti possidetis juris*, which the Court correctly did not apply in this case. But the question of *effectivités*, which the Court sought to avoid examining, was inevitably bound to come up again by reason of the very fact that the Court chose to base itself on a legal ground deriving from the 1939 decision. Thus any examination of the substantive validity of that decision would have impelled the Court to undertake an examination of the *effectivités*, for the Weightman Report — which underlay the British decision — justifies the award of the main Hawar Island ("Jazirat Hawar") on the basis of *effectivités*, while the award of the remaining Hawar Islands

is based on a simple presumption of *effectivités*. In this regard, the co-authors of the dissenting opinion note an internal contradiction in the Weightman Report and the application of a double standard as regards the principle of proximity. In sum, the Court's Judgment is notable for the fact that it rules "*ultra petita*", on the basis of *effectivités* limited to "Jazirat Hawar" and totally absent in the other islands and islets of the Hawar archipelago.

The co-authors note that, subsequently to its 1939 decision, the United Kingdom showed some hesitation and expressed doubts as to the correctness of that decision, going so far as to agree in the 1960s that the decision be re-examined by some "neutral" authority, no doubt in the form of an arbitration. Added to this were the persistent protests by Qatar and its refusal to acquiesce either in the said British decision of 1939 or in the successive acts of occupation of Jazirat Hawar by Bahrain. This permanent attitude of non-renunciation by Qatar, combined with the weakness of the *effectivités* on the islands other than Jazirat Hawar, are, in the co-authors' view, such as to prevent the creation of a title in favour of Bahrain over the Hawars. The Judgment should also have taken account of the failure to observe the territorial status quo, both during the period 1936-1939 when the final British decision was being prepared, and in the course of the Saudi mediation from 1983, and since 1991 when the case has been *sub judice* before the International Court of Justice.

According to the co-authors, there is no choice but to return to the crucial ground which the two Parties argued at length and which the Court unfortunately disregarded: identifying the historical title to the Hawars. Given the major importance taken on by historical facts in the dynamics of legal disputes over territory, the adjudicating forum bears a compelling duty: to meet the challenge with which history confronts it, even though it is not experienced in that discipline. Contemporary international law provides standards for the legal assessment of historical facts. Yet the Court's Judgment offers a purely descriptive, factual narrative of the historical context of the case, without applying the legal rules and principles which provide a framework for historical facts. The only occasion on which the Court sought to identify the historical title was, in the co-authors' view, in connection with the attribution of Zubarah, and this makes it even more unjustified that the same was not done with respect to the issue of the Hawars, where such historical research was more imperative.

A legal consequence of the British presence in the Gulf in the nineteenth and twentieth centuries was the creation of two separate entities, Bahrain and Qatar, beginning in the last third of the nineteenth century. The historical title of the Al-Thanis to the peninsula of Qatar and its adjacent natural features was thus gradually formed and consolidated.

Thereafter, the Ottoman presence in Qatar, from 1871 to 1914, had legal consequences which definitively established the historical title of the Al-Thani dynasty to Qatar. The United Kingdom's conduct constituted explicit recognition of Bahrain's loss of any title to any part of Qatar, including the Hawar Islands. This conduct on the part of the British was combined with that of Bahrain, whose long tacit acquiescence marked the loss of its title, and with the diametrically opposite conduct of the successive Sheikhs of Qatar, who extended their authority throughout the peninsula of Qatar. This was all reflected in treaties. The Anglo-Ottoman Conventions of 1913 and 1914, the Anglo-Saudi Treaties of 1915 and 1927 and, most importantly, the 1916 Agreement between Great Britain and Qatar show most clearly that Qatar had since 1868 gradually established a historical title to the entire peninsula, including its adjacent features, which was definitively consolidated through the Anglo-Qatari Agreement.

According to the co-authors, the convergence of history and law, as interpreted in accordance with law, is also matched in this case by the convergence of geography and law, which serves as a countercheck to confirm the existence of a valid, certain title held by Qatar to the Hawars. The question of geographical proximity has given birth to a legal concept which we ignore at our peril. The notion of "distance" has been given legal expression in various ways in the modern international law of the sea. These include the establishment of a strong legal presumption that all islands lying in a coastal State's territorial sea belong to that State. The co-authors believe that the issue of the territorial integrity of a coastal State deserved closer attention from the Court. From this perspective, the solution for a legally unassailable award of the Hawar Islands was obvious, and the law would have been in perfect harmony with both history and geography.

Judges Bedjaoui, Ranjeva and Koroma also regret the silence of the Judgment on the subject of the map evidence. Though it is true that the evidentiary importance of cartographic material is only relative, it nevertheless remains the case that maps are the expression or reflection of general public opinion and of repute. In this respect the voluminous map file submitted by Qatar, buttressed by the fact that those maps were produced in a wide variety of countries and at widely varying dates, together with the British War Office maps, which are particularly credible, confirms Qatar's historical title to the Hawars, as do the many historical documents establishing the respective territorial extent of each Party.

As far as the maritime delimitation is concerned, the co-authors have focused their critical remarks on four points. *First*, the Judgment rules *infra petita*, in the view of Judges Bedjaoui, Ranjeva and Koroma, having regard to the Bahraini formula as applied to the course of the single maritime boundary, which the Judgment describes as a single multifunctional line. Recourse to the technique of enumerating the areas to be delimited has a dual aim: to specify individually the areas for delimitation and to emphasize the distinct nature of each area in relation to the others, since each possesses its own coherent character in law; it was therefore incumbent upon the Court to ensure that the result it achieved was coherent over the entire maritime area delimited.

This test of coherence was necessary, given the impact of the award of the Hawar Islands to Bahrain: confirmation

in the operative part of the Judgment of the right of innocent passage through Bahrain's territorial waters is not enough. The co-authors of this dissenting opinion consider that it would be wrong to underestimate the risk of conflicts arising in connection with the implementation of the right of innocent passage. Although it had not been specifically seized of this issue, the Court, as it did in the case concerning *Kasikili/Sedudu Island (Botswana/Namibia)*, should also have regarded as part and parcel of the settlement of the merits of the dispute the conclusion of an agreement between the two Parties providing for the legal enclavement of the Hawar Islands under a regime of international easement".

Secondly, the method adopted to draw the provisional median line was also criticized by the three judges as contrary to the basic principles of delimitation. Under the adage "the land dominates the sea", it is essentially *terra firma* that has to be taken into account, and special circumstances must not be allowed to influence prematurely the course of the theoretical provisional median line. The law does not require that the baselines and points used for delimitation have to be the same as those used to fix the external seaward boundaries of maritime areas. It is this interpretation of the law that prevailed in the work of the conferences on the law of the sea, contrary to the position of the International Law Commission. Case-law has failed to espouse the trend towards an interpretation favouring a duality of function. The Court, contrary to the present decision, has always favoured the choice of equitable points, so that both the method for drawing the line and its result should be fair. "The equitableness of an equidistance line depends on whether the precaution is taken of eliminating the disproportionate effect of certain islets, rocks and minor coastal projections." (*I.C.J. Reports 1985*, p. 48, para. 64) This is a general rule which applies equally to the calculation of the equidistance line in a delimitation of the territorial sea. It is thus surprising to find the sea dominated not by *terra firma* but by quite insignificant maritime features (such as Umm Jalid, for example), precisely lacking in any solid base.

Thirdly, the legal characterization of Qit'at Jaradah is not supported by the co-authors, because of its geophysical characteristics. The issue of islands hinges upon considerations of hydrography (high tide) and geomorphology (natural area of land). According to an old decision, the *Anna* case, the origin of the land is immaterial for purposes of characterization of a feature as an island. However, since the inclusion in the 1958 Geneva Convention of the adjective "natural", the approach has changed: a feature appearing above the waterline must be an area composed otherwise than of rocks or atolls, the unstable land composing such features being specifically mentioned in the Montego Bay Convention in the provision on deltas. Thus Qit'at Jaradah does not meet the requirements of Article 121 of the 1982 Convention on the Law of the Sea. Moreover, the authors dispute the award to Bahrain of this island, which is closer to the coast of Qatar than of Bahrain, according to the calculations of the Court-appointed hydrographer.

This anomaly is aggravated by the fact that Qit'at Jaradah is accorded an effect of 500 metres, even though the Court had decided not to give it any effect at all and to draw the delimitation line at a strict tangent to Qit'at Jaradah. This has distorting consequences for the northern part of the line.

The position is further aggravated by the fact that the Court has established a single maritime boundary on the basis of two contradictory maps, an American one for the southern sector and a British one for the northern sector. This duality in the Court's approach is somewhat puzzling, since it would have been more normal for it to rely on a single map for the entire course of the line and to choose the most recent one, providing the most up-to-date data. This was the British map, prepared in 1994 by the Admiralty of the country that had for many years been the protecting power in the region and was thus quite well informed of the true situation. This British bathymetric chart clearly demonstrates the geographical continuity between the Hawars and Qatar, which form a single entity and together constitute the Qatari peninsula. But in choosing to rely rather on the American map for this southern sector of the single boundary, the Court could represent the low-water line in that southern sector in an arbitrary manner only, thus raising fears as to the legibility of the decision and above all creating *a real risk of amputation of the territory of Qatar proper*. Thus the choice of the less suitable map for the southern sector leaves serious doubts, not only as to the fairness, but also as to the simple accuracy, of the line obtained. Having failed to choose the British map, it would have been better if the Judgment had not assumed responsibility for errors in the course of the line and had instead invited the Parties to negotiate that course on the basis of indications from the Court.

For all of the reasons set out above, Judges Bedjaoui, Ranjeva and Koroma regret that they cannot accept responsibility for any amputation of Qatar's territory.

Finally, Judges Bedjaoui, Ranjeva and Koroma regret that the vote by Members of the Court was not made on the basis of a division of the final single maritime line into two parts, given the Parties' positions and the award of the Hawar Islands to Bahrain, which the authors could not accept. The northern part, on the other hand, appeared overall to be acceptable to them, even if its course could have been improved by being shifted slightly to the west.

In conclusion, Judges Bedjaoui, Ranjeva and Koroma share the Court's analyses of the inapplicability of the principle of *uti possidetis juris*, to which they are committed as representatives of the various legal systems of the continent of Africa. But they note that it cannot be said that there was State succession in the present case, given that no new subject of international law was created. Also, simple reasons of legal ethics required them to deny application of that principle owing to the real motives for the 1939 decision: it would seem to them that "oil dominates the land and the sea" was the watchword of that decision. Any legal edifice founded on that notion was therefore bound to have been coloured by artifice and deception, to the detriment of

the rights of the peoples. Finally, the principle of uti *possidetis juris* applies to two States' boundaries taken "as a whole", while here the Court's examination focused on a single text. Thus, Judges Bedjaoui, Ranjeva and Koroma were led to conduct a critical examination of the validity of the 1939 decision, as measured by the yardstick of contemporary international norms and modern methods of interpretation.

Declaration of Judge Herczegh

In his declaration, Judge Herczegh stressed the importance of paragraph 2 (*b*) of the operative part of the Judgment, in which the Court stated that vessels of the State of Qatar enjoy in the territorial sea of Bahrain separating the Hawar Islands from the other Bahraini islands the right of innocent passage. This statement in paragraph 2 (*b*) has enabled him to vote in favour of paragraph 6 of the operative part of the Judgment, which defines the single maritime boundary that divides the maritime areas of the two States party to the dispute.

Declaration of Judge Vereshchetin

In his declaration Judge Vereshchetin briefly expounds the reasons which prevented him from concurring in the Court's findings on the legal position of the Hawar Islands and the maritime feature Qit'at Jaradah. The Court's finding on the Hawar Islands rests exclusively on the 1939 decision by the former "protecting Power". This implies that the 1939 British decision is viewed by the Court as a sort of legally binding third-party settlement of a territorial dispute between two sovereign States. It also implies that the two States under British protection at the relevant time could — and actually did — freely express their sovereign will to be legally bound by the British decision. In turn, the deciding "third party" must be presumed neutral and impartial. In the opinion of Judge Vereshchetin, none of the above prerequisites necessary for the affirmation by the Court of the formal validity of the 1939 decision existed in the context of the "special relationship" between the "protected" and "protecting" States obtaining at the relevant time.

The inevitable uncertainty as to the formal validity of the 1939 decision, especially in an absolutely new political and legal setting, required the Court to revert to the legal grounds lying at the basis of the 1939 decision. By abstaining from analysing whether the 1939 decision was well founded in law and rectifying it if appropriate, the Court failed in its duty to take into account all the elements necessary for determining the legal position of the Hawar Islands.

As to the legal position of Qit'at Jaradah, Judge Vereshchetin takes the view that this tiny maritime feature, constantly changing its physical condition, cannot be considered an island within the meaning of the 1982 Convention on the Law of the Sea. Rather, it is a low-tide elevation whose appurtenance depends on its location in the territorial sea of one State or the other. Therefore, the attribution of Qit'at Jaradah should have been effected after the delimitation of the territorial seas of the Parties and not vice versa.

Declaration of Judge Rosalyn Higgins

Judge Higgins considers that sovereignty over Janan lies with Bahrain, for reasons that have been elaborated by Judges Kooijmans and Fortier. She therefore voted in the negative on paragraph 3 of the *dispositif*. But as the Court found that sovereignty over Janan lies with Qatar, and as she agrees generally with the delimitation line drawn in the Judgment, she voted in favour of paragraph 6.

Had it so chosen, the Court could also have grounded Bahraini title in the Hawars on the law of territorial acquisition. Among acts occurring in the Hawars were some that did have relevance for legal title. These *effectivités* were no sparser than those on which title has been founded in other cases.

Even if Qatar had, by the time of these early *effectivités*, extended its own sovereignty to the coast of the peninsula facing the Hawars, it performed no comparable *effectivités* in the Hawars of its own.

These elements are sufficient to displace any presumption of title by the coastal State.

Separate opinion of Judge Parra-Aranguren

Even though voting in favour of the operative part of the Judgment, Judge Parra-Aranguren states that his favourable vote does not mean that he shares all and every part of the reasoning followed by the Court in reaching its conclusion. In particular he considers paragraph 2 (*b*) of the operative part to be unnecessary and makes it clear, to avoid misunderstandings, that in his opinion Qatar enjoys the right of innocent passage accorded by customary international law in all the territorial sea under the sovereignty of Bahrain. Furthermore, Judge Parra-Aranguren explains that his vote for paragraph 4 of the operative part is the consequence of his agreement with the maritime delimitation line between Qatar and Bahrain drawn in its paragraph 6. In his opinion, the drilling of an artesian well, advanced by Bahrain to demonstrate its sovereignty over Qit'at Jaradah, cannot be characterized as an act of sovereignty. Nor can the acts of sovereignty alleged in respect of the low-tide elevation of Fasht ad Dibal, i.e., the construction of navigational aids and the drilling of an artesian well, be characterized as such. Therefore, in his opinion, it is not necessary to take a stand, as the Judgment does, on the question whether, from the point of view of establishing sovereignty, low-tide elevations can be fully assimilated with islands or other land territory.

Separate opinion of Judge Kooijmans

In his separate opinion Judge Kooijmans takes issue with the Court with regard to that part of the Judgment which deals with the territorial issues which divided the Parties (Zubarah, the Hawar Islands, Janan), although he voted in favour of the Court's findings on sovereignty over

Zubarah and the Hawars, dissenting only with regard to Janan.

He disassociates himself, however, from the Court's reasoning on all three issues, since in his view the Court has taken an unduly formalistic approach by basing itself mainly on the position taken by the former Protecting Power (Great Britain) and not on substantive rules and principles of international law, in particular those on the acquisition of territory.

Judge Kooijmans starts by giving a picture of the political and legal situation in the Gulf region in the nineteenth and early twentieth century. At that time the formation of States as territorially based sovereign entities had not yet taken place. It was only the discovery of oil in the 1920s which led to the need for clearly defined boundaries and to the notion of exclusive spatial jurisdiction.

It is noteworthy that the legal character of the relations between the main Western Power in the region, Great Britain, and the local rulers, which was laid down in a number of treaties concluded in that early period, did not change after the exploitability of natural resources had become a dominant factor. The local sheikhdoms were not colonized but kept their character as independent legal entities, even if political control by the Protecting Power may have tightened.

Judge Kooijmans thus is of the view that the principle or rule of *uti possidetis juris.* invoked by Bahrain, is not applicable. Crucial in this respect is whether there is (*a*) a transfer of sovereignty from one State to another State as a result of which (*b*) administrative boundaries are transformed into international boundaries.

In the present case neither of these criteria is met. When the Protecting Power settled territorial issues it did so by determining international boundaries between two entities with which it had treaty relations.

Under those treaties the Protecting Power had no right to determine unilaterally the boundaries of the sheikhdoms or to decide upon matters of territorial sovereignty. It could do so only with the consent of the local rulers.

Judge Kooijmans fundamentally disagrees with the Court that, when in 1939 the British Government attributed the Hawar Islands to Bahrain, this decision was the result of a dispute settlement procedure to which the Ruler of Qatar had freely agreed at the appropriate time. There was no consent from his part, nor was there subsequent acceptance or acquiescence. The British decision consequently has no legal validity *in se*. All territorial issues, and not only that of Zubarah, where the Protecting Power did not take a formal decision, must be resolved in the light of the general principles of international law.

As for Zubarah, this part of the dispute dates back to the nineteenth century when tribal loyalties played a more important role than territorial claims. Bahrain bases its claim mainly on historic rights and ties of allegiance with (a branch of) the Naim tribe.

Such ties of allegiance as may have existed between the Ruler of Bahrain and certain tribes in the area were insufficient to establish any tie of territorial sovereignty (*Western Sahara* case). On the other hand it can be observed that Qatar gradually succeeded in consolidating its authority over the area.

Moreover, there is evidence of acquiescence by conduct on the part of Bahrain in the period before it revitalized the dispute in the second half of the twentieth century. Judge Kooijmans therefore agrees with the finding of the Court that Zubarah appertains to Qatar, although in his view the Court relied too much on the position taken by Great Britain and the Ottoman Empire.

With regard to the Hawar Islands Qatar bases its claim on original title as recognized by Great Britain (and the Ottomans) in conjunction with the principle of proximity or contiguity, since the islands are situated close to the coast of the peninsula and geographically are part of it. According to Judge Kooijmans it would be an anachronism to construe the 1868 Agreement concluded by Great Britain with the chief in Doha as providing him with title to the whole of the Qatar peninsula; as to the principle of contiguity, this is in international law no more than a rebuttable presumption which must yield to a better claim.

Bahrain invokes long-standing ties of allegiance with the Dowasir of Hawar, a tribe which has its principal domicile on Bahrain's main island, and a number of *effectivités* which allegedly evidence a genuine display of authority.

Although it is plausible that links have existed between the inhabitants of the Hawar Islands and Bahrain, it is less certain that these links translated themselves into ties of "allegiance" with the Ruler of Bahrain. Nor can the *effectivités*, presented by Bahrain, be interpreted as evidence of continuous display of authority. In view of the fact, however, that Qatar has not presented any *effectivités* at all, the observation of the Permanent Court of International Justice in the *Eastern Greenland* case that tribunals often had to be satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim, holds true for the present case also.

The Hawars must therefore be considered to appertain to Bahrain, and the 1939 British decision as being intrinsically correct.

Sovereignty over Janan is a separate issue only because it was excluded from the Hawar group by the British Government in its decision of 1947 on the division of the sea-bed between the Parties. It is clear from the facts however that, when the dispute about the Hawars arose, Janan was considered part of the Hawar group by both Parties as well as by the Protecting Power. Nor was it given separate mention in the 1939 decision. Since the 1947 decision is ambiguous as to its legal character and cannot be seen as attributing sovereign rights, Janan must be considered part of the Hawars over which Bahrain already had sovereignty at the time of the 1947 decision. For this reason, Judge Kooijmans voted against the operative provision in which the Court found that Qatar has

sovereignty over Janan. The single maritime boundary should consequently run between Janan and the Qatar peninsula and not between Hawar Island and Janan.

Separate opinion of Judge Al-Khasawneh

While Judge Al-Khasawneh concurred with the majority decision regarding the territorial issues, i.e., Zubarah and Hawars, with regard to the latter he criticized the Court's exclusive reliance on the 1939 British decision "as a valid political decision that binds the Parties". He felt that approach was too restrictive and unduly formalistic. Moreover, he believed that reasonable doubts linger regarding the reality of Qatari consent when set contextually within the facts of almost total British control over Bahrain and Qatar. Moreover, he thought that accusations by Qatar that there was "bias and prejudgment" by some British officials were not adequately answered in the Judgment. The absence of any reference to substantive law in the part of the Judgment dealing with Hawars was also unwarranted.

Instead, alternative lines of reasoning should have been explored by the Court if the decision is to stand on firmer ground. These are *uti possidetis*, historic or original title, *effectivités*, and the concept of geographic proximity.

With respect to *uti possidetis juris* he concluded that it was inapplicable because the British Government, unlike the Spanish Crown in Latin America, had not acquired title. Moreover, he thought that the doctrine of intertemporal law argued against it. In general he felt that too ready a reliance on the principle is inimical to other legal principles, e.g., the right of self-determination, and can detract from the proper function of international courts, which is to correct illegalities where they occur and not simply to declare pre-existing territorial situations legal — in the interest of averting conflicts — without regard to title and other legally relevant criteria.

Acknowledging the difficulty of determining original titles, which stems partly from the inherent limitation of historical enquiries and partly from the paucity of information on the crucial question of Qatar's territorial extent, he thought that nevertheless some historical facts emerge with relative clarity. Among these is that Bahraini sheikhs exercised considerable control over the affairs of the Qatar peninsula until 1868. Notions of Qatari independence as of that date (when Mohammad Al-Khalifah was punished by the British) are however greatly exaggerated, for the fact that the British dealt directly with the Sheikhs of Qatar does not in itself create title. Moreover Qatar was an Ottoman territory. The real date for Qatari independence was 1913, when the Ottomans concluded a treaty with Great Britain. However, even then the territorial expanse of Al-Thani rule remained unclear. Bahrain has claimed a number of *effectivités* on the Hawars; some are modest and do not carry much probative value. However the *effectivités* carried out from 1872 to 1913 are important, for no one could doubt the authority of the Ottoman rule over the whole peninsula. The fact that the Ottomans acquiesced to such *effectivités* shows that the Ottomans, while they did not recognize any Bahraini territorial sovereignty on the Qatari mainland, nevertheless considered the Ruler of Bahrain to have ownership rights on the islands on the western coast of Qatar. Additional *effectivités* were demonstrated by Bahrain until 1936. When the spatial expanse of title is not clear, such *effectivités* play an essential role in interpreting that expanse. Notwithstanding their small number, Qatar could show no comparable *effectivités*, indeed none at all over the islands. On this basis Judge Al-Khasawneh joins the majority view.

Dissenting opinion of Judge ad hoc Torres Bernárdez

1. Judge Torres Bernárdez voted in favour of subparagraphs (1), (2) (*b*), (3) and (5) of the operative part of the Judgment. In these subparagraphs, the Court finds that the State of Qatar has sovereignty over Zubarah and Janan Island, including Hadd Janan, and that the low-tide elevation of Fasht ad Dibal also falls under the sovereignty of the State of Qatar. Moreover, the adopted course of the single maritime boundary: (i) likewise places under the sovereignty of the State of Qatar the low-tide elevations of Qit'at ash Shajarah and Qita'a el Erge; and (ii) leaves to the State of Qatar most of the continental shelf and superjacent waters of the Parties' northern sector of the maritime delimitation area in dispute with its living and non-living resources. Lastly, the operative part of the Judgment recalls us that the vessels of the State of Qatar enjoy in the territorial sea of the State of Bahrain separating the Hawar Islands from other Bahraini islands the right of innocent passage accorded by customary international law, thus placing this right of the State of Qatar within the *res judicata* of the present Judgment.

2. However, Judge Torres Bernárdez regrets being unable to support the findings of the majority with regard to sovereignty over the Hawar Islands and Qit'at Jaradah, namely subparagraphs 2 (*a*) and (4) of the operative part, for reasons set out in his opinion. The conclusions of Judge Torres Bernárdez on these two territorial questions are exactly the opposite of those of the majority.

3. Judge Torres Bernárdez also voted against the whole of subparagraph (6) of the operative part of the Judgment concerning the single maritime boundary, but for procedural reasons because a vote by division was not allowed. This is his second regret. His position on the matter had nothing to do with the findings in the Judgment on territorial questions. In fact, Judge Torres Bernárdez accepts as falling within the parameters of an equitable solution the course of the single maritime dividing line as from Qita'a el Erge up to the very last point of the line in the Parties' northern sector, precisely because the findings in the Judgment on territorial questions. But, he cannot accept that the delimitation in the Hawar Islands maritime area — those islands becoming *foreign* coastal islands by virtue of the Judgment — be effected through the application of the "semi-enclave method" in favour of the distant sovereign and not by most equitable methods applied in such kind of situations, namely by the application of the "enclave method" in favour of the coastal sovereign or other alternative means capable of

achieving an equitable maritime delimitation in the area concerned.

4. In the view of Judge Torres Bernárdez, the conclusions of the majority on the issues referred to in paragraphs 2 and 3 above: (1) fail to acknowledge the scope of the original title of the State of Qatar to the entire peninsula and its adjoining islands fully established by 1913-1915 through a process of historical consolidation and general recognition; (2) make of the 1939 British "decision" on the Hawar Islands the source of a Bahraini derivative title prevailing over the original title of Qatar, notwithstanding the formal and essential invalidity of that "decision" in international law and the fact that the Hawar Islands — geographically part of the western coast of the peninsula of Qatar — fall within the scope of the original title of the State of Qatar and are located in the territorial sea generated by the west coast of Qatar; (3) characterize a maritime feature as Qit'at Jaradah as an island and accept that such a maritime feature may be the object of appropriation as land territory (*terra firma*) through alleged Bahraini "activities" not amounting to acts performed by the State of Bahrain *à titre de souverain*; and (4) disregard in the maritime delimitation the resulting geographical/political situation arising from the attribution of the Hawar Islands to the State of Bahrain; this *superviniens* "special circumstance" should have been taken into account to achieve an equitable solution in the delimitation of the Hawar Islands area by applying a balance of equities approach through the said enclave method, by defining an area of common territorial sea or by other measures territorial in character.

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5. As to the *territorial aspect of the case*, Judge Torres Bernárdez recalls in his opinion that political and physical geography do not necessarily coincide. The opinion then goes on to review the respective merits of the Parties' claims to be the holder of an *original title* in the disputed territorial questions. In this connection, the opinion first analyses the original title to territory of each of the Parties as a whole and then the scope of such a title with respect to the particular disputed territorial questions, namely Zubarah, the Hawar Islands and Janan Island. As the two States parties are the result of an historical evolution, Judge Torres Bernárdez underlines *historical consolidation and general recognition* as a mode of acquiring original title to a given land territory.

6. The opinion recalls the origins of the ruling families of Qatar and of Bahrain, the settlement of the Al-Khalifah on Bahrain Island in 1783 and the legal effects on title to territory consequential on that settlement after 17 years at Zubarah, namely the absence of *corpus possesionis* by the Al-Khalifah in the Qatar peninsula and its adjoining islands, as well as the consequential effects of Al-Thani settlement in the Doha area on the establishment and consolidation of their original title to the entire Qatar peninsula and its adjoining islands.

7. The opinion points out that the Al-Thani and Al-Khalifah families were not the only protagonists in the shaping of their respective original title to territory. There were also other protagonists in the political scene of the Gulf from the last decades of the eighteenth century onwards such as Persia, Muscat, Oman and, in particular, the Wahhabis. But the most important historically related events occurred during the nineteenth century. First, Great Britain's presence in the Gulf in connection with its role in maintaining peace at sea became paramount and, secondly, the establishment of the former Ottoman Empire on the mainland of the Arabian peninsula, including in Qatar from 1871 to 1915. For Judge Torres Bernárdez the *termination* of the historical connection between Bahrain and Qatar occurred in about 1868-1871. In any case, Qatari tribes ceased paying the common tribute (*zakat*) due from Bahrainis and Qataris to the Wahhabi Amir in 1872.

8. The opinion also underlines Great Britain's protection of Bahrain *in the Bahrain islands* and the importance in this respect of, inter alia, the 1861 Agreement between Great Britain and Bahrain; and also the 1867 acts of war across the sea by the Ruler of Bahrain against the Qataris (Doha was destroyed) and British intervention to stop the subsequent Bahraini/Qatari hostilities described in some contemporary British documents as a "war". The outcome of those events was the agreements concluded in 1868 by Great Britain with the new Al-Khalifah Ruler of Bahrain and with the Al-Thani Chief of Gutter. The arrival of the Ottomans in Qatar three years later, in 1871, is the second historical event which together with the 1868 Agreements would, according to the opinion, determine, the future scope of the original title to the territory of Qatar and of Bahrain.

9. In fact, for Judge Torres Bernárdez, the *process* of consolidation and recognition of the Al-Thani Rulers' original title to the territory of the entire peninsula of Qatar and its adjoining islands *began* precisely some years before 1868. The respective conduct of Great Britain and Bahrain concerning the arrival of the Ottomans in Qatar is very revealing in this respect. The Ottomans organized Qatar as a *kaza* or administrative unit of the Ottoman Empire and appointed the Al-Thani Chief of Qatar as *kaimakam*. Thus, during the Ottoman period, the Chiefs of Qatar progressively developed their effective authority over Qatari tribes and territory taking advantage of their dual capacity as Chiefs of Qatar and kaimakams of the Ottoman *kaza* of Qatar. The conduct of Great Britain vis-à-vis the Al-Thani Chief of Qatar during the Ottoman period enhanced the development of that effective authority. Great Britain did not challenge the presence of the Ottoman Empire in the Qatar peninsula and continued to deal with the Al-Thani Chief of Qatar particularly in matters relating to the maintenance of peace at sea. On the other hand, the territorial scope of the effective authority of the Al-Khalifah Rulers of Bahrain was limited by treaty obligations assumed by them with Great Britain to the Bahrain islands proper. In any case, the Al-Khalifah did not exercise any kind of effective authority, directly or indirectly, over the peninsula of Qatar and its adjoining islands during the whole Ottoman

period of Qatar which lasted until 1915, namely about 44 years.

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10. In 1873, Bahrain submitted its first claim to *Zubarah* to the British alleging ill-defined rights in the area and invoking ties of allegiance between the Al-Khalifah and the Naim tribe. The British rejected this claim as unfounded and continued to reject subsequent Bahraini claims on Zubarah, including in 1937. In fact, Zubarah was part of the *kaza* of Qatar where the Chief of Qatar and the Ottomans exercised effective authority as shown by the documentary evidence in the case file. Britain recognized that situation which was also acknowledged on certain occasions by the Rulers of Bahrain themselves. The preoccupation of the British with the maintenance of peace at sea and ensuring the security of the Bahraini islands explains that the sea between Qatar and Bahrain peninsula was seen by the British as a buffer zone between the two countries from the 1868 Agreements onwards.

11. Somewhat at odds with Bahrain's above-mentioned claims on Zubarah, the Al-Khalifah Rulers waited until 1936 to submit their first written claim over the *Hawar Islands* and *Janan Island* to the British. This first claim is dated April 1936. Bahrain's prolonged silence on the Hawar Islands and Janan Island including at the very moment when the original title of the Al-Thani Chief of Qatar had been historically consolidated and generally recognized cannot be without legal effects in international law. Bahrain had occasion to claim the islands referred to. For example, at the time of Major Prideaux's visit to Zakhnuniyah and Jazirat Hawar in 1909, Bahrain claimed Zakhnuniyah but not Jazirat Hawar (*qui taceret consentire videtur*). This means that for Judge Torres Bernárdez the 1936 Bahraini claim on the islands concerned is a somewhat belated one by international law standards and, in any case, could not have retroactive effect against the historical consolidation and general recognition of the original title of Qatar already firmly established before 1936.

12. Bent's 1889 definition as well as other British descriptions of "Bahrain" and the 1908 authoritative testimony of Lorimer approved by the British Political Resident Prideaux, merely reflect the territorial realities in the area, namely Qatar's original title over the entire peninsula and adjoining Hawar Islands and Janan Island. This results also from the presumption of international law concerning islands in the territorial sea of a given State (see the first Award of the *Eritrea/Yemen* Arbitration Tribunal), and from the role of proximity or contiguity in the establishment of title to coastal islands, including the "portico doctrine" formulated by Lord Stowell in 1805. The jurisprudence of the Permanent Court in the *Eastern Greenland* case and the *Island of Palmas* Arbitration. Articles 11, 12 and 13 of the 1913 Anglo/Ottoman Convention and annexed maps — the 1914 Anglo/Ottoman Convention — the 1915 Anglo/Saudi Treaty, and the 1916 Anglo/Qatari Treaty are conventional instruments which reflect the scope of the respective original titles of Qatar and of Bahrain recognized by the Powers at the beginning of the twentieth century. The original title to territory of the State of Qatar is confirmed furthermore by general opinion or repute as expressed in the copious collection of official and unofficial map evidence before the Court, including the map in Annex V of the 1913 Anglo-Ottoman Convention and British official maps such as the one of 1920 relating to the negotiation of the Peace Treaty of Lausanne. There is also the 1923 map signed by Holmes acting on behalf of BAPCO, etc.

13. Moreover, between 1916 and 1936, British representatives acted as though and indeed proclaimed that the Al-Thani Ruler was the Chief of *the whole of Qatar* for example, during the negotiations leading to the first 1935 Qatari oil concession. Furthermore, during that period the Ruler of Qatar continued the normal exercise of his effective authority over the whole territory of Qatar including the Hawar Islands, as proved by the consent requested by the British and granted by the Ruler of Qatar to an RAF aerial survey of Qatar's territory. All the relevant British official reports, documents and cartographic evidence concerning the period 1916-1936 confirm the conclusion that the Hawar Islands and Janan Island were part of the territory of Qatar and were therefore islands under the sovereignty of the State of Qatar.

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14. Great Britain's conduct during the Ottoman period vis-à-vis the presence of the Ottoman Empire in the Qatar peninsula, as well as the conduct of the Al-Khalifah Rulers of Bahrain themselves during the same period, helped to consolidate the original title of the Al-Thani Chief of Qatar to the whole of the peninsula. At that time Bahrain's territory was defined by all the main Powers in the area (Great Britain, Ottoman Empire, Persia) as exclusively composed by the Bahrain islands archipelago proper, namely without any Bahraini dependency in the Qatar peninsula and adjoining islands. The fact that, in sharp contrast to the Zubarah case, Bahrain's first claim to *Hawar Islands* dates from 1936 speaks for itself. In international law this can only mean acquiescence by the Rulers of Bahrain to the existing territorial situation in the area. Territorial sovereignty also signifies obligations and, in the first place, the obligation to observe vigilant conduct towards possible inroads by other States in the holder's own territory or in what it considered or claimed to be its own territory. Ottoman and Qatari authority over the entire peninsula is, in any case, recognized by the contemporary documentary records before the Court and confirmed by the cartographic evidence referred to above.

15. Until 1937 Bahrain was not present in the *Hawar Islands* and until 1936 did not even claim those islands as part of its territory. As islands adjoining the peninsula of Qatar, the Hawar Islands fell within the scope of the Chief of Qatar's title to the whole peninsula. Lorimer's 1907-1908 articles on the principality of Bahrain and on Qatar, revised and endorsed by Prideaux, British Political Resident in the Gulf, are clear evidence that, at the beginning of the

twentieth century, the Hawar Islands were considered by all those most directly concerned to be a part of the territory of the Chief of Qatar, in other words Qatari territory. The case file contains no protest or claim by the Ruler of Bahrain against the territorial situation existing in the Hawar Islands until 1936-1939.

16. Furthermore, the 1913 and 1914 Anglo-Ottoman Conventions expressed in treaty form the understanding of Great Britain and the Ottoman Empire that the extent of the territorial title of the Chief of Qatar encompassed the "peninsula of Qatar" as a whole. The Chief of Qatar was to govern the whole of the said peninsula *as in the past* and Great Britain said it should be understood *that it will not allow the interference of the Sheikh of Bahrain in the internal affairs of Qatar, his endangering of the autonomy of that area or his annexing it*. It is difficult to express more clearly that Bahrain did not have title to territory over the peninsula of Qatar and, therefore, over its adjoining islands and territorial waters. Moreover, the 1913 Anglo-Ottoman Convention did not recognize any right in favour of Bahraini subjects in the Hawar Islands, as it did in the case of Zakhnuniyah Island. The 1916 Anglo-Qatari Treaty contains nothing which could be construed as a change in Great Britain's position on the extent of the title to territory of the Al-Thani Chief of Ruler of Qatar. Conventional evidence therefore confirms the pre-existing territorial state of affairs and also counters Bahrain's thesis of being the holder of an original title to the Hawar Islands.

17. The general opinion or repute reflected in the voluminous map evidence before the Court corroborates Qatar's original title to the Hawar Islands beyond any reasonable doubt. Qatar's conduct after the 1916 Anglo-Qatari Treaty also confirms the effective authority exercised by the Chief of Qatar over the entire peninsula and its adjoining islands, the Hawars and Janan included. The same applies to the conduct of Great Britain and Bahrain until 1936-1939. There were no Bahraini *State effectivités* of any kind in the Hawar Islands before the clandestine occupation of the main Hawar Island in 1937. By then, however, Qatar's original title to the Hawar Islands was already fully consolidated and generally recognized according to the standards applied by international courts and tribunals relating to disputes on the attribution of sovereignty.

18. Furthermore, beyond the conduct of the Parties and Great Britain, international law naturally also has to be considered. In the case of islands, international law has a general rule formulated in terms of a presumption according to which sovereignty over the islands wholly or partly in the territorial sea of a given State belongs to that State *unless a full case to the contrary is established by another State*. This rule has recently been applied by an arbitral tribunal to groups of islands in the Red Sea (*Eritrea/Yemen*) case. Most of the Hawar Islands were in the 1930s wholly or partly within the 3-mile territorial sea of Qatar and today all are wholly within the 12-mile territorial sea of Qatar. As a presumption *juris tantum*, the norm is also an element of interpretation of the text of certain relevant treaty undertakings, such as the 1868 Pelly Agreements, the 1913 and 1914 Anglo-Ottoman Conventions and the 1916 Treaty between Britain and Qatar.

19. In the circumstances of the present case, this contributes to a more precise definition of the territorial scope of Qatar's original title, as established by historical consolidation and general recognition. The norm based upon criteria such as proximity and security was in force long before the 1930s and has continued to be in force since. Moreover, as a presumption which creates a right, the norm is subject to the intertemporal law principle, according to which the continued manifestation of the right concerned follows the conditions required by the evolution of the law. Thus, authorization by international law for an extension of the territorial sea up to a 12-mile coastal belt extends the scope of the presumption to the islands lying off the 12-mile territorial sea of the coastal State concerned. This was how the 1998 Arbitral Award in the *Eritrea/Yemen* case understood and applied the said presumption.

20. This presumption is a logical and reasonable norm intended, like others, to facilitate the application in practice of the principle of effective possession (in the form of presumed possession) to particular concrete situations by reference to an objective geographical criterion, while preserving a fully established case to the contrary that another State may have. In other words, and with reference to the present case, the norm presumes that the Hawar Islands and Janan Island are in the possession of Qatar, unless Bahrain is able to prove a fully established case to the contrary. This is precisely what Bahrain failed to prove in the current proceedings with respect to the Hawar Islands and Janan Island.

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21. The opinion ends its consideration of the original title matter by concluding that *Qatar is the holder of the original title to the territorial questions in dispute, namely Zubarah, the Hawar Islands and Janan Island*, and that, consequently, in the absence of a better or prevailing *derivative title* of Bahrain, Qatar has sovereignty over Zubarah, the Hawar Islands and Janan Island. The findings of the present Judgment on *Zubarah* and *Janan Island* coincide with the conclusions of Judge Torres Bernárdez. However, they do not coincide with respect to the *Hawar Islands*, the finding of the majority being that Bahrain has sovereignty over the Hawar Islands. The opinion therefore wonders whether it may be said that Bahrain has a better or prevailing *derivative title to the Hawar Islands*, and begins by considering *the 1939 British "decision"* on the Hawar Islands invoked by Bahrain because such a "decision" is indeed the basis of the finding relevant of the majority. While agreeing with the Judgment that the British "decision" is *not* an international arbitral award with *the force of res judicata*, Judge Torres Bernárdez dissents from the conclusion of the majority that the 1939 British "decision" is *nevertheless* a decision which had in 1939 and still has binding legal effects in the relations between the Parties to the present case.

22. For Judge Torres Bernárdez the conclusion of the majority is wholly erroneous in law, difficult to explain in the light of the evidence submitted by the Parties and rather flimsy in its motivating reasons. As the legal question at issue is *consent* to the 1938-1939 British procedure on the Hawar Islands, the opinion begins by underlining that consent to a given procedure is not consent which might or should be ascertained *in abstracto*. It must be considered in the specific context where the alleged consent was given. In this respect, Judge Torres Bernárdez notes that, in determining the alleged legal effects of the 1939 British "decision", the corresponding reasoning in the Judgment fails to take into account some closely related events prior to 1938, particularly the 1936 British "provisional decision" and the clandestine and unlawful occupation by Bahrain in 1937 of the northern part of Jazirat Hawar made under the umbrella of that "provisional decision".

23. The reasoning also fails — according to the opinion — to explain the scope of the authority or power of the British Government to make a "decision" on the Hawar Islands with *legally binding effects in international law* for Qatar and Bahrain on the basis of consent allegedly given to the 1938-1939 British procedure. The Judgment likewise fails to analyse the question whether the determined consent of the Ruler of Qatar to the 1938-1939 British procedure implied acceptance by him of the outcome of the procedure as a decision with legally binding effects in international law on the questions of title or sovereignty over the Hawar Islands. For Judge Torres Bernárdez all these matters would have deserved full treatment in the Judgment because what is at the stake here is the *principle of consensuality* which in international law governs consent to any kind of peaceful settlement with binding or non-binding outcome.

24. The two main reasons why Judge Torres Bernárdez cannot accept the conclusion of the majority on the 1939 British "decision" are even more fundamental. They relate to both the validity of the consent which has been determined of the Ruler of Qatar to the 1938-1939 British procedure and the validity in international law of the actual 1939 British "decision" itself. On the first question, the consent of the Ruler of Qatar which has been determined was not an informed consent to a meaningful procedure freely given. Judge Torres Bernárdez considers it proven by the evidence before the Court that such consent was vitiated by induced error, fraudulent conduct and coercion. The bad faith of the British Political Agent, Weightman, involved in the negotiations with the Ruler of Qatar is quite obvious and his promise that the decision would be given by the British Government "*in the light of truth and justice*" was not intended to be fulfilled and was not fulfilled. As to the second question, namely the validity of the 1939 British decision itself, Judge Torres Bernárdez finds that, for reasons explained in his opinion, the "decision" is an invalid decision in international law from the standpoint of both formal validity and essential validity. It follows that the opinion considers it wholly unjustified, in the circumstances of the case, that the 1939 British "decision" could be the source of a *derivative title* of Bahrain to the Hawar Islands.

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25. Having concluded as to the invalidity of the 1938 consent by the Ruler of Qatar and of the 1939 British "decision", the opinion considers the two other derivative titles invoked by Bahrain, namely *effectivités* and *uti possidetis juris*. As regards *uti possidetis juris*, Judge Torres Bernárdez concludes that, *qua norm* of general international law, this principle is inapplicable to the present case. As to the *effectivités* in the Hawar Islands alleged by Bahrain, they are *voluminous in quantity but sparse in useful content*. Most of them are not admissible because they are subsequent to the clandestine and unlawful occupation of Jazirat Hawar by Bahrain in 1937. Others are in clear contradiction with the status quo accepted by the Parties in the context of the Saudi Arabian mediation. Furthermore, the admissible *effectivités* do not constitute an international display of power and authority over territory, by the exercise of jurisdiction and State functions, on a continuous and peaceful basis. The Dowasir activities are not acts performed by Bahrain *à titre de souverain*. Thus, Judge Torres Bernárdez cannot uphold the Bahraini *effectivités* plea either. Moreover, in the past as today the *effectivités* alleged by Bahrain relate to Jazirat Hawar island alone. No Bahraini *effectivités* of any kind existed or exist in the other islands of the Hawars group.

26. It follows from the above that since Bahrain's three pleas based upon alleged derivative titles to the Hawar Islands are rejected by Judge Torres Bernárdez, *sovereignty over the Hawar Islands belongs for him to the State of Qatar by virtue of its original title to those islands.The original title of Qatar over the Hawar Islands has not been displaced by any better derivative title of Bahrain.*

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27. Regarding the *maritime delimitation aspect* of the case, the opinion rejects the "archipelagic State", the "historic title or rights" and the "*de facto* archipelago or multiple-island State" arguments of Bahrain. The Judgment also rejects the "archipelagic State" and "historic title or rights" arguments of Bahrain, but according to Judge Torres Bernárdez is not immune to the "*de facto* archipelago or multiple-island State" argument.

28. This explains in the view of Judge Torres Bernárdez the peculiar way in which the Judgment interprets the relevant principles and rules of general international law applicable to the maritime delimitation in the present case. The Court's task was to draw a *single* maritime boundary between the relevant *coasts* of the States parties and this means, inter alia, that the result of the delimitation should be "*equitable*" all along the course of the line, independently of the maritime jurisdiction divided by the line in a given sector. In this respect, Judge Torres Bernárdez considers that the majority gave excessive and unjustified weight to the fact that in part of its course the line divides territorial seas of the Parties.

29. Judge Torres Bernárdez emphasizes that the Judgment avoids defining the "area of delimitation" and

artificially identifies the "*Bahraini relevant coasts*" which it defines by reference to "basepoints" located in tiny islands and low-tide elevations. The result is that while the relevant coast of Qatar is a geographical and continuous coast or coastal front (namely the relevant western coast of the Qatar peninsula), the "Bahraini relevant coasts" is composed of a series of "basepoints" on the said minor maritime features distant from each other as well as from the Bahraini mainland coast or coastal front. It follows that the "Bahraini relevant coasts" of the Judgment are formed ultimately by some isolated "basepoints" on minor maritime features and by *water in between*! It is certainly a peculiar and extraordinary conclusion of the majority on the definition of the relevant coasts in order to effect a maritime delimitation.

30. The "*equidistance line*" constructed by the Judgment is therefore not a line between two coastal lines but something else. Judge Torres Bernárdez rejects that "equidistance line" as artificial and without legal justification. In fact *la mer domine la terre* in the reasoning of the Judgment. The non-application by the Judgment of the mainland-to-mainland method means that the "equidistance line" of the Judgment is *not* an "equidistance line" as normally understood in maritime delimitations. For all practical purposes it represents the outer limit of the claims of Bahrain and sometimes even more than that. It is true that the "equidistance line" constructed by the Judgment is subsequently corrected in favour of Qatar in some segments of the line. Nevertheless, the "equidistance line" of the Judgment gives an *unjustified* initial *plus* to Bahrain and, in fact, Bahrain obtains at the end of the delimitation operation more maritime spaces than through previous sea-bed dividing lines external to the Parties (the 1947 British line and the Boggs-Kennedy line), particularly in the central and southern sectors of the maritime delimitation area.

31. With respect to the "*special circumstances*" justifying adjustment of the "equidistance line" of the Judgment, the latter does not take account of the length of the relevant coasts of the Parties either. Moreover, the majority considers that Qit'at Jaradah is an island (supposedly without territorial sea effects in the definition of the single maritime boundary) and attributes sovereignty over that particular maritime feature to Bahrain by occupation! This finding is quite unfounded in law. However, Fasht ad Dibal falls under the sovereignty of Qatar. In effect, this low-tide elevation which lies in the territorial sea of the State of Qatar is on the Qatari side of the single maritime boundary. For Judge Torres Bernárdez the same conclusions should have been applied to the low-tide elevation of Qit'at Jaradah. Regarding the question whether Fasht al Azm is part of Sitrah Island as alleged by Bahrain, the Judgment decides *not* to determine the question. For Judge Torres Bernárdez it is clear, in the light of unsuspected technical evidence before the Court, that Fasht al Azm was separated from Sitrah Island by a natural channel used in the past by fishermen and, consequently, Fasht al Azm is a low-tide elevation and not part of Sitrah Island.

32. For Judge Torres Bernárdez the most legally unjustified decision of the majority concerning the "special circumstances" relates to the Hawar Islands maritime area. The Hawar Islands should have been enclaved because they form part of the western coast of the Qatar peninsula and are, therefore, located in the territorial sea of the State of Qatar. By applying the semi-enclave method to *foreign* coastal islands in favour of Bahrain, the result cannot be more *inequitable* because the western coast of Qatar is divided into two separate parts by the Hawar Islands themselves and by Bahraini territorial waters. The precedent of the British Channel Islands (*Iles Anglo-Normandes*) case was disregarded, *although* subparagraph (2) (*b*) of the operative part of the Judgment recalls the right of innocent passage of Qatari vessels in the territorial sea of Bahrain separating the Hawar Islands from the other Bahraini islands as accorded by customary international law.

33. In the light of the above considerations, Judge Torres Bernárdez is of the opinion that the single maritime boundary is not "equitable" in the Hawar Islands maritime area and rejects it in that area. On the other hand, Judge Torres Bernárdez finds that, as from Quita'a el Erge to its last point in the northern sector of the delimitation area, the course of the single maritime boundary is acceptable, although Bu Thur and Qit'at Jaradah should have been placed on the Qatari side of the single maritime boundary.

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34. In conclusion, the dissent of Judge Torres Bernárdez relates essentially to the finding of the majority of the Court on the Hawar Islands dispute, the legal basis of that finding, and the consequences it entails for the maritime delimitation. In effect, this finding fails, according to the opinion, to acknowledge (1) the *original title* and corresponding sovereignty of the State of Qatar over the Hawar Islands, a title established through a process of historical consolidation and general recognition; and (2) the absence of any superior *derivative title* of the State of Bahrain over the Hawar Islands. To this it should be added that the resulting *superviniens* maritime "special circumstance" is not treated as such in the definition of the course of the single maritime boundary in the Hawar Islands maritime area.

35. The opinion considers the conclusion of the majority on the Hawar Islands dispute quite erroneous in international law and states, with regret, that as a result of that conclusion the State of Qatar — which came to the Court in order inter alia to remedy a breach of its territorial integrity in the Hawar Islands through the peaceful means of judicial settlement — did not in that respect obtain from the Court the judicial answer which the merits of its case on the Hawar Islands dispute deserved. This example makes Judge Torres Bernárdez wonder whether judicial settlement is in fact a means of redressing notorious territorial usurpations by effecting the peaceful change that the re-establishment of international law may require in a given situation. In any case, *quieta non movere* does not provide an explanation in the present case because the Judgment *non movere* in the

Hawar Islands dispute does not apply to the definition of the single maritime boundary. In the maritime delimitation aspect of the case, the Judgment is *movère*. But, the *non movere* like the *movere* of the majority always seems to be in one direction, in a manner which, in the view of Judge Torres Bernárdez, does not coincide with the normative requirements of the applicable general international law and/or the relative weight of the arguments and evidence submitted by the Parties. Last but not least, the considerations in the reasoning of the Judgment concerning the finding on the Hawar Islands dispute are quite inadequate. The reasoning is unable, according to the opinion, to duly justify the finding of the majority on the Hawar Islands dispute.

36. How is it possible to explain a finding on the basis of a vitiated consent to a 1938-1939 British procedure and whose outcome, the 1939 British "decision", was clearly and obviously an invalid decision in international law, both formally and essentially, at the time of its adoption and remains so? The resurrection in the year 2001 of an invalid colonially minded decision linked to oil interests to resolve a territorial question in dispute between two States is more than amazing and for Judge Torres Bernárdez a quite unacceptable legal proposition. The Judgment's reasoning on consent is to all practical purposes exclusively focused on Qatar. But the 1938-1939 British procedure was a procedure with three participants. Where in the reasoning is the analysis of consent and its conditions with respect to the other two participants? It seems it has also been forgotten that the British representatives in the Gulf involved in dealing with Qatar and Bahrain, Fowle, Weightman and others, and the British officials in London, such as those of the India Office, were agents of the British Government acting in that capacity. Thus, their acts, to the extent that they are proven as vitiated, are vitiated acts of the British Government or imputable to the British Government in international law, namely to the very Government which made the 1939 "decision". Moreover, the reasoning of the Judgment does not even explicitly consider the question of whether the 1939 British "decision" was valid at that time from the standpoint of the essential validity requirements of the law.

37. Furthermore, intertemporal validity is quite alien to the reasoning of the Judgment. How may it be affirmed that the 1939 British "decision" has legally binding effects today between the Parties without analysing whether the so-called "consent" to the 1938-1939 British procedure may be considered a valid consent in the international law in force at the time of the adoption of the present Judgment? To conclude that this is so, it would have been necessary to bring into the picture such as, for example, the possible existence of *jus cogens superviniens* rules or of *erga omnes* imperative obligations, as well as the fundamental principles of the Charter of the United Nations and of the present international legal order.

38. It follows that Judge Torres Bernárdez is unable to accept the conclusion that the State of Bahrain is the holder of a derivative title to the Hawar Islands on the basis of consent to the British procedure as determined by the Judgment. The reality and validity of that consent — as well as the permanency of its affirming legally binding effects for the Parties — is ***not*** adequately and convincingly explained in the reasoning of the Judgment. At the same time, as he has found no other relevant derivative title or titles of Bahrain, the original title of Qatar to the Hawar Islands cannot for Judge Torres Bernárdez but prevail as between the Parties in the Hawar Islands dispute of the present case.

Separate opinion of Judge ad hoc Fortier

In his separate opinion Judge Fortier makes the following observations:

Preliminary issue

The only reference in the Judgment to the Qatari documents whose authenticity was challenged by Bahrain is a narrative found in the section setting out the history of the proceedings before the Court. These documents played an essential role in Qatar's Memorial, serving as almost the only basis for Qatar's claim to the Hawar Islands. Once the authenticity of these documents was challenged by Bahrain, Qatar did not abandon its claim to the Hawar Islands. It adduced a new argument which was not even developed in its original Memorial as an alternative argument. Qatar's case cannot be considered without having in mind the damage that would have been done to the administration of international justice, indeed to the very position of this Court, if the challenge by Bahrain of the authenticity of these documents, had not led Qatar, eventually, to inform the Court that it had decided to disregard all the challenged documents.

Zubarah

The documents originating between 1869 and 1916 on which Qatar relies in support of its claim to Zubarah, and which the Court found dispositive, does no such thing. By 1916, Bahrain had not lost its title to Zubarah on the Qatar peninsula. The allegiance of the Naim tribes that inhabited the north-west of the Qatar peninsula and who remained loyal to Bahrain and the Al-Khalifah until 1937 confirm Bahrain's title over the Zubarah region. International law recognizes that, in certain territories that are possessed of exceptional circumstances such as low habitability, a ruler can establish and maintain title to his territory by manifestation of dominion or control through tribes who gave him their allegiance and looked to him for assistance.

In 1937, the Naim tribesmen who lived in Zubarah were attacked by the Al-Thani and forcibly evicted from the region. The events of July 1937 must be characterized as acts of conquest by Qatar. If the seizure of Zubarah, in 1937, by an act of force were to occur today it would be unlawful and ineffective to deprive Bahrain of its title. However, forcible taking of territories in the pre-United Nations Charter days cannot be protested today. The principle of stability is a significant factor in questions

concerning territorial sovereignty. The Court is not competent to judge and declare today, more than 60 years after the forcible taking, that Bahrain at all material times has remained sovereign over Zubarah.

Janan Island

The critical issue in relation to Janan is whether, by the normal canons of interpretation, the 1939 British decision is to be understood as having, at the time, included Janan. The Court's sole task is to interpret the 1939 decision. The 1939 British decision can only be understood as including Janan.

The Court has attached a great deal of importance to the letters sent on 23 December 1947 by the British Government to the Rulers of Qatar and Bahrain. These letters purported only to express the policy of the United Kingdom and had no legal significance whatsoever regarding ownership of Janan Island. Janan, including Hadd Janan, must be considered to be part of the Hawars over which Bahrain has sovereignty.

Maritime delimitation

Judge Fortier has serious reservations with the Court's reasoning in respect of certain aspects of the maritime delimitation. He does not agree with that part of the single maritime boundary that runs westward between Jazirat Hawar and Janan. He does not, however, express his reservations or disagreement by casting a negative vote.

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134. LAGRAND CASE (GERMANY *v.* UNITED STATES OF AMERICA) (MERITS)

Judgment of 27 June 2001

In its Judgment in the LaGrand Case (Germany v. United States of America), the Court:

- found by fourteen votes to one that, by not informing Karl and Walter LaGrand without delay following their arrest of their rights under Article 36, paragraph 1 (*b*), of the Vienna Convention on Consular Relations, and by thereby depriving Germany of the possibility, in a timely fashion, to render the assistance provided for by the Convention to the individuals concerned, the United States breached its obligations to Germany and to the LaGrand brothers under Article 36, paragraph 1, of the Convention;
- found by fourteen votes to one that, by not permitting the review and reconsideration, in the light of the rights set forth in the Convention, of the convictions and sentences of the LaGrand brothers after the violations referred to in paragraph (3) above had been established, the United States breached its obligation to Germany and to the LaGrand brothers under Article 36, paragraph 2, of the Convention;
- found by thirteen votes to two that, by failing to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the International Court of Justice in the case, the United States breached the obligation incumbent upon it under the Order indicating provisional measures issued by the Court on 3 March 1999;
- took note unanimously of the commitment undertaken by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (*b*), of the Convention; and finds that this commitment must be regarded as meeting Germany's request for a general assurance of non-repetition;
- found by fourteen votes to one that should nationals of Germany nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1 (b), of the Convention having been respected, the United States, by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention.

The Court was composed as follows: President Guillaume; Vice-President Shi; Judges Oda, Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; Registrar Couvreur.

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President Guillaume appended a declaration to the Judgment of the Court; Vice-President Shi appends a separate opinion to the Judgment of the Court; Judge Oda appended a dissenting opinion to the Judgment of the Court; Judges Koroma and Parra-Aranguren appended separate opinions to the Judgment of the Court; Judge Buergenthal appended a dissenting opinion to the Judgment of the Court.

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

"128. For these reasons,

THE COURT,

(1) By fourteen votes to one,

Finds that it has jurisdiction, on the basis of Article I of the Optional Protocol concerning the Compulsory

Settlement of Disputes to the Vienna Convention on Consular Relations of 24 April 1963, to entertain the Application filed by the Federal Republic of Germany on 2 March 1999;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Oda, Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;

AGAINST: Judge Parra-Aranguren;

(2) (*a*) By thirteen votes to two,

Finds that the first submission of the Federal Republic of Germany is admissible;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;

AGAINST: Judges Oda, Parra-Aranguren;

(*b*) By fourteen votes to one,

Finds that the second submission of the Federal Republic of Germany is admissible;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;

AGAINST: Judge Oda;

(*c*) By twelve votes to three,

Finds that the third submission of the Federal Republic of Germany is admissible;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh;

AGAINST: Judges Oda, Parra-Aranguren, Buergenthal;

(*d*) By fourteen votes to one,

Finds that the fourth submission of the Federal Republic of Germany is admissible;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;

AGAINST: Judge Oda;

(3) By fourteen votes to one,

Finds that, by not informing Karl and Walter LaGrand without delay following their arrest of their rights under Article 36, paragraph 1 (*b*), of the Convention, and by thereby depriving the Federal Republic of Germany of the possibility, in a timely fashion, to render the assistance provided for by the Convention to the individuals concerned, the United States of America breached its obligations to the Federal Republic of Germany and to the LaGrand brothers under Article 36, paragraph 1;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;

AGAINST: Judge Oda;

(4) By fourteen votes to one,

Finds that, by not permitting the review and reconsideration, in the light of the rights set forth in the Convention, of the convictions and sentences of the LaGrand brothers after the violations referred to in paragraph (3) above had been established, the United States of America breached its obligation to the Federal Republic of Germany and to the LaGrand brothers under Article 36, paragraph 2, of the Convention;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;

AGAINST: Judge Oda;

(5) By thirteen votes to two,

Finds that, by failing to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the International Court of Justice in the case, the United States of America breached the obligation incumbent upon it under the Order indicating provisional measures issued by the Court on 3 March 1999;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;

AGAINST: Judges Oda, Parra-Aranguren;

(6) Unanimously,

Takes note of the commitment undertaken by the United States of America to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (*b*), of the Convention; and *finds* that this commitment must be regarded as meeting the Federal Republic of Germany's request for a general assurance of non-repetition;

(7) By fourteen votes to one,

Finds that should nationals of the Federal Republic of Germany nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1 (*b*), of the Convention having been respected, the United States of America, by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;

AGAINST: Judge Oda."

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History of the proceedings and submissions of the Parties
(paras. 1-12)

The Court recalls that on 2 March 1999 Germany filed in the Registry of the Court an Application instituting proceedings against the United States of America for "violations of the Vienna Convention on Consular Relations [of 24 April 1963] (hereinafter referred to as the "Vienna Convention"); and that, in its Application, Germany based the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes, which accompanies the Vienna Convention (hereinafter referred to as the "Optional Protocol"). It further recalls that on the same day the German Government also filed a request for the indication of provisional measures, and that, by an Order of 3 March 1999, the Court indicated certain provisional measures. After pleadings and certain documents had been duly filed, public hearings were held from 13 to 17 November 2000.

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

On behalf of the Government of Germany,

"The Federal Republic of Germany respectfully requests the Court to adjudge and declare

(1) that the United States, by not informing Karl and Walter LaGrand without delay following their arrest of their rights under Article 36, subparagraph 1 (*b*), of the Vienna Convention on Consular Relations, and by depriving Germany of the possibility of rendering consular assistance, which ultimately resulted in the execution of Karl and Walter LaGrand, violated its international legal obligations to Germany, in its own right and in its right of diplomatic protection of its nationals, under Articles 5 and 36, paragraph 1, of the said Convention;

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

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

and, pursuant to the foregoing international legal obligations,

(4) that the United States shall provide Germany an assurance that it will not repeat its unlawful acts and that, in any future cases of detention of or criminal proceedings against German nationals, the United States will ensure in law and practice the effective exercise of the rights under Article 36 of the Vienna Convention on Consular Relations. In particular in cases involving the death penalty, this requires the United States to provide effective review of and remedies for criminal convictions impaired by a violation of the rights under Article 36."

On behalf of the Government of the United States,

"The United States of America respectfully requests the Court to adjudge and declare that:

(1) There was a breach of the United States obligation to Germany under Article 36, paragraph 1 (*b*), of the Vienna Convention on Consular Relations, in that the competent authorities of the United States did not promptly give to Karl and Walter LaGrand the notification required by that Article, and that the United States has apologized to Germany for this breach, and is taking substantial measures aimed at preventing any recurrence; and

(2) All other claims and submissions of the Federal Republic of Germany are dismissed."

History of the dispute
(paras. 13-34)

In its Judgment, the Court begins by outlining the history of the dispute. It recalls that the brothers Karl and Walter LaGrand — German nationals who had been permanently residing in the United States since childhood —were arrested in 1982 in Arizona for their involvement in an attempted bank robbery, in the course of which the bank manager was murdered and another bank employee seriously injured. In 1984, an Arizona court convicted both of murder in the first degree and other crimes, and sentenced them to death. The LaGrands being German nationals, the Vienna Convention on Consular Relations required the competent authorities of the United States to inform them without delay of their right to communicate with the consulate of Germany. The United States acknowledged that this did not occur. In fact, the consulate was only made aware of the case in 1992 by the LaGrands themselves, who had learnt of their rights from other sources. By that stage, the LaGrands were precluded because of the doctrine of "procedural default" in United States law from challenging their convictions and sentences by claiming that their rights under the Vienna Convention had been violated.

Karl LaGrand was executed on 24 February 1999. On 2 March 1999, the day before the scheduled date of execution of Walter LaGrand, Germany brought the case to the International Court of Justice. On 3 March 1999, the Court made an Order indicating provisional measures (a kind of interim injunction), stating inter alia that the United States should take all measures at its disposal to ensure that Walter

LaGrand was not executed pending a final decision of the Court. On that same day, Walter LaGrand was executed.

Jurisdiction of the Court
(paras. 36-48)

The Court observes that the United States, without having raised preliminary objections under Article 79 of the Rules of Court, nevertheless presented certain objections to the jurisdiction of the Court. Germany based the jurisdiction of the Court on Article I of the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes of 24 April 1963, which reads as follows:

> "Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol."

With regard to Germany's first submission
(paras. 37-42)

The Court first examines the question of its jurisdiction with respect to the first submission of Germany. Germany relies on paragraph 1 of Article 36 of the Vienna Convention, which provides:

> "With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> (*a*) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> (*b*) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;
>
> (*c*) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action."

Germany alleges that the failure of the United States to inform the LaGrand brothers of their right to contact the German authorities "prevented Germany from exercising its rights under Art. 36 (1) (*a*) and (*c*) of the Convention" and violated "the various rights conferred upon the sending State vis-à-vis its nationals in prison, custody or detention as provided for in Art. 36 (1) (*b*) of the Convention". Germany further alleges that by breaching its obligations to inform, the United States also violated individual rights conferred on the detainees by Article 36, paragraph 1 (*a*), second sentence, and by Article 36, paragraph 1 (*b*). Germany accordingly claims that it "was injured in the person of its two nationals", a claim which Germany raises "as a matter of diplomatic protection on behalf of Walter and Karl LaGrand". The United States acknowledges that violation of Article 36, paragraph 1 (*b*), has given rise to a dispute between the two States and recognizes that the Court has jurisdiction under the Optional Protocol to hear this dispute insofar as it concerns Germany's own rights. Concerning Germany's claims of violation of Article 36, paragraph 1 (*a*) and (*c*), the United States however calls these claims "particularly misplaced" on the grounds that the "underlying conduct complained of is the same" as the claim of the violation of Article 36, paragraph 1 (*b*). It contends, moreover, that "to the extent that this claim by Germany is based on the general law of diplomatic protection, it is not within the Court's jurisdiction" under the Optional Protocol because it "does not concern the interpretation or application of the Vienna Convention".

The Court does not accept the United States objections. The dispute between the Parties as to whether Article 36, paragraph 1 (*a*) and (*c*), of the Vienna Convention have been violated in this case in consequence of the breach of paragraph 1 (*b*) does relate to the interpretation and application of the Convention. This is also true of the dispute as to whether paragraph 1 (*b*) creates individual rights and whether Germany has standing to assert those rights on behalf of its nationals. These are consequently disputes within the meaning of Article I of the Optional Protocol. Moreover, the Court cannot accept the contention of the United States that Germany's claim based on the individual rights of the LaGrand brothers is beyond the Court's jurisdiction because diplomatic protection is a concept of customary international law. This fact does not prevent a State party to a treaty, which creates individual rights, from taking up the case of one of its nationals and instituting international judicial proceedings on behalf of that national, on the basis of a general jurisdictional clause in such a treaty. Therefore the Court concludes that it has jurisdiction with respect to the whole of Germany's first submission.

With regard to Germany's second and third submissions
(paras. 43-45)

Although the United States does not challenge the Court's jurisdiction in regard to Germany's second and third submissions, the Court observes that the third submission of Germany concerns issues that arise directly out of the dispute between the Parties before the Court over which the Court has already held that it has jurisdiction, and which are

thus covered by Article I of the Optional Protocol. The Court reaffirms, in this connection, what it said in its Judgment in the *Fisheries Jurisdiction* case, where it declared that in order to consider the dispute in all its aspects, it may also deal with a submission that "is one based on facts subsequent to the filing of the Application, but arising directly out of the question which is the subject matter of that Application. As such it falls within the scope of the Court's jurisdiction ..." (*Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 203, para. 72). Where the Court has jurisdiction to decide a case, it also has jurisdiction to deal with submissions requesting it to determine that an order indicating measures which seeks to preserve the rights of the Parties to this dispute has not been complied with.

With regard to Germany's fourth submission
(paras. 46-48)

The United States objects to the jurisdiction of the Court over the fourth submission insofar as it concerns a request for assurances and guarantees of non-repetition. It contends that Germany's fourth submission "goes beyond any remedy that the Court can or should grant, and should be rejected. The Court's power to decide cases ... does not extend to the power to order a State to provide any 'guarantee' intended to confer additional legal rights on the Applicant State ... The United States does not believe that it can be the role of the Court ... to impose any obligations that are additional to or that differ in character from those to which the United States consented when it ratified the Vienna Convention". The Court considers that a dispute regarding the appropriate remedies for the violation of the Convention alleged by Germany is a dispute that arises out of the interpretation or application of the Convention and thus is within the Court's jurisdiction. Where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation (*Factory at Chorzów, P.C.I.J., Series A, No. 9*, p. 22). Consequently, the Court has jurisdiction in the present case with respect to the fourth submission of Germany.

Admissibility of Germany's submissions
(paras. 49-63)

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

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

The United States also argues that Germany's third submission is inadmissible because of the manner in which these proceedings were brought before the Court by Germany. It notes that German consular officials became aware of the LaGrands' case in 1992, but that the issue of the absence of consular notification was not raised by Germany until 22 February 1999, two days before the date scheduled for Karl LaGrand's execution. Germany then filed the Application instituting these proceedings, together with a request for provisional measures, after normal business hours in the Registry in the evening of 2 March 1999, some 27 hours before the execution of Walter LaGrand. Germany acknowledges that delay on the part of a claimant State may render an application inadmissible, but maintains that international law does not lay down any specific time limit in that regard. It contends that it was only seven days before it filed its Application that it became aware of all the relevant facts underlying its claim, in particular, the fact that the authorities of Arizona knew of the German nationality of the LaGrands since 1982.

The Court recognizes that Germany may be criticized for the manner in which these proceedings were filed and for their timing. The Court recalls, however, that notwithstanding its awareness of the consequences of Germany's filing at such a late date, it nevertheless considered it appropriate to enter the Order of 3 March 1999, given that an irreparable prejudice appeared to be imminent. In view of these considerations, the Court considers that Germany is now entitled to challenge the alleged failure of the United States to comply with the Order. Accordingly, the Court finds that Germany's third submission is admissible.

The United States argues further that Germany's first submission, as far as it concerns its right to exercise diplomatic protection with respect to its nationals, is inadmissible on the ground that the LaGrands did not exhaust local remedies. The United States maintains that the alleged breach concerned the duty to inform the LaGrands of their right to consular access, and that such a breach could have been remedied at the trial stage, provided it was raised in a timely fashion.

The Court notes that it is not disputed that the LaGrands sought to plead the Vienna Convention in United States courts after they learned in 1992 of their rights under the Convention; it is also not disputed that by that date the procedural default rule barred the LaGrands from obtaining any remedy in respect of the violation of those rights. Counsel assigned to the LaGrands failed to raise this point earlier in a timely fashion. However, the Court finds that the United States may not now rely on this fact in order to preclude the admissibility of Germany's first submission, as it was the United States itself which had failed to carry out its obligation under the Convention to inform the LaGrand brothers.

The United States also contends that Germany's submissions are inadmissible on the ground that Germany seeks to have a standard applied to the United States that is different from its own practice.

The Court considers that it does not need to decide whether this argument of the United States, if true, would result in the inadmissibility of Germany's submissions. It finds that the evidence adduced by the United States does not justify the conclusion that Germany's own practice fails to conform to the standards it demands from the United States in this litigation. The cases referred to entailed relatively light criminal penalties and are not evidence as to German practice where an arrested person, who has not been informed without delay of his or her rights, is facing a severe penalty as in the present case. The Court considers that the remedies for a violation of Article 36 of the Vienna Convention are not necessarily identical in all situations. While an apology may be an appropriate remedy in some cases, it may in others be insufficient. The Court accordingly finds that this claim of inadmissibility must be rejected.

Merits of Germany's submissions
(paras. 64-127)

Having determined that it has jurisdiction, and that the submissions of Germany are admissible, the Court then turns to the merits of each of these four submissions.

Germany's first submission
(paras. 65-78)

The Court begins by quoting Germany's first submission and observes that the United States acknowledges, and does not contest Germany's basic claim, that there was a breach of its obligation under Article 36, paragraph 1 (*b*), of the Convention "promptly to inform the LaGrand brothers that they could ask that a German consular post be notified of their arrest and detention".

Germany also claims that the violation by the United States of Article 36, paragraph 1 (*b*), led to consequential violations of Article 36, paragraph 1 (*a*) and (*c*). It points out that, when the obligation to inform the arrested person without delay of his or her right to contact the consulate is disregarded, "the other rights contained in Article 36, paragraph 1, become in practice irrelevant, indeed meaningless". The United States argues that the underlying conduct complained of by Germany is one and the same, namely, the failure to inform the LaGrand brothers as required by Article 36, paragraph 1 (*b*). Therefore, it disputes any other basis for Germany's claims that other provisions, such as subparagraphs (*a*) and (*c*) of Article 36, paragraph 1, of the Convention, were also violated. The United States asserts that Germany's claims regarding Article 36, paragraph 1 (*a*) and (*c*), are "particularly misplaced" in that the LaGrands were able to and did communicate freely with consular officials after 1992. In response, Germany asserts that it is "commonplace that one and the same conduct may result in several violations of distinct obligations". Germany further contends that there is a causal relationship between the breach of Article 36 and the ultimate execution of the LaGrand brothers. It is claimed that, had Germany been properly afforded its rights under the Vienna Convention, it would have been able to intervene in time and present a "persuasive mitigation case" which "likely would have saved" the lives of the brothers.

Moreover, Germany argues that, due to the doctrine of procedural default and the high post-conviction threshold for proving ineffective counsel under United States law, Germany's intervention at a stage later than the trial phase could not "remedy the extreme prejudice created by the counsel appointed to represent the LaGrands". According to the United States, these German arguments "rest on speculation" and do not withstand analysis.

The Court observes that the violation of paragraph 1 (*b*) of Article 36 will not necessarily always result in the breach of the other provisions of this Article, but that the circumstances of this case compel the opposite conclusion, for the reasons indicated below. Article 36, paragraph 1, the Court notes, establishes an interrelated regime designed to facilitate the implementation of the system of consular protection. It begins with the basic principle governing consular protection: the right of communication and access (Art. 36, para. 1 (*a*)). This clause is followed by the provision which spells out the modalities of consular notification (Art. 36, para. 1 (*b*)). Finally Article 36, paragraph 1 (*c*), sets out the measures consular officers may take in rendering consular assistance to their nationals in the custody of the receiving State. It follows that when the sending State is unaware of the detention of its nationals due to the failure of the receiving State to provide the requisite consular notification without delay, which was true in the present case during the period between 1982 and 1992, the sending State has been prevented for all practical purposes from exercising its rights under Article 36, paragraph 1.

Germany further contends that "the breach of Article 36 by the United States did not only infringe upon the rights of Germany as a State party to the [Vienna] Convention but also entailed a violation of the individual rights of the LaGrand brothers". Invoking its right of diplomatic protection, Germany also seeks relief against the United States on this ground. The United States questions what this additional claim of diplomatic protection contributes to the case and argues that there are no parallels between the

present case and cases of diplomatic protection involving the espousal by a State of economic claims of its nationals. The United States contends, furthermore, that rights of consular notification and access under the Vienna Convention are rights of States, and not of individuals, even though these rights may benefit individuals by permitting States to offer them consular assistance. It maintains that the treatment due to individuals under the Convention is inextricably linked to and derived from the right of the State, acting through its consular officer, to communicate with its nationals, and does not constitute a fundamental right or a human right.

On the basis of the text of the provisions of Article 36, paragraph 1, the Court concludes that Article 36, paragraph 1, creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in the Court by the national State of the detained person. These rights were violated in the present case.

Germany's second submission
(paras. 79-91)

The Court then quotes the second of Germany's submissions.

Germany argues that, under Article 36, paragraph 2, of the Vienna Convention "the United States is under an obligation to ensure that its municipal 'laws and regulations ... enable full effect to be given to the purposes for which the rights accorded under this article are intended' [and that it] is in breach of this obligation by upholding rules of domestic law which make it impossible to successfully raise a violation of the right to consular notification in proceedings subsequent to a conviction of a defendant by a jury". Germany emphasizes that it is not the "procedural default" rule as such that is at issue in the present proceedings, but the manner in which it was applied in that it "deprived the brothers of the possibility to raise the violations of their right to consular notification in U.S. criminal proceedings". In the view of the United States: "[t]he Vienna Convention does not require States Party to create a national law remedy permitting individuals to assert claims involving the Convention in criminal proceedings"; and "[i]f there is no obligation under the Convention to create such individual remedies in criminal proceedings, the rule of procedural default — requiring that claims seeking such remedies be asserted at an appropriately early stage — cannot violate the Convention".

The Court quotes Article 36, paragraph 2, of the Vienna Convention which reads as follows: "The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded to under this article are intended." It finds that it cannot accept the argument of the United States which proceeds, in part, on the assumption that paragraph 2 of Article 36 applies only to the rights of the sending State and not also to those of the detained individual. The Court determines that Article 36, paragraph 1, creates individual rights for the detained person in addition to the rights accorded to the sending State, and consequently the reference to "rights" in paragraph 2 must be read as applying not only to the rights of the sending State, but also to the rights of the detained individual. The Court emphasizes that, in itself, the "procedural default" rule does not violate Article 36 of the Vienna Convention. The problem arises when the procedural default rule does not allow the detained individual to challenge a conviction and sentence by claiming, in reliance on Article 36, paragraph 1, of the Convention, that the competent national authorities failed to comply with their obligation to provide the requisite consular information "without delay", thus preventing the person from seeking and obtaining consular assistance from the sending State. The Court finds that under the circumstances of the present case the procedural default rule had the effect of preventing "full effect [from being] given to the purposes for which the rights accorded under this article are intended", and thus violated paragraph 2 of Article 36.

Germany's third submission
(paras. 92-116)

The Court then quotes the third of Germany's submissions, and observes that, in its Memorial, Germany contended that "[p]rovisional [m]easures indicated by the International Court of Justice [were] binding by virtue of the law of the United Nations Charter and the Statute of the Court". It observes that in support of its position, Germany developed a number of arguments in which it referred to the "principle of effectiveness", to the "procedural prerequisites" for the adoption of provisional measures, to the binding nature of provisional measures as a "necessary consequence of the bindingness of the final decision", to "Article 94 (1), of the United Nations Charter", to "Article 41 (1), of the Statute of the Court" and to the "practice of the Court". The United States argues that it "did what was called for by the Court's 3 March Order, given the extraordinary and unprecedented circumstances in which it was forced to act". It further states that "[t]wo central factors constrained the United States ability to act. The first was the extraordinarily short time between issuance of the Court's Order and the time set for the execution of Walter LaGrand ... The second constraining factor was the character of the United States of America as a federal republic of divided powers." The United States also alleges that the "terms of the Court's 3 March Order did not create legal obligations binding on [it]". It argues in this respect that "[t]he language used by the Court in the key portions of its Order is not the language used to create binding legal obligations" and that "the Court does not need here to decide the difficult and controversial legal question of whether its orders indicating provisional measures would be capable of creating international legal obligations if worded in mandatory ... terms". It nevertheless maintains that those orders cannot have such effects and, in support of that view, develops arguments concerning "the language and history of Article 41 (1) of the Court's Statute and Article 94 of the

Charter of the United Nations", the "Court's and State practice under these provisions", and the "weight of publicists' commentary". Lastly, the United States states that in any case, "[b]ecause of the press of time stemming from Germany's last-minute filing of the case, basic principles fundamental to the judicial process were not observed in connection with the Court's 3 March Order" and that "[t]hus, whatever one might conclude regarding a general rule for provisional measures, it would be anomalous — to say the least — for the Court to construe this Order as a source of binding legal obligations".

The Court observes that the dispute which exists between the Parties with regard to this point essentially concerns the interpretation of Article 41, which has been the subject of extensive controversy in the literature. It therefore proceeds to the interpretation of that Article. It does so in accordance with customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties. According to paragraph 1 of Article 31, 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 the treaty's object and purpose.

The French text of Article 41 reads as follows:

"1. La Cour a le pouvoir *d'indiquer*, si elle estime que les circonstances l'exigent, quelles mesures conservatoires du droit de chacun *doivent* être prises à titre provisoire.

2. En attendant l'arrêt définitif, *l'indication* de ces mesures est immédiatement notifiée aux parties et au Conseil de sécurité." (Emphasis added.)

The Court notes that in this text, the terms "indiquer" and "l'indication" may be deemed to be neutral as to the mandatory character of the measure concerned; by contrast the words "doivent être prises" have an imperative character.

For its part, the English version of Article 41 reads as follows:

"1. The Court shall have the power to *indicate*, if it considers that circumstances so require, any provisional measures which *ought* to be taken to preserve the respective rights of either party.

2. Pending the final decision, notice of the measures *suggested* shall forthwith be given to the parties and to the Security Council." (Emphasis added.)

According to the United States, the use in the English version of "indicate" instead of "order", of "ought" instead of "must" or "shall", and of "suggested" instead of "ordered", is to be understood as implying that decisions under Article 41 lack mandatory effect. It might however be argued, having regard to the fact that in 1920 the French text was the original version, that such terms as "indicate" and "ought" have a meaning equivalent to "order" and "must" or "shall".

Finding itself faced with two texts which are not in total harmony, the Court first of all notes that according to Article 92 of the Charter, the Statute "forms an integral part of the present Charter". Under Article 111 of the Charter, the French and English texts of the latter are "equally authentic". The same is equally true of the Statute.

In cases of divergence between the equally authentic versions of the Statute, neither it nor the Charter indicates how to proceed. In the absence of agreement between the parties in this respect, it is appropriate to refer to paragraph 4 of Article 33 of the Vienna Convention on the Law of Treaties, which in the view of the Court again reflects customary international law. This provision reads "when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted". The Court therefore goes on to consider the object and purpose of the Statute together with the context of Article 41.

The object and purpose of the Statute is to enable the Court to fulfil the functions provided for therein, and in particular, the basic function of judicial settlement of international disputes by binding decisions in accordance with Article 59 of the Statute. It follows from that object and purpose, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court. The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article. A related reason which points to the binding character of orders made under Article 41 and to which the Court attaches importance, is the existence of a principle which has already been recognized by the Permanent Court of International Justice when it spoke of "the principle universally accepted by international tribunals and likewise laid down in many conventions ... to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute" (*Electricity Company of Sofia and Bulgaria, Order of 5 December 1939, P.C.I.J., Series A/B, No. 79*, p. 199). The Court does not consider it necessary to resort to the preparatory work of the Statute which, as it nevertheless points out, does not preclude the conclusion that orders under Article 41 have binding force.

The Court finally considers whether Article 94 of the United Nations Charter precludes attributing binding effect to orders indicating provisional measures. That Article reads as follows:

"1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems

necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."

The Court notes that the question arises as to the meaning to be attributed to the words "the decision of the International Court of Justice" in paragraph 1 of this Article; it observes that this wording could be understood as referring not merely to the Court's judgments but to any decision rendered by it, thus including orders indicating provisional measures. It could also be interpreted to mean only judgments rendered by the Court as provided in paragraph 2 of Article 94. In this regard, the fact that in Articles 56 to 60 of the Court's Statute, both the word "decision" and the word "judgment" are used does little to clarify the matter. Under the first interpretation of paragraph 1 of Article 94, the text of the paragraph would confirm the binding nature of provisional measures; whereas the second interpretation would in no way preclude their being accorded binding force under Article 41 of the Statute. The Court accordingly concludes that Article 94 of the Charter does not prevent orders made under Article 41 from having a binding character. In short, it is clear that none of the sources of interpretation referred to in the relevant Articles of the Vienna Convention on the Law of Treaties, including the preparatory work, contradict the conclusions drawn from the terms of Article 41 read in their context and in the light of the object and purpose of the Statute. Thus, the Court reaches the conclusion that orders on provisional measures under Article 41 have binding effect.

The Court then considers the question whether the United States has complied with the obligation incumbent upon it as a result of the Order of 3 March 1999.

After reviewing the steps taken by the authorities of the Unites States (the State Department, the United States Solicitor General, the Governor of Arizona, and the United States Supreme Court) with regard to the Order of 3 March 1999, the Court concludes that the various competent United States authorities failed to take all the steps they could have taken to give effect to the Order.

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

Germany's fourth submission
(paras. 117-127)

Finally, the Court considers the fourth of Germany's submissions and observes that Germany points out that its fourth submission has been so worded "as to ... leave the choice of means by which to implement the remedy [it seeks] to the United States".

In reply, the United States argues as follows: "Germany's fourth submission is clearly of a wholly different nature than its first three submissions. Each of the first three submissions seeks a judgment and declaration by the Court that a violation of a stated international legal obligation has occurred. Such judgments are at the core of the Court's function, as an aspect of reparation. In contrast, however, to the character of the relief sought in the first three submissions, the requirement of assurances of non-repetition sought in the fourth submission has no precedent in the jurisprudence of this Court and would exceed the Court's jurisdiction and authority in this case. It is exceptional even as a non-legal undertaking in State practice, and it would be entirely inappropriate for the Court to require such assurances with respect to the duty to inform undertaken in the Consular Convention in the circumstances of this case." It points out that "U.S. authorities are working energetically to strengthen the regime of consular notification at the state and local level throughout the United States, in order to reduce the chances of cases such as this recurring". The United States further observes that: "[e]ven if this Court were to agree that, as a result of the application of procedural default with respect to the claims of the LaGrands, the United States committed a second internationally wrongful act, it should limit that judgment to the application of that law in the particular case of the LaGrands. It should resist the invitation to require an absolute assurance as to the application of US domestic law in all such future cases. The imposition of such an additional obligation on the United States would ... be unprecedented in international jurisprudence and would exceed the Court's authority and jurisdiction."

The Court observes that in its fourth submission Germany seeks several assurances. First it seeks a straightforward assurance that the United States will not repeat its unlawful acts. This request does not specify the means by which non-repetition is to be assured. Additionally, Germany seeks from the United States that "in any future cases of detention of or criminal proceedings against German nationals, the United States will ensure in law and practice the effective exercise of the rights under Article 36 of the Vienna Convention on Consular Relations". The Court notes that this request goes further, for, by referring to the law of the United States, it appears to require specific measures as a means of preventing recurrence. Germany finally requests that "[i]n particular in cases involving the death penalty, this requires the United States to provide effective review of and remedies for criminal convictions impaired by a violation of the rights under Article 36". The Court observes that this request goes even further, since it is directed entirely towards securing specific measures in cases involving the death penalty.

In relation to the general demand for an assurance of non-repetition, the Court observes that it has been informed by the United States of the "substantial measures [which it

is taking] aimed at preventing any recurrence" of the breach of Article 36, paragraph 1 (*b*).

The Court notes that the United States has acknowledged that, in the case of the LaGrand brothers, it did not comply with its obligations to give consular notification. The United States has presented an apology to Germany for this breach. The Court considers however that an apology is not sufficient in this case, as it would not be in other cases where foreign nationals have not been advised without delay of their rights under Article 36, paragraph 1, of the Vienna Convention and have been subjected to prolonged detention or sentenced to severe penalties. In this respect, the Court has taken note of the fact that the United States repeated in all phases of these proceedings that it is carrying out a vast and detailed programme in order to ensure compliance by its competent authorities at the federal as well as at the state and local levels with its obligation under Article 36 of the Vienna Convention. The United States has provided the Court with information, which it considers important, on its programme. If a State, in proceedings before this Court, repeatedly refers as did the United States to substantial activities which it is carrying out in order to achieve compliance with certain obligations under a treaty, then this expresses a commitment to follow through with the efforts in this regard. The programme in question certainly cannot provide an assurance that there will never again be a failure by the United States to observe the obligation of notification under Article 36 of the Vienna Convention. But no State could give such a guarantee and Germany does not seek it. The Court considers that the commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (*b*), must be regarded as meeting Germany's request for a general assurance of non-repetition.

The Court then examines the other assurances sought by Germany in its fourth submission. The Court observes in this regard that it can determine the existence of a violation of an international obligation. If necessary, it can also hold that a domestic law has been the cause of this violation. In the present case the Court has made its findings of violations of the obligations under Article 36 of the Vienna Convention when it dealt with the first and the second submission of Germany. But it has not found that a United States law, whether substantive or procedural in character, is inherently inconsistent with the obligations undertaken by the United States in the Vienna Convention. In the present case the violation of Article 36, paragraph 2, was caused by the circumstances in which the procedural default rule was applied, and not by the rule as such. However, the Court considers in this respect that if the United States, notwithstanding its commitment referred to above, should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention. This obligation can be carried out in various ways. The choice of means must be left to the United States.

Declaration of President Guillaume

In a short declaration, the President recalls that subparagraph (7) of the operative part of the Judgment responds to certain submissions by Germany and hence rules only on the obligations of the United States in cases of severe penalties imposed upon German nationals. Thus, subparagraph (7) does not address the position of nationals of other countries or that of individuals sentenced to penalties that are not of a severe nature. However, in order to avoid any ambiguity, it should be made clear that there can be no question of applying an *a contrario* interpretation to this paragraph.

Separate opinion of Vice-President Shi

Vice-President Shi states that he voted with reluctance in favour of paragraphs (3) and (4) of the operative part of the Judgment (dealing with the merits of Germany's first and second submissions respectively), as he believes that the Court's findings in these two paragraphs were based on a debatable interpretation of Article 36 of the Vienna Convention. While he agrees with the Court that the United States violated its obligations to Germany under Article 36, paragraph 1, of the Convention, he has doubts as to the Court's finding in these paragraphs that the United States also violated its obligations to the LaGrand brothers.

The Court's conclusion that Article 36, paragraph 1 (*b*), of the Vienna Convention creates individual rights relies on the rule that if the relevant words in their natural and ordinary meaning make sense in their context, that is the end of the matter and there is no need to resort to other methods of interpretation. However, the Court has previously stated that this rule is not an absolute one, and that where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it. One author has also stated that "It is not clarity in the abstract which is to be ascertained, but clarity in relation to particular circumstances and there are few treaty provisions for which circumstances cannot be envisaged in which their clarity could be put in question".

The Vice-President questions whether it is proper for the Court to place so much emphasis on the purported clarity of language of Article 36, paragraph 1 (*b*). He considers the effect of wording in the title to the Vienna Convention, and in the Preamble, the *chapeau* to Article 36, and Article 5. He then refers in some detail to the *travaux préparatoires* relating to Article 36 of the Convention, and finds that it is not possible to conclude from the negotiating history that Article 36, paragraph 1 (*b*), was intended by the negotiators to create individual rights. He considers that if one keeps in mind that the general tone and thrust of the debate of the entire Conference concentrated on the consular functions

and their practicability, the better view would be that no creation of any individual rights independent of rights of States was envisaged by the Conference.

The Vice-President adds that the final operative paragraph of the Judgment is of particular significance in a case where a sentence of death is imposed, which is a punishment of a severe and irreversible nature. He states that every possible measure should therefore be taken to prevent injustice or an error in conviction or sentencing, and that out of this consideration, he voted in favour of this paragraph.

Dissenting opinion of Judge Oda

Judge Oda voted against all but two of the subparagraphs of the operative part of the Court's Judgment in this case, as he objects to the case as a whole. He thinks that the Court is making an ultimate error on top of an accumulation of earlier errors: first by Germany, as Applicant; second by the United States, as Respondent; and third by the Court itself.

Judge Oda states that Germany, in its Application instituting proceedings, based its claims on alleged violations by the United States of the Vienna Convention on Consular Relations. In his opinion, that approach is different from the one later adopted by Germany, based on claims of a *dispute* between it and the United States arising out of the interpretation or application of the said Convention, over which claims the Court would have jurisdiction under the Optional Protocol accompanying the Convention. He thinks that this is, in fact, a case of unilateral application made in reliance upon subsequent consent to the Court's jurisdiction by the respondent State.

Judge Oda submits that at no time in the almost two decades between the arrest and conviction of the LaGrand brothers and the submission of an Application to this Court did Germany or the United States consider there to be a dispute in existence between them concerning the interpretation or application of the Vienna Convention. Judge Oda finds it surprising that, after such a lengthy period of time, Germany would file its Application unilaterally, as it did. As a consequence, it was only after Germany instituted the proceedings that the United States learned that a dispute existed between the two countries. Judge Oda expresses the fear that the Court's acceptance of the Application in this case will in future lead States that have accepted the compulsory jurisdiction of the Court, either under the Court's Statute or the optional protocols attached to multilateral treaties, to withdraw their acceptance.

Judge Oda further states that the United States erred by failing to respond appropriately to Germany's Application. In his view the United States prior to the submission of its Counter-Memorial should have lodged objections to the Court's jurisdiction in the present case on grounds akin to those expressed above.

Judge Oda also notes that the Court erred in acceding to Germany's request for provisional measures, submitted on 2 March 1999 together with the Application instituting proceedings. Notwithstanding the delicate position the Court was in (as Walter LaGrand's execution in the United States was imminent), the Court should have adhered to the principle that provisional measures are ordered to preserve rights of *States*, and not *individuals*, exposed to an imminent breach which is irreparable. The Court thus erred in granting the Order indicating provisional measures.

Having identified the accumulated errors and their impact on the present case, Judge Oda then mentions five issues that inform his view of the case and notes the errors in the Court's Judgment. *First*, he observes that the United States has already admitted its violation of the Vienna Convention's requirement of prompt consular notification. *Second*, he sees no link between this admitted violation of the Convention and the imposition of the death penalty in the case of the LaGrands. *Third*, he considers that the non-compliance, if any, with the Order of 3 March 1999 bears no relation to the alleged violation of the Convention. *Fourth*, he notes that individuals of the sending and receiving States should be accorded equal rights and equal treatment under the Convention. *Finally*, he believes that the Court has confused the right, if any, accorded under the Convention to arrested foreign nationals with the rights of foreign nationals to protection under general international law or other treaties or conventions, and, possibly, even with human rights.

Judge Oda notes his objection to five of the seven subparagraphs of the operative part of the Judgment. *First*, Judge Oda states that he voted in favour of the Court's determination that it has jurisdiction to entertain Germany's Application, only because the United States did not raise preliminary objections to the Application. He emphasizes, however, that the Court's jurisdiction does not extend to Germany's submissions subsequent to the filing of its Application.

With regard to the *second* subparagraph, Judge Oda reiterates his view that, while the Court might entertain Germany's Application, the question of admissibility of each submission presented subsequently to the Application should not have been raised, even though the United States did not raise preliminary objections in connection with admissibility.

Third, Judge Oda disagrees with the Court's finding that certain sections of Article 36 of the Vienna Convention confer rights on individuals as well as States. In this context, he points the reader to the separate opinion of Vice-President Shi, with whose views he fully agrees.

Fourth, Judge Oda asserts that the Vienna Convention does not afford greater protection or broader rights to nationals of the sending State than to those of the receiving State and, accordingly, he disagrees with the Court's holding that the exercise of the procedural default rule by American courts was implicated in any violation of the Vienna Convention.

Fifth, Judge Oda expresses the view that the Court should not need to voice an opinion as to whether orders indicating provisional measures are binding, as the issue is

far removed from the violation of the Vienna Convention, the main issue of the present case. He further disagrees with the Court's finding that such orders do have binding effect and also that the United States did not comply with the Court's Order of 3 March 1999.

Sixth, while Judge Oda believes the Court should say nothing in its Judgment pertaining to assurances and guarantees of non-repetition of violations of the Vienna Convention, he explains that he voted in favour of this subparagraph as it "cannot cause any harm".

Finally, Judge Oda notes his total disagreement with the final subparagraph of the operative part of the Judgment, which goes far beyond the question of the alleged violation of the Vienna Convention by the United States.

Separate opinion of Judge Koroma

1. In his separate opinion, Judge Koroma stated that although he supported the findings of the Judgment, he has misgivings with regard to certain issues, particularly since they also form part of the *dispositif*.

2. With respect to the procedural default rule, which, according to Germany, by its Application violated the international legal obligation to Germany borne by the United States, Judge Koroma finds it inconsistent and untenable for the Court to hold that "it has not found that a United States law, whether substantive or procedural in character, is inherently inconsistent with the obligations undertaken by the United States in the Vienna Convention", but that "[I]n the present case the violation of Article 36, paragraph 2, was caused by the circumstances in which the procedural default rule was applied, and not by the rule as such".

3. In Judge Koroma's view, the rights referred to in Article 36, paragraph 1, of the Convention are the duties of the receiving State to inform promptly the relevant consular post of a detention or arrest, the duty to forward communication by a detained foreign national promptly, and the duty of prompt consular assistance for a detained person. In his view, none of these rights were violated by the procedural default rule or by its application. It therefore seems odd to hold that a violation of Article 36, paragraph 2, was caused by the application of the rule and not by the rule as such.

4. In his view, the real issue which the Court should have determined was not whether the procedural default rule was the cause of the breach of the obligations, but rather whether the obligations owed to Germany were breached as a result of the non-performance of the relevant obligations under the Convention, irrespective of a law, which, in any case, the Court had found not to be inconsistent with the obligations.

5. This position notwithstanding, he emphasized that he strongly subscribes to the notion that everyone is entitled to benefit from judicial guarantees, including the right to appeal a conviction and sentence.

6. On the issue of the binding nature of provisional measures, Judge Koroma reasoned that the finding of the Court on this should have been mainly limited to the Order made on 3 March 1999 as that was the issue in dispute. For him, the binding nature of such Orders in general cannot be in doubt, given their purpose and object to protect and preserve the rights and interests of the parties in a dispute before the Court, pending the Court's final decision. In other words, an order does not prejudge the issue raised in the request. Nor, in his view, should the Court's jurisprudence on this issue be considered in doubt. As far as he is concerned, there should not be any linguistic ambiguity in the provision, nor any fundamental misunderstanding as to its purpose and meaning. Doubts should therefore not be cast on the legal value of previous orders, albeit unwittingly.

7. Finally, Judge Koroma pointed out that with respect to operative paragraph 128 (7) of the Judgment, everyone, irrespective of nationality, is entitled to the benefit of fundamental judicial guarantees including the right to appeal against or obtain review of a conviction and sentence.

Separate opinion of Judge Parra-Aranguren

Judge Parra-Aranguren voted against paragraph 128 (1), (2) (*a*) of the Judgment because there is no dispute between the Parties as to the breach by the United States of Article 36, paragraph 1 (*b*), of the Vienna Convention on Consular Relations. Since the existence of a dispute is an "essentially preliminary" question, in his opinion the Court does not have jurisdiction on this point under Article I of the Optional Protocol of the said Vienna Convention. Furthermore Judge Parra-Aranguren considers that the claim made by Germany in its third submission does not arise out of the interpretation of the Vienna Convention but of Article 41 of the Statute of the Court. For this reason he concludes that the Court does not have jurisdiction to decide this matter on the basis of the Optional Protocol. Consequently Judge Parra-Aranguren voted against paragraph 128 (1), (2) (*a*), (2) (*c*) and (5) of the Judgment.

Dissenting opinion of Judge Buergenthal

Judge Buergenthal dissents with regard to the admissibility of Germany's third submission relating to the Order of 3 March 1999. He considers that the Court should have ruled that submission inadmissible.

In Judge Buergenthal's view, Germany's justification for its last-minute request seeking provisional measures, which prompted the Court to issue the 3 March Order without

giving the United States an opportunity to be heard, was based on factual allegations by Germany that do not withstand scrutiny in light of the information now before the Court.

Although the Court had no way of knowing this to be so at the time it issued the Order, this information justifies holding the third submission to be inadmissible. Such a decision would ensure that Germany not benefit from a litigation strategy amounting to procedural misconduct highly prejudicial to the rights of the United States as a party to this case. Germany's strategy deprived the United States of procedural fairness and is incompatible with the sound administration of justice. See case concerning *Legality of Use of Force* (*Yugoslavia* v. *Belgium*) *Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, para. 44.

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135. SOVEREIGNTY OVER PULAU LIGITAN AND PULAU SIPADAN (INDONESIA *v.* MALAYSIA) (Permission to intervene by the Philippines)

Judgment of 23 October 2001

In its Judgment on the Application of the Philippines for permission to intervene in the case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), the Court found that the Application of the Republic of the Philippines, filed in the Registry of the Court on 13 March 2001, for permission to intervene in the proceedings under Article 62 of the Statute of the Court, could not be granted.

The Court was composed as follows: President Guillaume; Vice-President Shi; Judges Oda, Ranjeva, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; Judges ad hoc Weeramantry, Franck; Registrar Couvreur.

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* *

Judge Oda appended a dissenting opinion to the Judgment of the Court; Judge Koroma appended a separate opinion to the Judgment of the Court; Judges Parra-Aranguren and Kooijmans appended declarations to the Judgment of the Court; Judges ad hoc Weeramantry and Franck appended separate opinions to the Judgment of the Court.

*
* *

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

"95. For these reasons,

THE COURT,

(1) By fourteen votes to one,

Finds that the Application of the Republic of the Philippines, filed in the Registry of the Court on 13 March 2001, for permission to intervene in the proceedings under Article 62 of the Statute of the Court, cannot be granted.

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Ranjeva, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; Judges ad hoc Weeramantry, Franck;

AGAINST: Judge Oda."

*
* *

History of the proceedings
(paras. 1-17)

The Court recalls that by joint letter dated 30 September 1998, Indonesia and Malaysia filed at the Registry of the Court a Special Agreement between the two States, which was signed in Kuala Lumpur on 31 May 1997 and entered into force on 14 May 1998. In accordance with the aforementioned Special Agreement, the Parties request the Court to "determine on the basis of the treaties, agreements and any other evidence furnished by the Parties, whether sovereignty over Pulau Ligitan and Pulau Sipadan belongs to the Republic of Indonesia or to Malaysia".

The Parties agreed that the written pleadings should consist of a Memorial, a Counter-Memorial and a Reply, to be submitted by each of the Parties simultaneously within certain fixed time limits as well as of "a Rejoinder, if the Parties so agree or if the Court decides ex officio or at the request of one of the Parties that this part of the proceedings is necessary and the Court authorizes or prescribes the presentation of a Rejoinder".

The Memorials, Counter-Memorials and Replies were filed within the prescribed time limit. In view of the fact that the Special Agreement provided for the possible filing of a fourth pleading by each of the Parties, the latter informed the Court by joint letter of 28 March 2001 that they did not wish to produce any further pleadings. Nor did the Court itself ask for such pleadings.

By letter of 22 February 2001, the Philippines, invoking Article 53, paragraph 1, of the Rules of Court, asked the Court to furnish it with copies of the pleadings and documents annexed which had been filed by the Parties. Pursuant to that provision, the Court, having ascertained the

views of the Parties, decided that it was not appropriate, in the circumstances, to grant the Philippine request.

On 13 March 2001, the Philippines filed an Application for permission to intervene in the case, invoking Article 62 of the Statute of the Court. According to the Application, the Philippine interest of a legal nature which may be affected by a decision in the present case "is solely and exclusively addressed to the treaties, agreements and other evidence furnished by Parties and appreciated by the Court which have a direct or indirect bearing on the matter of the legal status of North Borneo". The Philippines also indicated that the object of the intervention requested was:

> "(*a*) First, to preserve and safeguard the historical and legal rights of the Government of the Republic of the Philippines arising from its claim to dominion and sovereignty over the territory of North Borneo, to the extent that these rights are affected, or may be affected, by a determination of the Court of the question of sovereignty over Pulau Ligitan and Pulau Sipadan.
>
> (*b*) Second, to intervene in the proceedings in order to inform the Honourable Court of the nature and extent of the historical and legal rights of the Republic of the Philippines which may be affected by the Court's decision.
>
> (*c*) Third, to appreciate more fully the indispensable role of the Honourable Court in comprehensive conflict prevention and not merely for the resolution of legal disputes."

The Philippines further stated in its Application that it did not seek to become a party to the dispute before the Court concerning sovereignty over Pulau Ligitan and Pulau Sipadan, and that the Application "is based solely on Article 62 of the Statute, which does not require a separate title of jurisdiction as a requirement for this Application to prosper".

As both Indonesia and Malaysia, in their written observations, objected to the Application for permission to intervene submitted by the Philippines, the Court, in June 2001, held public sittings pursuant to Article 84, paragraph 2, of the Rules of Court to hear the views of the Philippines, the State seeking to intervene, and those of the Parties in the case.

At the oral proceedings, it was stated by way of conclusion that:

On behalf of the Government of the Philippines,

at the hearing of 28 June 2001:

> "The Government of the Republic of the Philippines seeks the remedies provided for in Article 85 of the Rules of Court, namely,
>
> - paragraph 1: 'the intervening State shall be supplied with copies of the pleadings and documents annexed and shall be entitled to submit a written statement within a time limit to be fixed by the Court'; and
> - paragraph 3: 'the intervening State shall be entitled, in the course of the oral proceedings, to submit its observations with respect to the subject matter of the intervention'."

On behalf of the Government of Indonesia,

at the hearing of 29 June 2001:

> "The Republic of Indonesia respectfully submits that the Republic of the Philippines should not be granted the right to intervene in the case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*."

On behalf of the Government of Malaysia,

at the hearing of 29 June 2001: "[Malaysia requests] that the Court should reject the Philippines Application."

Timeliness of the Application for permission to intervene
(paras. 18-26)

The Court first addresses the argument of both Indonesia and Malaysia that the Philippine Application should not be granted because of its "untimely nature".

The Court refers to Article 81, paragraph 1, of the Rules of Court, which stipulates that:

> "[a]n application for permission to intervene under the terms of Article 62 of the Statute ... shall be filed as soon as possible, and not later than the closure of the written proceedings. In exceptional circumstances, an application submitted at a later stage may however be admitted."

The Court indicates that the Philippines had been aware that the Court had been seized of the dispute between Indonesia and Malaysia for more than two years before it filed its Application to intervene in the proceedings under Article 62 of the Statute. By the time of the filing of the Application, 13 March 2001, the Parties had already completed three rounds of written pleadings as provided for as mandatory in the Special Agreement — Memorials, Counter-Memorials and Replies — , their time limits being a matter of public knowledge. Moreover, the Agent for the Philippines stated during the hearings that his Government "was conscious of the fact that *after* 2 March 2001, Indonesia and Malaysia might no longer consider the need to submit a final round of pleadings as contemplated in their Special Agreement". Given these circumstances, the time chosen for the filing of the Application by the Philippines can hardly be seen as meeting the requirement that it be filed "as soon as possible" as contemplated in Article 81, paragraph 1, of the Rules of Court.

The Court notes, however, that despite the filing of the Application at a late stage in the proceedings, which does not accord with the stipulation of a general character contained in Article 81, paragraph 1, of the Rules, the Philippines cannot be held to be in violation of the requirement of the same Article, which establishes a specific deadline for an application for permission to intervene, namely "not later than the closure of the written proceedings". The Court recalls that the Special Agreement provided for the possibility of one more round of written pleadings — the exchange of Rejoinders — "if the Parties so agree or if the Court decides so ex officio or at the request of one of the Parties". It was only on 28 March 2001

that the Parties notified the Court by joint letter "that [their] Governments ... ha[d] agreed that it is not necessary to exchange Rejoinders". Thus, although the third round of written pleadings terminated on 2 March 2001, neither the Court nor third States could know on the date of the filing of the Philippine Application whether the written proceedings had indeed come to an end. In any case, the Court could not have "closed" them before it had been notified of the views of the Parties concerning a fourth round of pleadings, contemplated by Article 3, paragraph 2 (*d*), of the Special Agreement. Even after 28 March 2001, in conformity with the same provision of the Special Agreement, the Court itself could ex officio authorize or prescribe the presentation of a Rejoinder, which the Court did not do. The Court therefore concludes that it cannot uphold the objection raised by Indonesia and Malaysia based on the alleged untimely filing of the Philippine Application.

Failure to annex documentary or other evidence in support of the Application
(paras. 27-30)

The Court notes further that Article 81, paragraph 3, of the Rules of Court provides that an application for permission to intervene "shall contain a list of documents in support, which documents shall be attached". After referring to the observations of Indonesia and the Philippines on this point, the Court confines itself to observing that there is no requirement that the State seeking to intervene necessarily attach any documents to its application in support of its claims. It is only where such documents have in fact been attached to the said application that a list thereof must be included. It follows that the Philippine Application for permission to intervene cannot be rejected on the basis of Article 81, paragraph 3, of the Rules of Court.

The Court therefore concludes that the Philippine Application was not filed out of time and contains no formal defect which would prevent it from being granted.

Alleged absence of a jurisdictional link
(paras. 31-36)

The Court recalls that, under the terms of Article 62 of the Statute:

> "1. Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.
>
> 2. It shall be for the Court to decide upon this request."

As a Chamber of the Court has already had occasion to observe:

> "Intervention under Article 62 of the Statute is for the purpose of protecting a State's 'interest of a legal nature' that might be affected by a decision in an existing case already established between other States, namely the parties to the case. It is not intended to enable a third State to tack on a new case ... An incidental proceeding cannot be one which transforms [a] case into a different case with different parties." (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990*, pp. 133-134, paras. 97-98)

Moreover, as that same Chamber pointed out, and as the Court itself has recalled:

> "It ... follows ... from the juridical nature and from the purposes of intervention that the existence of a valid link of jurisdiction between the would-be intervener and the parties is not a requirement for the success of the application. On the contrary, the procedure of intervention is to ensure that a State with possibly affected interests may be permitted to intervene even though there is no jurisdictional link and it therefore cannot become a party." (Ibid., p. 135, para. 100; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Application to Intervene, Order of 21 October 1999, I.C.J. Reports 1999*, pp. 1034-1035, para. 15)

Thus, such a jurisdictional link between the intervening State and the parties to the case is required only if the State seeking to intervene is desirous of "itself becoming a party to the case". The Court finds that that is not the situation here. The Philippines is seeking to intervene in the case as a non-party.

Existence of an "interest of a legal nature"
(paras. 37-83)

In relation to the existence of an "interest of a legal nature" justifying the intervention, the Court refers to the Philippines contention that:

> "Under Article 2 of the Special Agreement between Indonesia and the Government of Malaysia, the Court has been requested to determine the issue of sovereignty over Pulau Ligitan and Pulau Sipadan 'on the basis of treaties, agreements and any other evidence' to be furnished by the Parties. The interest of the Republic of the Philippines is solely and exclusively addressed to the treaties, agreements and other evidence furnished by Parties and appreciated by the Court which have a direct or indirect bearing on the matter of the legal status of North Borneo. The legal status of North Borneo is a matter that the Government of the Republic of the Philippines considers as its legitimate concern."

The Court also recalls that the Philippines refers to the fact that access to the pleadings and to the annexed documents filed by the Parties was denied to it by the Court. It contends that it therefore could not "say with any certainty whether and which treaties, agreements and facts are in issue". The Philippines asserts that as long as it does not have access to the documents filed by the Parties and does not know their content, it will not be able to explain really what its interest is.

The Philippines emphasizes that "Article 62 does not say that the intervening State must have a 'legal interest' or 'lawful interest' or 'substantial interest'", and that the "threshold for the invocation of Article 62 is, as a result, a

subjective standard: the State requesting permission to intervene must 'consider' that it has an interest". The Philippines asserts that "[t]he criteria are not to *prove* a legal or lawful interest, but to 'identify the interest of a legal nature' and 'to show in what way [it] may be affected'". The Philippines further indicates that the statements made by Indonesia and Malaysia during the public hearing "provide evidence that the Court will be presented with many of the treaties and agreements upon which the Philippines claim is based and will be pressed to adopt interpretations that will certainly affect the Philippine interest". It submits that, on the basis of that part of the record to which it has been allowed access, "the probability of consequences for the interests of the Philippines meets the 'may' requirements of Article 62 and justifies Philippine intervention".

The Philippines points out that it "has a direct legal interest in the interpretation of the 1930 United States-United Kingdom boundary, being the successor-in-interest of one party to that agreement, the United States", that "the 1930 Agreement cannot be construed in any way as an instrument of cession", and that "Britain could not have acquired sovereignty over Pulau Sipadan and Pulau Ligitan by virtue of the interpretation placed by Malaysia on the 1930 United States-United Kingdom Agreement"; it follows from this that "the two islands in question were acquired by the United Kingdom in 1930 for and on behalf of the Sultan of Sulu". The Philippines further states that "the territory ceded by the Sultan to the Philippines in 1962 covered only those territories which were included and described in the 1878 Sulu-Overbeck lease agreement", and that its "Application for permission to intervene is based solely on the rights of the Government of the Republic of the Philippines transferred by and acquired from the Sulu Sultanate".

The Philippines concludes that:

> "Any claim or title to territory in or islands near North Borneo that assumes or posits or purports to rest a critical link on the legitimate sovereign title of Great Britain from 1878 up to the present is unfounded. Similarly, the interpretation of any treaty, agreement or document concerning the legal status of North Borneo as well as islands off the coast of North Borneo which would presume or take for granted the existence of British sovereignty and dominion over these territories has no basis at all in history as well as in law and, if upheld by the Court, it would adversely affect an interest of a legal nature on the part of the Republic of the Philippines."

For its part, Indonesia denies that the Philippines has an "interest of a legal nature". It states that "the subject matter of the dispute currently pending before the Court is limited to the question whether sovereignty over the islands of Ligitan and Sipadan belongs to Indonesia or Malaysia". It recalls that on 5 April 2001, the Philippines sent a diplomatic Note to Indonesia in which, referring to the ongoing case between Indonesia and Malaysia, it wished to reassure the Government of Indonesia that the Philippines does not have "any territorial interest on Sipadan and Ligitan islands". Indonesia contends that "It is evident from this [note] that the Philippines raises no claim with respect to Pulau Ligitan and Pulau Sipadan" and maintains that

> "The legal status of North Borneo is not a matter on which the Court has been asked to rule. Moreover, the desire of the Philippines to submit its view on various unspecified 'treaties, agreements and other evidence furnished by the Parties' is abstract and vague."

With reference to the question of the Philippine interest of a legal nature which may be affected by the decision in the case, Malaysia argues that

> "[t]hat legal interest must be precisely identified, then compared with the basis of [the Court's] jurisdiction as it appears from the document of scisin, in the present instance the Special Agreement"

and contends that:

> "the Philippines does not indicate how the *decision* ... that the Court is asked to take on the issue of sovereignty over Ligitan and Sipadan might *affect* any specific legal interest. It is content to refer vaguely to the 'treaties, agreements and other evidence' on which the Court might 'lay down an appreciation'. But ... the interest of a legal nature must, if affected, be so affected by the *decision* of the Court and not just by its *reasoning*. Such appreciation as the Court may be led to make of the effect of a particular legal instrument, or of the consequences of particular facts, as grounds for its decision cannot, in itself, serve to establish an interest of a legal nature in its decision in the case."

Malaysia further contends that "the issue of sovereignty over Ligitan and Sipadan is completely independent of that of the status of North Borneo", and that "[t]he territorial titles are different in the two cases".

The Court sets out by considering whether a third State may intervene under Article 62 of the Statute in a dispute brought to the Court under a special agreement, when the State seeking to intervene has no interest in the subject matter of that dispute as such, but rather asserts an interest of a legal nature in such findings and reasonings that the Court might make on certain specific treaties that the State seeking to intervene claims to be in issue in a different dispute between itself and one of the two Parties to the pending case before the Court.

The Court first considers whether the terms of Article 62 preclude, in any event, an "interest of a legal nature" of the State seeking to intervene in anything other than the operative decision of the Court in the existing case in which the intervention is sought. From an examination of the English and French texts of that Article, the Court concludes that the interest of a legal nature to be shown by a State seeking to intervene is not limited to the *dispositif* alone of a judgment. It may also relate to the reasons which constitute the necessary steps to the *dispositif*.

Having reached this conclusion, the Court then considers the nature of the interest capable of justifying an intervention. In particular, it considers whether the interest

of the State seeking to intervene must be in the subject matter of the existing case itself, whether it may be different and, if so, within what limits.

The Court observes that the question of whether a stated interest in the reasoning of the Court and any interpretations it might give as an interest of a legal nature for purposes of Article 62 of the Statute, can only be examined by testing whether the legal claims which the State seeking to intervene has outlined might be affected. Whatever the nature of the claimed "interest of a legal nature" that a State seeking to intervene considers itself to have (and provided that it is not simply general in nature) the Court can only judge it "*in concreto* and in relation to all the circumstances of a particular case". Thus, the Court proceeds to examine whether the Philippine claim of sovereignty in North Borneo could or could not be affected by the Court's reasoning or interpretation of treaties in the case concerning Pulau Ligitan and Pulau Sipadan. The Court adds that a State which, as in this case, relies on an interest of a legal nature other than in the subject matter of the case itself necessarily bears the burden of showing with a particular clarity the existence of the interest of a legal nature which it claims to have.

The Court recalls that the Philippines has strongly protested that it is severely and unfairly hampered in "identifying" and "showing" its legal interest in the absence of access to the documents in the case between Indonesia and Malaysia and that it was not until the oral phase of the present proceedings that the two Parties publicly stated which treaties they considered to be in issue in their respective claims to Pulau Ligitan and Pulau Sipadan. The Court observes, however, that the Philippines must have full knowledge of the documentary sources relevant to its claim of sovereignty in North Borneo. While the Court acknowledges that the Philippines did not have access to the detailed arguments of the Parties as contained in their written pleadings, this did not prevent the Philippines from explaining its own claim, and from explaining in what respect any interpretation of particular instruments might adversely affect that claim.

In outlining that claim the Philippines has emphasized the importance of the instrument entitled "Grant by Sultan of Sulu of territories and lands on the mainland of the island of Borneo" (hereinafter "the Sulu-Overbeck grant of 1878"). This instrument is said by the Philippines to be its "primal source" of title in North Borneo. The Philippines interprets the instrument as a lease and not as a cession of sovereign title. It also acknowledges that the territorial scope of the instrument described in its first paragraph ("together with all the islands which lie within nine miles from the coast") did not include Pulau Ligitan and Pulau Sipadan.

The Court observes, however, that the Philippine claims as shown on the British map submitted to the Court by the Philippines during the oral proceedings, do not coincide with the territorial limits of the grant by the Sultan of Sulu in 1878. Moreover, the grant of 1878 is not in issue as between Indonesia and Malaysia in the case, both agreeing that Pulau Ligitan and Pulau Sipadan were not included in its reach. Also, the question whether the 1878 grant is to be characterized as a lease or a cession does not form part of the claim to title of either Party to the islands in issue. Neither Indonesia nor Malaysia relies on the 1878 grant as a source of title, each basing its claimed title upon other instruments and events. The burden which the Philippines carries under Article 62, to show the Court that an interest of a legal nature may be affected by any interpretation it might give or reasoning it might adduce as to its "primal source" of title, is thus not discharged.

The Philippines supplements its contention that sovereignty of North Borneo was retained by the Sultanate of Sulu by means of cited extracts from British State papers of the late nineteenth century and the first part of the twentieth century. The Court observes however that neither of these agreements is regarded by the Parties to the main proceedings as founding title to Pulau Ligitan and Pulau Sipadan.

Certain other instruments to which the Court was referred by the Philippines do appear to have a certain relevance not only to the Philippine claims of sovereignty in North Borneo, but also to the question of title to Pulau Ligitan and Pulau Sipadan. The Philippine interest in the 20 June 1891 Convention, concluded between Great Britain and the Netherlands for the purpose of defining boundaries in Borneo, lies in noting that while the Convention set boundaries defining "Netherlands possessions" and "British Protected States", the "State of North Borneo" was indeed one of the British Protected States. However, in resolving the interpretation of Article 4 of that Convention, the Court has no need to pronounce upon the precise nature of the British interests lying to the north of latitude 4° 10', mentioned in this article. Notwithstanding that the 1891 Convention may be said to have a certain relevance for Indonesia, Malaysia and the Philippines, the Philippines has demonstrated no legal interest that could be affected by the outcome or reasoning in the case between Indonesia and Malaysia.

The precise status of the legal ties in 1907 as addressed in the Exchange of Notes on 3 July and 10 July 1907 between Great Britain and the United States, relating to the administration of certain islands on the east cost of Borneo by the BNBC, is not central to Malaysia's claims. Accordingly, no interest of a legal nature that requires an intervention under Article 62, to present their interpretation of the 1907 Exchange of Notes, has been shown by the Philippines.

The Court also notes that the 1930 Convention between Great Britain and the United States, regarding the boundary between the Philippine Archipelago and North Borneo, has as its particular object the determination of which of the islands in the region "belong" to the United States on the one hand and to the State of North Borneo on the other. This Convention does not appear to the Court at this stage of the proceedings to concern the legal status of the principal territory of North Borneo.

The Court further finds that any interest that the Philippines claims to have as to references that the Court

might make in the case between Indonesia and Malaysia to the 1946 North Borneo Cession Order in Council is too remote for purposes of intervention under Article 62.

The Court considers that the Philippines needs to show to the Court not only "a certain interest in ... legal considerations" (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Application to Intervene, Judgment, I.C.J. Reports 1981*, p. 19, para. 33) relevant to the dispute between Indonesia and Malaysia, but to specify an interest of a legal nature which may be affected by reasoning or interpretations of the Court. The Court has stated that a State seeking to intervene should be able to do this on the basis of its documentary evidence upon which it relies to explain its own claim.

Some of the instruments which the Philippines has invoked, and the submissions it has made as to them, may indeed have shown a certain interest in legal considerations before the Court in the dispute between Indonesia and Malaysia; but as regards none of them has the Philippines been able to discharge its burden of demonstrating that it has an interest of a legal nature that may be affected, within the sense of Article 62. The Philippines has shown in these instruments no legal interest that might be affected by reasoning or interpretations of the Court in the main proceedings, either because they form no part of the arguments of Indonesia and Malaysia or because their respective reliance on them does not bear on the issue of retention of sovereignty by the Sultanate of Sulu as described by the Philippines in respect of its claim in North Borneo.

The precise object of the intervention
(paras. 84-93)

In respect of "the precise object of the intervention" which the Philippines states, the Court first quotes the three objects cited above.

As regards the first of the three objects stated in the Application of the Philippines, the Court notes that similar formulations have been employed in other applications for permission to intervene, and have not been found by the Court to present a legal obstacle to intervention.

So far as the second listed object of the Philippines is concerned, the Court, in its Order of 21 October 1999 in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Application to Intervene*, recently reaffirmed a statement of a Chamber that:

> "[s]o far as the object of [a State's] intervention is 'to inform the Court of the nature of the legal rights [of that State] which are in issue in the dispute', it cannot be said that this object is not a proper one: it seems indeed to accord with the function of intervention" (*I.C.J. Reports 1999, p. 1034, para. 14*).

As to the third object listed in its Application, the Court observes that every occasional mention was made of it during the oral pleadings. But the Philippines did not develop it nor did it contend that it could suffice alone as an "object" within the meaning of Article 81 of the Rules. The Court therefore rejects the relevance under the Statute and Rules of the third listed object.

The Court concludes that notwithstanding that the first two of the objects indicated by the Philippines for its intervention are appropriate, the Philippines has not discharged its obligation to convince the Court that specified legal interests may be affected in the particular circumstances of this case.

Dissenting opinion of Judge Oda

Judge Oda voted against the operative part of the Judgment, as he firmly believed that the Philippine request for permission to intervene in the case between Indonesia and Malaysia should have been granted.

He recalled the four previous rulings given on applications for permission to intervene under Article 62 of the Statute, in 1981, 1984, 1990 and 1999. He stated that his position had remained unchanged throughout these four cases. In his view, Article 62 of the Court's Statute should be interpreted liberally so as to entitle a State, even one not having a jurisdictional link with the parties, which shows "an interest of a legal nature which *may* be affected by the decision in the case" to participate in the case as a *non-party*. He recalled that he had also enunciated that view in a lecture given to the Hague Academy of International Law in 1993.

Judge Oda was further of the view that where participation as a *non-party* is permitted, it is not for the intervening State to prove in advance that its interest will be affected by the decision in the case. He considered that without participating in the merits phase of the case, the intervening State has no way of knowing the issues involved, particularly when it is refused access to the written pleadings. Thus, if a request for permission to intervene is to be rejected, he considered that the burden should be placed on the parties to the principal case to show that the interest of the third State will not be affected by the decision in the case.

In Judge Oda's view, the question of whether, in fact, an intervening State does or does not have an interest of a legal nature can only be considered in the merits phase. He said that after having heard the views of the intervening State in the main case, the Court might, after all, find in some cases that the third State's interest will not be affected by the decision in the case.

Judge Oda then went on to say that present proceedings had been dealt with in a way widely at variance with the foregoing. The Philippines had learned of the subject matter of the dispute between Indonesia and Malaysia specified in Article 2 of the Special Agreement of 31 May 1997, but still did not know how the two Parties would present their position concerning sovereignty over the two islands. At best, the Philippines could speculate that its interests in North Borneo *might* be affected depending on what Indonesia and Malaysia would say in the principal case about the two islands. As a result of the objections by

Indonesia and Malaysia, the Philippines had been refused access to the Parties' written pleadings and thus was still not in a position to know whether or not its interests may, in fact, be affected by the decision of the Court in the principal case. In seeking permission to intervene, all the Philippines could do, as it did in its Application, was to make known its claim to sovereignty in North Borneo, which *may be* affected by the decision in the case.

Judge Oda considered that the burden was not on the Philippines but on Indonesia and Malaysia to assure the Philippines that its interests would not be affected by the Judgment to be rendered by the Court in the principal case. He questioned whether it was really reasonable — or even acceptable — for Indonesia and Malaysia to require the Philippines to explain how its interest *may* be affected by the decision in the case, while they concealed from it the reasoning supporting their claims in the principal case. He said that at the time it filed its Application for permission to intervene, and at least until the second round of oral pleadings, the Philippines could not have known how the respective claims of Indonesia and Malaysia to the two islands in question would relate to its own claim to sovereignty over North Borneo. He stated that the whole procedure in this case struck him as being rather unfair to the intervening State. He believed that the argument concerning "treaties, agreement and any other evidence" could not, and should not, have been made until the Philippines had been afforded an opportunity to participate in the principal case.

Separate opinion of Judge Koroma

In his separate opinion, Judge Koroma stated that, although he had supported the Judgment, he could not express unqualified adherence to some of the positions reached in the Judgment.

From his perspective, the wider meaning given by the Court to "decision" in Article 62 as including not only the *dispositif* but the reasoning of the Judgment, though it may not be wrong, is not free from creating doubts and difficulties and could restrain the Court from declaring the law or giving full interpretation to the legal instrument or issues before it in a particular case, for fear that a previous interpretation of a legal instrument may come to haunt it in a future claim yet to be submitted to it.

In Judge Koroma's view, it is the role of the Court, in performing its judicial function to declare the law and every case should be decided on its merits, taking into consideration all the issues of law and fact before it. For him, the Court's decision resides in the *dispositif*, as it is the *dispositif* which embodies the findings of the Court in response to the submissions made by parties in a particular case. He also observed that whether an application to intervene in a particular case is successful or not, the decision of the Court in that particular case cannot be considered *res judicata* for a State not a party to the dispute before the Court and in the light of Article 59 of the Statute of the Court that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case".

If the decision is considered non-binding for a State not a party to the dispute, it follows that the Court's reasoning cannot be considered of a binding nature either.

Judge Koroma concluded that Article 62 should therefore not have been interpreted in such a way that it may prevent the Court from properly performing its judicial function or require a State to exercise undue vigilance regarding the reasoning of the Court in reaching its decision in a case in which that State is not a party.

Declaration of Judge Parra-Aranguren

Notwithstanding his vote for the operative part of the Judgment, Judge Parra-Aranguren considers it necessary to state that, in his opinion, Article 62 of the Statute refers only to the *dispositif* part of the Judgment in the main case. The findings or reasoning supporting the future Judgment of the Court in the main case are not known at this stage of the proceedings. Therefore, it is impossible to take them into consideration, as the majority maintains (para. 47), in order to determine whether they may affect the legal interest of the State seeking for permission to intervene. Consequently, Judge Parra-Aranguren cannot agree with other paragraphs of the Judgment which, after examining certain documents, conclude that the Philippines' legal interest may not be affected by their interpretation.

Declaration of Judge Kooijmans

Judge Kooijmans fully concurs with the Court's finding that the Philippines has not demonstrated that its legal interest may be affected by the Court's decision in the case between Indonesia and Malaysia on sovereignty over Pulau Ligitan and Pulau Sipadan and that consequently its Application for permission to intervene cannot be granted.

He is, however, of the opinion that the Court could and should have given more attention to the requirement it formulated itself, when it said that the Philippines "must explain with sufficient clarity its own claim to North Borneo and the legal instruments on which it is said to rest" (paragraph 60 of the Judgment). He feels that the Philippines, by not addressing highly relevant issues which were raised during the oral proceedings, failed to provide the Court with sufficient clarity regarding its claim and that the Court should have said so explicitly.

This point is not only of importance from a legal point of view, it also has practical implications.

It is sometimes said that third-party intervention basically is at odds with the system of consensual jurisdiction; in order to allay fears that States might be less inclined to submit disputes to the Court if they run the risk of a third State being granted too easily permission to intervene, the Court should for reasons of judicial policy give special attention to the specificity of the legal interest mentioned in Article 62, paragraph 1, of the Statute and to the plausibility of the claim which is at its origin.

Separate opinion of Judge ad hoc Weeramantry

Judge Weeramantry agreed with the decision of the Court but considered this an appropriate occasion to examine the question of intervention in international law because of the dearth of judicial authority on the question and the increasing importance of intervention procedures will acquire in the more closely interrelated world of the future. The opinion examines the wide discretion of the Court under Article 62 and the principles to be extracted from comparisons and contrasts between domestic and international law relating to intervention. It notes value of such principles to the Court in the exercise of its discretion under Article 62. The opinion concludes with observations on the problem of a jurisdictional link, an interest of a legal nature, the precise object of intervention, the lateness of the intervention and the confidentiality of pleadings.

Separate opinion of Judge ad hoc Franck

Judge Franck agrees with the Judgment of the Court and with its reasoning. He adds, however, that the Philippine Application is also barred by a supervening legal principle: the right of non-self-governing people to exercise their right of self-determination. This right has been confirmed by treaties, judgments of this Court and resolutions of the General Assembly. It is, quite simply, pre-eminent in modern international law.

In the instance of North Borneo's decolonization, Judge Franck believes, this right was implemented in 1963 through elections observed by the representative of the United Nations Secretary-General, who certified the fairness and conclusiveness of the popular choice made by the voters in favour of federation with Malaysia. This was acted upon by the United Nations General Assembly's Committee on Non-Self-Governing Territories.

In Judge Franck's view, the Court is bound to take judicial notice of the momentous international legal development brought about by the adoption and implementation of the right of self-determination. Accordingly, whatever interest the Philippines might have inherited from the Sultan of Sulu — even were it to be fully demonstrable — cannot now be held to prevail over a validated exercise of so fundamental a right. Since the claim is barred by law, the Philippines cannot possibly be said to have a legal interest in further ventilating it in this forum.

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136. ARREST WARRANT OF 11 APRIL 2000 (DEMOCRATIC REPUBLIC OF THE CONGO *v.* BELGIUM) (MERITS)

Judgment of 14 February 2002

In its Judgment in the case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), the Court found, by thirteen votes to three, that the issue against Mr. Abdulaye Yerodia Ndombasi of the arrest warrant of 11 April 2000, and its international circulation, constituted violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law.

It also found, by ten votes to six, that the Kingdom of Belgium must, by means of its own choosing, cancel the arrest warrant of 11 April 2000 and so inform the authorities to whom that warrant was circulated. The Court reached these findings after having found, by 15 votes to 1, that it had jurisdiction, that the Application of the Democratic Republic of the Congo ("the Congo") was not without object (and the case accordingly not moot) and that the Application was admissible, thus rejecting the objections which the Kingdom of Belgium ("Belgium") had raised on those questions.

The Court was composed as follows: President Guillaume; Vice-President Shi; Judges Oda, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; Judges ad hoc Bula-Bula, Van den Wyngaert; Registrar Couvreur.

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President Guillaume appended a separate opinion to the Judgment of the Court; Judge Oda appended a dissenting opinion to the Judgment of the Court; Judge Ranjeva appended a declaration to the Judgment of the Court; Judge Koroma appended a separate opinion to the Judgment of the Court; Judges Higgins, Kooijmans and Buergenthal appended a joint separate opinion to the Judgment of the Court; Judge Rezek appended a separate opinion to the Judgment of the Court; Judge Al-Khasawneh appended a dissenting opinion to the Judgment of the Court; Judge ad hoc Bula-Bula appended a separate opinion to the Judgment of the Court; Judge ad hoc Van den Wyngaert appended a dissenting opinion to the Judgment of the Court.

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

"78. For these reasons,

THE COURT,

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

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

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

AGAINST: Judge Oda;

(B) By fifteen votes to one,

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

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

AGAINST: Judge Oda;

(C) By fifteen votes to one,

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

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

AGAINST: Judge Oda;

(D) By fifteen votes to one,

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

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

AGAINST: Judge Oda;

(2) By thirteen votes to three,

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

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

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

(3) By ten votes to six,

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

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

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

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History of the proceedings and submissions of the Parties
(paras. 1-12)

The Court recalls that on 17 October 2000 the Democratic Republic of the Congo (hereinafter "the Congo") filed in the Registry of the Court an Application instituting proceedings against the Kingdom of Belgium (hereinafter "Belgium") in respect of a dispute concerning an "international arrest warrant issued on 11 April 2000 by a Belgian investigating judge ... against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo, Mr. Abdulaye Yerodia Ndombasi".

In that Application the Congo contended that Belgium had violated the "principle that a State may not exercise its authority on the territory of another State", the "principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations", as well as "the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations". In order to found the Court's jurisdiction the Congo invoked in the aforementioned Application the fact that "Belgium ha[d] accepted the jurisdiction of the Court and, insofar as may be required, the [aforementioned] Application signifie[d] acceptance of that jurisdiction by the Democratic Republic of the Congo".

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

By Order of 13 December 2000, the President of the Court, taking account of the agreement of the Parties as

expressed at a meeting held with their Agents on 8 December 2000, fixed time limits for the filing of a Memorial by the Congo and of a Counter-Memorial by Belgium, addressing both issues of jurisdiction and admissibility and the merits. After the pleadings had been filed within the time limits as subsequently extended, public hearings were held from 15 to 19 October 2001.

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

On behalf of the Government of the Congo,

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

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

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

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

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

On behalf of the Government of Belgium,

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

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

Background to the case
(paras. 13-21)

On 11 April 2000 an investigating judge of the Brussels *tribunal de première instance* issued "an international arrest warrant *in absentia*" against Mr. Abdulaye Yerodia Ndombasi, charging him, as perpetrator or co-perpetrator, with offences constituting grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto, and with crimes against humanity. The arrest warrant was circulated internationally through Interpol.

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

The crimes with which Mr. Yerodia was charged were punishable in Belgium under the Law of 16 June 1993 "concerning the Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 Additional Thereto", as amended by the Law of 19 February 1999 "concerning the Punishment of Serious Violations of International Humanitarian Law" (hereinafter referred to as the "Belgian Law").

On 17 October 2000, the Congo instituted proceedings before the International Court of Justice, requesting the Court "to declare that the Kingdom of Belgium shall annul the international arrest warrant issued on 11 April 2000". After the proceedings were instituted, Mr. Yerodia ceased to hold office as Minister for Foreign Affairs, and subsequently ceased to hold any ministerial office.

In its Application instituting proceedings, the Congo relied on two separate legal grounds. First, it claimed that "[t]he *universal jurisdiction* that the Belgian State attributes to itself under Article 7 of the Law in question" constituted a "[v]iolation of the principle that a State may not exercise its authority on the territory of another State and of the principle of sovereign equality among all Members of the United Nations". Secondly, it claimed that "[t]he non-recognition, on the basis of Article 5 ... of the Belgian Law, of the immunity of a Minister for Foreign Affairs in office" constituted a "[v]iolation of the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State". However, the Congo's Memorial and its final submissions refer only to a violation "in regard to the ... Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers".

Objections of Belgium relating to jurisdiction, mootness and admissibility
(paras. 22-44)

Belgium's first objection
(paras. 23-28)

The Court begins by considering the first objection presented by Belgium, which reads as follows:

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

The Court recalls that, according to its settled jurisprudence, its jurisdiction must be determined at the time that the act instituting proceedings was filed. Thus, if the Court has jurisdiction on the date the case is referred to it, it continues to do so regardless of subsequent events. Such events might lead to a finding that an application has subsequently become moot and to a decision not to proceed to judgment on the merits, but they cannot deprive the Court of jurisdiction.

The Court then finds that, on the date that the Congo's Application instituting these proceedings was filed, each of the Parties was bound by a declaration of acceptance of compulsory jurisdiction, filed in accordance with Article 36, paragraph 2, of the Statute of the Court: Belgium by a declaration of 17 June 1958 and the Congo by a declaration of 8 February 1989. Those declarations contained no reservation applicable to the present case. The Court further observes that it is, moreover, not contested by the Parties that at the material time there was a legal dispute between them concerning the international lawfulness of the arrest warrant of 11 April 2000 and the consequences to be drawn if the warrant was unlawful. The Court accordingly concludes that at the time that it was seized of the case it had jurisdiction to deal with it, and that it still has such jurisdiction, and that Belgium's first objection must therefore be rejected.

Belgium's second objection
(paras. 29-32)

The second objection presented by Belgium is the following:

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

The Court notes that it has already affirmed on a number of occasions that events occurring subsequent to the filing of an application may render the application without object such that the Court is not called upon to give a decision thereon. However, the Court considers that this is not such a case. It finds that the change which has occurred in the situation of Mr. Yerodia has not in fact put an end to the dispute between the Parties and has not deprived the Application of its object. The Congo argues that the arrest warrant issued by the Belgian judicial authorities against Mr. Yerodia was and remains unlawful. It asks the Court to hold that the warrant is unlawful, thus providing redress for the moral injury which the warrant allegedly caused to it. The Congo also continues to seek the cancellation of the warrant. For its part, Belgium contends that it did not act in violation of international law and it disputes the Congo's submissions. In the view of the Court, it follows from the foregoing that the Application of the Congo is not now without object and that accordingly the case is not moot. Belgium's second objection is accordingly rejected.

Belgium's third objection
(paras. 33-36)

The third Belgian objection is put as follows:

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

The Court notes that, in accordance with settled jurisprudence, it "cannot, in principle, allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character". However, the Court considers that in the present case the facts underlying the Application have not changed in a way that produced such a transformation in the dispute brought before it. The question submitted to the Court for decision remains whether the issue and circulation of the arrest warrant by the Belgian judicial authorities against a person who was at that time the Minister for Foreign Affairs of the Congo were contrary to international law.

The Congo's final submissions arise "directly out of the question which is the subject matter of that Application". In these circumstances, the Court considers that Belgium cannot validly maintain that the dispute brought before the Court was transformed in a way that affected its ability to prepare its defence, or that the requirements of the sound administration of justice were infringed. Belgium's third objection is accordingly rejected.

Belgium's fourth objection
(paras. 37-40)

The fourth Belgian objection reads as follows:

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

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

In any event, the Court recalls that an objection based on non-exhaustion of local remedies relates to the admissibility of the application. Under settled jurisprudence, the critical date for determining the admissibility of an application is

the date on which it is filed. Belgium accepts that, on the date on which the Congo filed the Application instituting proceedings, the Congo had a direct legal interest in the matter, and was asserting a claim in its own name. Belgium's fourth objection is accordingly rejected.

Belgium's subsidiary argument concerning the non ultra petita rule
(paras. 41-43)

As a subsidiary argument, Belgium further contends that "[i]n the event that the Court decides that it does have jurisdiction in this case and that the application is admissible, ... the *non ultra petita* rule operates to limit the jurisdiction of the Court to those issues that are the subject of the [Congo]'s final submissions".

Belgium points out that the Congo initially advanced a twofold argument, based, on the one hand, on the Belgian judge's lack of jurisdiction and, on the other, on the immunity from jurisdiction enjoyed by its Minister for Foreign Affairs. According to Belgium, the Congo now confines itself to arguing the latter point, and the Court consequently cannot rule on the issue of universal jurisdiction in any decision it renders on the merits of the case.

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

Merits of the case
(paras. 45-71)

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

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

Immunity and inviolability of an incumbent Foreign Minister in general
(paras. 47-55)

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

The Court notes that a certain number of treaty instruments were cited by the Parties in this regard, including the Vienna Convention on Diplomatic Relations of 18 April 1961 and the New York Convention on Special Missions of 8 December 1969. The Court finds that these Conventions provide useful guidance on certain aspects of the question of immunities, but that they do not contain any provision specifically defining the immunities enjoyed by Ministers for Foreign Affairs. It is consequently on the basis of customary international law that the Court must decide the questions relating to the immunities of such Ministers raised in the present case.

In customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States. In order to determine the extent of these immunities, the Court must therefore first consider the nature of the functions exercised by a Minister for Foreign Affairs. After an examination of those functions, the Court concludes that they are such that, throughout the duration of his or her office, a Minister for Foreign Affairs when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.

The Court finds that in this respect no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an "official" capacity and those claimed to have been performed in a "private capacity", or, for that matter, between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office. Thus, if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office. Furthermore,

even the mere risk that, by travelling to or transiting another State, a Minister for Foreign Affairs might be exposing himself or herself to legal proceedings could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her official functions.

The Court then addresses Belgium's argument that immunities accorded to incumbent Ministers for Foreign Affairs can in no case protect them where they are suspected of having committed war crimes or crimes against humanity.

The Court states that it has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords in the United Kingdom or the French Court of Cassation, and that it has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity. The Court adds that it has also examined the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals, and which are specifically applicable to the latter (see Charter of the International Military Tribunal of Nuremberg, Art. 7; Charter of the International Military Tribunal of Tokyo, Art. 6; Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 7, para. 2; Statute of the International Criminal Tribunal for Rwanda, Art. 6, para. 2; Statute of the International Criminal Court, Art. 27), and that it finds that these rules likewise do not enable it to conclude that any such exception exists in customary international law in regard to national courts. Finally, the Court observes that none of the decisions of the Nuremberg and Tokyo international military tribunals, or of the International Criminal Tribunal for the former Yugoslavia, cited by Belgium deal with the question of the immunities of incumbent Ministers for Foreign Affairs before national courts where they are accused of having committed war crimes or crimes against humanity. The Court accordingly notes that those decisions are in no way at variance with the findings it has reached above. The Court accordingly does not accept Belgium's argument in this regard.

It further notes that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction.

Thus, although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. The Court emphasizes, however, that the *immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility. Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances. The Court refers to circumstances where such persons are tried in their own countries, where the State which they represent or have represented decides to waive that immunity, where such persons no longer enjoy all of the immunities accorded by international law in other States after ceasing to hold the office of Minister for Foreign Affairs, and where such persons are subject to criminal proceedings before certain international criminal courts, where they have jurisdiction.

The issue and circulation of the arrest warrant of 11 April 2000
(paras. 62-71)

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

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

After examining the terms of the arrest warrant, the Court notes that its *issuance*, as such, represents an act by the Belgian judicial authorities intended to enable the arrest on Belgian territory of an incumbent Minister for Foreign Affairs on charges of war crimes and crimes against humanity. The fact that the warrant is enforceable is clearly apparent from the order given in it to "all bailiffs and agents of public authority ... to execute this arrest warrant" and from the assertion in the warrant that "the position of Minister for Foreign Affairs currently held by the accused does not entail immunity from jurisdiction and enforcement". The Court notes that the warrant did admittedly make an exception for the case of an official visit by Mr. Yerodia to Belgium, and that Mr. Yerodia never suffered arrest in Belgium. The Court considers itself bound, however, to find that, given the nature and purpose of the warrant, its mere issue violated the immunity which Mr. Yerodia enjoyed as the Congo's incumbent Minister for Foreign Affairs. The Court accordingly concludes that the issue of the warrant constituted a violation of an obligation

of Belgium towards the Congo, in that it failed to respect the immunity of that Minister and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.

The Court also notes that Belgium admits that the purpose of the international *circulation* of the disputed arrest warrant was "to establish a legal basis for the arrest of Mr. Yerodia ... abroad and his subsequent extradition to Belgium". The Court finds that, as in the case of the warrant's issue, its international circulation from June 2000 by the Belgian authorities, given its nature and purpose, effectively infringed Mr. Yerodia's immunity as the Congo's incumbent Minister for Foreign Affairs and was furthermore liable to affect the Congo's conduct of its international relations. The Court concludes that the circulation of the warrant, whether or not it significantly interfered with Mr. Yerodia's diplomatic activity, constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and inviolability then enjoyed by him under international law.

Remedies
(paras. 72-77)

The Court then addresses the issue of the remedies sought by the Congo on account of Belgium's violation of the above-mentioned rules of international law. (Cf. the second, third and fourth submissions of the Congo reproduced above.)

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

However, the Court goes on to observe that, as the Permanent Court of International Justice stated in its Judgment of 13 September 1928 in the case concerning the *Factory at Chorzów*:

> "[t]he essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals — is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed" (*P.C.I.J., Series A, No. 17*, p. 47).

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

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

Separate opinion of Judge Guillaume, President

In his separate opinion, President Guillaume subscribes to the Judgment of the Court and sets out his position on one question which the Judgment had not addressed: whether the Belgian judge has jurisdiction to issue an international arrest warrant against Mr. Yerodia Ndombasi.

He recalls that the primary aim of the criminal law is to enable punishment in each country of offences committed in the national territory. He adds that classic international law does not exclude a State's power in some cases to exercise its judicial jurisdiction over offences committed abroad, but he emphasizes that the exercise of that jurisdiction is not without its limits, as the Permanent Court stated in the "*Lotus*" case as long ago as 1927.

He continues by making it clear that, under the law as classically formulated, a State normally has jurisdiction over an offence committed abroad only if the offender, or at the very least the victim, has the nationality of that State, or if the crime threatens its internal or external security.

Additionally, States may exercise jurisdiction in cases of piracy and in the situation of subsidiary universal jurisdiction provided for by various conventions if the offender is present on their territory. However, apart from these cases, international law does not accept universal jurisdiction; still less does it accept universal jurisdiction *in absentia*.

Thus, President Guillaume concludes that, if the Court had addressed these questions, it ought to have found that the Belgian judge was wrong in holding himself competent to prosecute Mr. Yerodia Ndombasi by relying on a universal jurisdiction incompatible with international law.

Dissenting opinion of Judge Oda

Judge Oda voted against all of the provisions of the operative part of the Court's Judgment in this case. In his dissenting opinion, Judge Oda stresses that the Court should have declared ex officio that it lacked jurisdiction to entertain the Congo's Application of 17 October 2000 because there was at the time no legal dispute between the Parties of the kind required under Article 36, paragraph 2, of the Court's Statute. In his dissenting opinion, Judge Oda reiterates the arguments he made in his declaration appended to the Court's Order of 8 December 2000

concerning the request for indication of preliminary measures, and he addresses four main points.

First, Judge Oda stresses that a belief by the Congo that the 1993 Belgian Law violated international law is not enough to create a legal dispute between the Parties. In its Application, the Congo asserted that Belgium's 1993 Law, as amended in 1999, concerning the Punishment of Serious Violations of International Humanitarian Law ("the 1993 Belgian Law"), contravenes international law. The Congo also argued that Belgium's prosecution of Mr. Yerodia, Foreign Minister of the Congo, violated the diplomatic immunity granted under international law to Ministers for Foreign Affairs. This argument was not supported by proof that Mr. Yerodia himself had suffered or would suffer anything more than some moral injury. Because of this, the case did not concern a *legal* dispute, but instead amounted to a request from the Congo for the Court to render a legal *opinion* on the lawfulness of the 1993 Belgian Law and actions taken under it. Judge Oda expresses grave concern that the Court's finding that there was a legal dispute could lead to an excessive number of cases being referred to the Court without any real injury being evidenced, a state of affairs which could cause States to withdraw their acceptance of the Court's compulsory jurisdiction.

Second, Judge Oda believes that the Congo changed the subject matter of the proceedings between the time it filed its Application of 17 October 2000 and submitted its Memorial on 15 May 2001. The questions the Congo originally raised — whether a State has extraterritorial jurisdiction over crimes amounting to serious violations of humanitarian law regardless of where they were committed and by whom, and whether a Foreign Minister is exempt from such jurisdiction — were transformed into questions concerning the issuance and international circulation of an arrest warrant against a Foreign Minister and the immunities of incumbent Foreign Ministers. This transformation of the basic issues of the case, Judge Oda believes, did not come within the scope of the right the Congo reserved in its Application "to argue further the grounds of its Application". Judge Oda agrees with the Court's determination that the alleged dispute (which he does not agree was a *legal dispute*), was the one existing in October 2000, and he believes, therefore, that the Court was correct to reject Belgium's objections relating to "jurisdiction, mootness and admissibility".

Third, Judge Oda turns to the question of whether the present case involves any legal issues on which the Congo and Belgium hold conflicting views. In response, he notes that the Congo appears to have abandoned its assertion, made in its Application, that the 1993 Belgian Law was itself contrary to the principle of sovereign equality under international law. In this regard, Judge Oda finds that extraterritorial criminal jurisdiction has been expanded in recent decades, and that universal jurisdiction is being increasingly recognized. Judge Oda believes that the Court wisely refrained from finding on this issue, since the law is not sufficiently developed in this area, and because the Court was not requested to take a decision on this point. Judge Oda also stresses his belief that the issuance and circulation of an arrest warrant, without any action concerning the warrant by third States, does not have any legal impact. Regarding diplomatic immunity, Judge Oda divides the question presented by this case into two main issues: first, whether in principle a Foreign Minister is entitled to the same immunity as diplomatic agents; and second, whether diplomatic immunity can be claimed in respect of serious breaches of humanitarian law. The Court, he indicates, has not sufficiently answered these questions, and should not have made the broad finding it appears to make, according Ministers for Foreign Affairs absolute immunity.

Finally, Judge Oda believes that there is no practical significance to the Court's order that Belgium cancel the arrest warrant of April 2000, since Belgium can presumably issue a new arrest warrant against Mr. Yerodia as a *former* Minister for Foreign Affairs. If the Court believes that the sovereign dignity of the Congo was violated in 2000, the harm done cannot be remedied by the cancellation of the arrest warrant; the only remedy would be an apology by Belgium. For his part, Judge Oda does not believe that the Congo suffered any injury, since no action was ever taken against Mr. Yerodia pursuant to the warrant. In closing, Judge Oda states that he finds the case "not only unripe for adjudication at this time but also fundamentally inappropriate for the Court's consideration".

Declaration of Judge Ranjeva

In his declaration, Judge Ranjeva expresses agreement with both the operative part and the Court's approach in refraining from consideration of the issue of the merit of the extremely broad interpretation given to universal jurisdiction *in absentia* by the organs of the Belgian State. The withdrawal of the Congo's original first submission from its final submissions resulted in excluding universal jurisdiction from the scope of the claims.

This change in the Applicant's litigation strategy obscured the heart of the problem underlying the present case as seen in the light of evolving opinion and international law concerning the suppression of the most heinous international crimes. The author points out that customary international law, as codified by the law of the sea conventions, recognizes one situation in which universal jurisdiction may be exercised: maritime piracy. The development of conventional law is marked by the gradual establishment of national courts' jurisdiction to punish, progressing as it has from the affirmation of the obligation to prevent and punish, without however establishing jurisdiction to punish, towards the enshrinement in treaty-made law of the principle *aut judicare aut dedere*.

Judge Ranjeva finds Belgium's interpretation of the "*Lotus*" case, which in its view lays down the principle that jurisdiction exists in the absence of an explicit prohibition, to be unreasonable given the facts and circumstances of the case on which the Permanent Court of International Justice was called to adjudicate. Judge Ranjeva is of the opinion that, leaving aside the compelling obligation to give effect

to the punishment and prevention called for by international law and without it being necessary to condemn the Belgian Law, it would have been difficult under current positive law not to uphold the Congo's original first submission.

Separate opinion of Judge Koroma

In his separate opinion, Judge Koroma stated that the choice of technique or method of responding to the final submissions put to the Court by the Parties is the prerogative of the Court so long as the Judgment provides a complete answer to the submissions. On the other hand, in the context of the present case, the Court decided not to engage in a legal discourse or exegesis to reach its conclusion, since it did not consider it necessary, interesting though it may have been. The Judgment cannot therefore be juridically queried on this ground.

Judge Koroma maintained that the Court was entitled, in responding to submissions, to take as its point of departure the determination of whether international law permits an exemption of immunity from the jurisdiction of an incumbent Minister for Foreign Affairs without delving into the issue of universal jurisdiction, particularly as both Parties had relinquished the issue and had asked the Court to pronounce on it only insofar as it relates to the question of the immunity of a Foreign Minister in office. Thus, in his view, and despite appearances to the contrary, what the Court is called upon to decide is not which of the principles of either immunity or universal jurisdiction is pre-eminent, but rather whether the issue and circulation of the warrant violated the immunity of a Foreign Minister in office. Judge Koroma pointed out that jurisdiction and immunity are different concepts.

According to him, the method chosen by the Court is also justified on practical grounds; in that the arrest warrant had been issued in Belgium on the basis of Belgian law, it was therefore appropriate for the Court to determine the impact of that law on an incumbent Foreign Minister. The Court has ruled that while Belgium is entitled to initiate criminal proceedings against anyone in its jurisdiction, this did not extend to an incumbent Foreign Minister of a foreign State who is immune from such jurisdiction. In the Judge's opinion, the Judgment should be seen as responding to that issue, the paramount legal justification for which is that a Foreign Minister's immunity is not only of functional necessity but increasingly nowadays he or she represents the State, even though this position is not assimilable to that of Head of State. However, in the Judge's view, the Judgment should not be considered either as a validation or a rejection of the principle of universal jurisdiction, particularly when no such submission was before the Court.

On the other hand, the Judge stated that, by issuing and circulating the warrant, Belgium had demonstrated how seriously it took its international obligation to combat international crimes, yet it is unfortunate that the wrong case would appear to have been chosen to do this. It is his opinion that today, together with piracy, universal jurisdiction is available for certain crimes such as war crimes, crimes against humanity including the slave trade and genocide.

Finally, on the issue of remedies, Judge Koroma considered that the Court's instruction to Belgium to cancel the arrest warrant should repair the moral injury suffered by the Congo and restore the situation *status quo ante* before the warrant was issued and circulated. This should restore legal peace between the Parties.

Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal

In their joint separate opinion, Judges Higgins, Kooijmans and Buergenthal agree with the Court's holding on jurisdiction and admissibility, and with much of what the Court has to say regarding immunities of incumbent Foreign Ministers. They consider, however, that the Court should also have addressed the issue of universal jurisdiction since the issue of immunities depends, conceptually, upon a pre-existing jurisdiction. The *ultra petita* rule bars only a ruling on universal jurisdiction in the *dispositif*, not its elucidation. Such elucidation was necessary because immunities and universal jurisdiction are closely interrelated in this case and bear on the maintenance of stability in international relations without perpetuating impunity for international crimes.

Turning to universal jurisdiction, Judges Higgins, Kooijmans and Buergenthal ask whether States are entitled to exercise such jurisdiction over persons accused of serious international crimes who have no connection with the forum State and are not present in the State's territory. Although they find no established practice indicating the exercise of such jurisdiction, neither do they find evidence of an *opinio juris* that deems it illegal.

Moreover, the growing number of multilateral treaties for the punishment of serious international crimes tend to be drafted with great care so as not to preclude the exercise of universal jurisdiction by national courts in these type of cases. Thus, while there may be no general rule specifically authorizing the right to exercise universal jurisdiction, the absence of a prohibitive rule and the growing international consensus on the need to punish crimes regarded as most heinous by the international community, indicate that the warrant for the arrest of Mr. Yerodia did not as such violate international law.

Judges Higgins, Kooijmans and Buergenthal agree in general with the Court's finding regarding Mr. Yerodia's immunity. They share the Court's view that the immunity of a Foreign Minister must not be equated with impunity and that procedural immunity cannot shield the Minister from personal responsibility once the Minister is no longer in office.

However, they consider as too expansive the scope of the immunities the Court attributes to Foreign Ministers and too restrictive the limits it appears to impose on the scope of the personal responsibility of such officials and where they may be tried. In their view, serious crimes under international law engage the personal responsibility of high

State officials. For purposes of immunities, the concept of official acts must be narrowly defined.

Judges Higgins, Kooijmans and Buergenthal voted against the Court's finding in paragraph (3) of the *dispositif* that Belgium must cancel the arrest warrant. They consider that the Court's reliance on the dictum in the *Factory at Chorzów* case is misplaced because the restoration of the *status quo ante* is not possible as Mr. Yerodia is no longer Foreign Minister. Morcover, since Mr. Yerodia no longer holds this office, the illegality attaching to the warrant ceased and with it the continuing illegality that would justify an order for its withdrawal.

Separate opinion of Judge Rezek

Judge Rezek voted in favour of all paragraphs of the operative part of the Judgment. He nonetheless regrets that the Court did not rule on the issue of the jurisdiction of the Belgian courts. The fact that the Congo confined itself to inviting the Court to render a decision based on immunity does not justify, in Judge Rezek's view, the Court's dropping of what represents an inevitable logical premise to the examination of the issue of immunity.

Judge Rezek considers that an examination of international law demonstrates that, as it currently stands, that law does not permit the exercise of criminal jurisdiction by domestic courts in the absence of some connecting circumstance with the forum State. *A fortiori*, it follows that Belgium cannot be considered as having been "obliged" to institute criminal proceedings in this case. Judge Rezek notes in particular that the Geneva Conventions do not enshrine any notion of universal jurisdiction *in absentia*, and that such jurisdiction has never been claimed by the Spanish courts in the *Pinochet* case.

Judge Rezek concludes by noting the importance of restraint in the exercise of criminal jurisdiction by domestic courts; a restraint in line with the notion of a decentralized international community, founded on the principle of the equality of its members and necessarily requiring mutual coordination.

Dissenting opinion of Judge Al-Khasawneh

Judge Al-Khasawneh dissented because, in his opinion, incumbent Ministers for Foreign Affairs enjoy only limited immunity, i.e., immunity from enforcement when on an official mission. He arrived at this conclusion on the bases that: immunity is an exception to the rule that man is legally and morally responsible for his actions and should therefore be construed narrowly; that unlike diplomats, the immunities of Foreign Ministers are not clear in terms of their basis or extent and unlike Heads of State, Foreign Ministers do not personify the State and are therefore not entitled to immunities and privileges attaching to their person. While the Belgian warrant went beyond jurisdiction, it contained express language regarding unenforceability if the Minister was on Belgian soil on official mission, similarly the circulation of the warrant was not accompanied — while Mr. Yerodia was still in office — by a Red Notice asking other States to take enforcement steps.

Judge Al-Khasawneh also dealt with the question of exceptions in the case of high-ranking State officials accused of grave crimes from the protection afforded by immunities. In this regard he felt that the morally embarrassing problem of impunity was not adequately dealt with in the Judgment which tried to circumvent the problem by an artificial distinction between "procedural immunity" on the one hand and "substantive immunity" on the other, and by postulating four situations where immunity and impunity would not be synonymous, i.e., (*a*) prosecution in the home State, (*b*) waiver and (*c*) prosecution after leaving office, except for official acts and (*d*) before international courts. Having considered these four situations he nevertheless felt that a lacuna still existed. Lastly, he argued that the need for effective combating of grave crimes — recognized as such by the international community — represents a higher norm than the rules on immunity and in case of conflict should prevail, even if one is to speak of reconciliation of opposing norms and not of the triumph of one over the other, this would suggest a more restrictive approach to immunity — which would incidentally bring immunity from criminal process into consonance with the now firmly established régime of restrictive immunities of States — than the Judgment portrays.

Separate opinion of Judge Bula-Bula

By conducting itself unlawfully, the Kingdom of Belgium, a sovereign State, committed an internationally wrongful act to the detriment of the Democratic Republic of the Congo, likewise a sovereign State.

Judge Bula-Bula fully supports the decision of the Court, which upholds the rule of law against the law of the jungle. In this regard, he has also indicated other grounds of fact and law which will render further substance to a Judgment of interest to the entire international community.

Dissenting opinion of Judge Van den Wyngaert

Judge Van den Wyngaert has voted against the Court's decision on the merits. She disagrees with the Court's conclusion that there is a rule of customary international law granting immunity to incumbent Foreign Ministers. She believes that Belgium has not violated a legal obligation it owed in this respect to the Congo. Even assuming, *arguendo*, that there was such a rule, there was no violation in the present case as the warrant could not be and was not executed, neither in the country where it was *issued* (Belgium) nor in the countries to which it was *circulated*. The warrant was not an "international arrest warrant" in a legal sense: it could and did not have this effect, neither in Belgium nor in third countries. Judge Van den Wyngaert believes that these are the only *objective elements* the Court should have looked at. The *subjective* elements, i.e., whether the warrant had a psychological effect on Mr. Yerodia or whether it was perceived as offensive by the Congo (cf. the

terms *iniuria* and *capitis diminutio* used by counsel for the Congo) was irrelevant for the dispute.

On the subject of *immunities*, Judge Van den Wyngaert finds no legal basis under international law for granting immunity to an incumbent Minister for Foreign Affairs. There is no conventional international law on the subject. There is no customary international law on the subject either. Before reaching the conclusion that Ministers for Foreign Affairs enjoy a *full* immunity from foreign jurisdiction under *customary* international law, the International Court of Justice should have satisfied itself of the existence of State practice (*usus*) and *opinio juris* establishing an international custom to this effect. A "negative" practice, consisting in their abstaining from instituting criminal proceedings, cannot, in itself, be seen as evidence for an *opinio juris* (*"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 28), and abstinence can be attributed to many other factors, including practical and political considerations. Legal opinion does not support the Court's proposition that Ministers for Foreign Affairs are immune from the jurisdiction of other States under customary international law. Moreover, the Court reaches this conclusion without regard to the general tendency toward the restriction of immunity of the State officials (including even Heads of State), not only in the field of private and commercial law but also in the field of criminal law, when there are allegations of war crimes and crimes against humanity. Belgium may have acted contrary to international comity, but it has not infringed international law. Judge Van den Wyngaert therefore believes that the whole Judgment is based on flawed reasoning.

On the subject of (*universal*) *jurisdiction*, on which the Court did not pronounce itself in the present Judgment, Judge Van den Wyngaert believes that Belgium was perfectly entitled to apply its legislation to the war crimes and crimes against humanity allegedly committed by Mr. Yerodia in the Congo. Belgium's War Crimes Act, giving effect to the principle of universal jurisdiction regarding war crimes and crimes against humanity, is not contrary to international law. On the contrary, international law permits and even encourages States to assert this form of jurisdiction in order to ensure that suspects of war crimes and crimes against humanity do not find safe havens. Universal jurisdiction is not contrary to the *principle of complementarity in the Rome Statute for an International Criminal Court*. The International Criminal Court will only be able to act if States that have jurisdiction are unwilling or unable genuinely to carry out investigation or prosecution (Art. 17). And even where such willingness exists, the International Criminal Court, like the ad hoc international tribunals, will not be able to deal with *all* crimes that come under its jurisdiction. The International Criminal Court will not have the capacity for that, and there will always be a need for States to investigate and prosecute core crimes. These States include, but are not limited to, national and territorial States. Especially in the case of sham trials, there will still be a need for third States to investigate and prosecute.

This case was to be *a test case*, probably the first opportunity for the International Court of Justice to address a number of questions that have not been considered since the famous "*Lotus*" case of the Permanent Court of International Justice in 1927. In technical terms, the dispute was about an arrest warrant against an incumbent Foreign Minister.

The warrant was, however, based on charges of war crimes and crimes against humanity, which the Court even fails to mention in the *dispositif*. In a more principled way, the case was about how far States can or must go when implementing modern international criminal law. It was about the question what international law requires or allows States to do as "agents" of the international community when they are confronted with complaints of victims of such crimes, given the fact that international criminal courts will not be able to judge all international crimes. It was about balancing two divergent interests in modern international (criminal) law: the need of international accountability for such crimes as torture, terrorism, war crimes and crimes against humanity and the principle of sovereign equality of States, which presupposes a system of immunities.

Judge Van den Wyngaert regrets that the Court has not addressed the dispute from this perspective and has instead focused on the *very narrow technical question* of immunities for incumbent Foreign Ministers. In failing to address the dispute from a more principled perspective, the International Court of Justice has missed an excellent opportunity to contribute to the development of modern international criminal law. In legal doctrine, there is a plethora of recent scholarly writings on the subject. Major scholarly organizations and non-governmental organizations have taken clear positions on the subject of international accountability. The latter may be seen as the opinion of *civil society*, an opinion that cannot be completely discounted in the formation of customary international law today. She highly regrets that the Court fails to acknowledge this development, and instead adopts a *formalistic reasoning*, examining whether there is, under customary international law, an international crimes exception to the — wrongly postulated — rule of immunity for incumbent Ministers under customary international law.

By adopting this approach, the Court implicitly establishes *a hierarchy between the rules on immunity* (protecting incumbent former Ministers) *and the rules on international accountability* (calling for the investigation of charges against incumbent Foreign Ministers suspected of war crimes and crimes against humanity). By elevating the former rules to the level of customary international law in the first part of its reasoning, and finding that the latter have failed to reach the same status in the second part of its reasoning, the Court does not need to give further consideration to the legal status of the principle of international accountability under international law. Other courts, for example, the House of Lords in the *Pinochet* case and the European Court of Human Rights in the *Al-Adsani* case have given more thought and consideration to the

balancing of the relative normative status of international *ius cogens* crimes and immunities.

Judge Van den Wyngaert disagrees with the Court's proposition that immunity does not lead to *impunity of incumbent Foreign Ministers*. This may be true in theory, but not in practice. It is, in theory, true that an incumbent or former Foreign Minister can always be prosecuted in his own country or in other States if the State whom he represents waves immunity, as the Court asserts. However, this is precisely the core of the problem of impunity: where national authorities are not willing or able to investigate or prosecute, the crime goes unpunished. And this is what happened in the present case. The Congo accused Belgium of exercising universal jurisdiction *in absentia* against an incumbent Foreign Minister, but it had itself omitted to exercise its jurisdiction *in presentia* in the case of Mr. Yerodia, thus infringing the Geneva Conventions and not complying with a host of United Nations resolutions to this effect. The Congo did not come to the Court with clean hands: it blamed Belgium for investigating and prosecuting allegations of international crimes that it was obliged to investigate and prosecute itself.

In addition, Judge Van den Wyngaert finds the Judgment highly unsatisfactory where it states that immunity does not lead to *impunity of former Foreign Ministers*: according to the Court, the lifting of full immunity, in this case, is only for acts committed prior or subsequent to his or her period of office and for acts committed during that period of office in a private capacity. Whether war crimes and crimes against humanity fall into this category the Court does not say. Judge Van den Wyngaert finds it extremely regrettable that the International Court of Justice has not, like the House of Lords in the *Pinochet* case, qualified this statement. It could and indeed should have added that war crimes and crimes against humanity can never fall into this category. Some crimes under international law (e.g., certain acts of genocide and of aggression) can, for practical purposes, only be committed with the means and mechanisms of a State and as part of a State policy. They cannot, from that perspective, be anything other than "official" acts. Immunity should never apply to crimes under international law, neither before international courts nor national courts.

Victims of such violations bringing legal action against such persons in third States would face the *obstacle of immunity* from jurisdiction. Today, they may, by virtue of the application of the 1969 Special Missions Convention, face the obstacle of immunity from execution while the Minister is on an official visit, but they would not be barred from bringing an action altogether. Judge Van den Wyngaert feels that taking immunities further than this may even lead to *conflict with international human rights* rules, particularly the right of access to court, as appears from the recent *Al-Adsani* case of the European Court of Human Rights.

According to Judge Van den Wyngaert, an implicit consideration behind this Judgment may have been a *concern for abuse and chaos*, arising from the risk of States asserting unbridled universal jurisdiction and engaging in abusive prosecutions against incumbent Foreign Ministers of other States and thus paralysing the functioning of these States. In the present dispute, however, there was no allegation of abuse of process on the part of Belgium. Criminal proceedings against Mr. Yerodia were not frivolous or abusive. The warrant was issued after two years of criminal investigations and there were no allegations that the investigating judge who issued it acted on false factual evidence. The accusation that Belgium applied its War Crimes Statute in an offensive and discriminatory manner against a Congolese Foreign Minister was manifestly ill-founded. Belgium, rightly or wrongly, wishes to act as an agent of the world community by allowing complaints brought by foreign victims of serious human rights abuses committed abroad. Since the infamous *Dutroux* case (a case of child molestation attracting great media attention in the late 1990s), Belgium has amended its laws in order to improve victims' procedural rights, without discriminating between Belgian and foreign victims. In doing so, Belgium has also opened its courts to victims bringing charges based on war crimes and crimes against humanity committed abroad. This new legislation has been applied, not only in the case against Mr. Yerodia but also in cases against Mr. Pinochet, Mr. Sharon, Mr. Rafzanjani, Mr. Hissen Habré, Mr. Fidel Castro, etc. It would therefore be wrong to say that the War Crimes Statute has been applied against a Congolese national in a discriminatory way.

In the abstract, the *chaos argument* may be pertinent. This risk may exist, and the Court could have legitimately warned against it in its Judgment without necessarily reaching the conclusion that a rule of customary international law exists to the effect of granting immunity to Foreign Ministers. Judge Van den Wyngaert observes that granting immunities to incumbent Foreign Ministers may *open the door to other sorts of abuse*. It dramatically increases the number of persons that enjoy international immunity from jurisdiction. Recognizing immunities for other members of government is just one step further: in present-day society, all cabinet members represent their countries in various meetings. If Foreign Ministers need immunities to perform their functions, why not grant immunities to other cabinet members as well? The International Court of Justice does not state this, but doesn't this flow from its reasoning leading to the conclusion that Foreign Ministers are immune? The rationale for assimilating Foreign Ministers with diplomatic agents and Heads of State, which is at the centre of the Court's reasoning, also exists for other Ministers who represent the State officially, for example, Ministers of Education who have to attend UNESCO conferences in New York or other Ministers receiving honorary doctorates abroad. *Male fide*

governments may appoint persons to cabinet posts in order to shelter them from prosecutions on charges of international crimes.

Judge Van den Wyngaert concludes by saying that the International Court of Justice, in its effort to close one *box of Pandora* for fear of chaos and abuse, may have opened another one: that of granting immunity and thus de facto impunity to an increasing number of government officials.

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137. ARMED ACTIVITIES ON THE TERRITORY OF THE CONGO (NEW APPLICATION: 2002) (DEMOCRATIC REPUBLIC OF THE CONGO *v.* RWANDA) (PROVISIONAL MEASURES)

Order of 10 July 2002

In an Order in the case concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo *v.* Rwanda), the Court rejected the request for the indication of provisional measures submitted by the Democratic Republic of the Congo (hereinafter "the Congo").

In its Order, the Court concludes that "[it] does not in the present case have the prima facie jurisdiction necessary to indicate those provisional measures requested by the Congo". The decision was taken by fourteen votes to two.

The Court also found, by fifteen votes to one, "that it cannot grant Rwanda's request that the case be removed from the List".

The Court was composed as follows: President Guillaume; Vice-President Shi; Judges Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby; Judges ad hoc Dugard, Mavungu; Registrar Couvreur.

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

"94. For these reasons,

THE COURT,

(1) By fourteen votes to two,

Rejects the request for the indication of provisional measures submitted by the Democratic Republic of the Congo on 28 May 2002;

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

AGAINST: Judge Elaraby; Judge ad hoc Mavungu;

(2) By fifteen votes to one,

Rejects the submissions by the Rwandese republic seeking the removal of the case from the Court's List;

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

AGAINST: Judge ad hoc Dugard."

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Judges Koroma, Higgins, Buergenthal and Elaraby appended declarations to the Order of the Court; Judges ad hoc Dugard and Mavungu appended separate opinions to the Order of the Court.

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Background information

In its Order, the Court recalls that, on 28 May 2002, the Congo had instituted proceedings against Rwanda in respect of a dispute concerning "massive, serious and flagrant violations of human rights and of international humanitarian law" alleged to have been committed "in breach of the 'International Bill of Human Rights', other relevant international instruments and mandatory resolutions of the United Nations Security Council". The Court recalls that, in the Application the Congo stated that "[the] flagrant and serious violations [of human rights and of international humanitarian law]" of which it complains "result from acts of armed aggression perpetrated by Rwanda on the territory of the Democratic Republic of the Congo in flagrant breach of the sovereignty and territorial integrity [of the latter], as guaranteed by the United Nations and OAU Charters".

The Court stresses that the Congo has recalled that it made a declaration recognizing the compulsory jurisdiction of the Court in accordance with Article 36, paragraph 2, of the Statute of the Court; and that it stated that the Rwandan Government "has made no such declaration of any sort".

The Court adds that referring to Article 36, paragraph 1, of the Statute, the Congo has relied, in order to found the jurisdiction of the Court, on Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination of 7 March 1966 (hereinafter the "Convention on Racial Discrimination"), Article 29, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women of 18 December

1979 (hereinafter the "Convention on Discrimination against Women"), Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 (hereinafter the "Genocide Convention"), Article 75 of the Constitution of the World Health Organization of 22 July 1946 (hereinafter the "WHO Constitution"), Article XIV, paragraph 2, of the Constitution of the United Nations Educational, Scientific and Cultural Organization of 16 November 1945 (hereinafter the "UNESCO Constitution") (as well as Article 9 of the Convention on the Privileges and Immunities of the Specialized Agencies of 21 November 1947, which is "also applicable to UNESCO"), Article 30, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (hereinafter the "Convention against Torture"), and Article 14, paragraph 1, of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971 (hereinafter the "Montreal Convention"). The Congo furthermore maintains that the 1969 Vienna Convention on the Law of Treaties gives the Court jurisdiction to settle disputes arising from the violation of peremptory norms (*jus cogens*) in the area of human rights, as those norms are reflected in a number of international instruments.

The Court recalls that on the same day the Congo had submitted a request for the indication of provisional measures.

Reasoning of the Court

In its Order, the Court first emphasizes that it "is deeply concerned by the deplorable human tragedy, loss of life, and enormous suffering in the east of the Democratic Republic of the Congo resulting from the continued fighting there". Mindful of the purposes and principles of the United Nations Charter and of its own responsibilities in the maintenance of peace and security under the Charter and its Statute, the Court "finds it necessary to emphasize that all parties to proceedings before it must act in conformity with their obligations pursuant to the United Nations Charter and other rules of international law, including humanitarian law". The Court considers that it "cannot in the present case over-emphasize the obligation borne by the Congo and Rwanda to respect the provisions of the Geneva Conventions of 12 August 1949 and of the first Protocol additional to those Conventions, of 8 June 1977, relating to the protection of victims of international armed conflicts, to which instruments both of them are parties".

The Court then points out that it "does not automatically have jurisdiction over legal disputes between States" and that "one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction". Moreover it cannot indicate provisional measures without its jurisdiction in the case being established prima facie (at first sight).

Jurisdiction of the Court

With regard to its jurisdiction, the Court observes that, in accordance with Article 36, paragraph 2, of the Statute, the Congo (then Zaire), by means of a declaration dated 8 February 1989, recognized the compulsory jurisdiction of the Court in relation to any State accepting the same obligation; that Rwanda on the other hand has not made such a declaration; that the Court accordingly will consider its prima facie jurisdiction solely on the basis of the treaties and conventions relied upon by the Congo pursuant to Article 36, paragraph 1, of the Statute, providing: "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force."

- The Convention against Torture

The Court notes that the Congo has been a party to that Convention since 1996, but that Rwanda stated that it is not, and has never been, party to the 1984 Convention against Torture. The Court finds that such is indeed the case.

- The Convention on Racial Discrimination

The Court first notes that both the Congo and Rwanda are parties to the Convention on Racial Discrimination; that however Rwanda's instrument of accession to the Convention includes a reservation reading as follows: "The Rwandese Republic does not consider itself as bound by article 22 [the dispute settlement clause] of the Convention." It also notes that in the present proceedings the Congo has challenged the validity of that reservation. The Court observes that the Convention on Racial Discrimination prohibits reservations incompatible with its object and purpose; that under Article 20, paragraph 2, of the Convention, "[a] reservation shall be considered incompatible ... if at least two-thirds of the States Parties to this Convention object to it"; that such has not been the case in respect of Rwanda's reservation concerning the jurisdiction of the Court; that that reservation does not appear incompatible with the object and purpose of the Convention; and that the Congo did not object to that reservation when it acceded to the Convention. The Court concludes that Rwanda's reservation is prima facie applicable.

- The Genocide Convention

The Court first notes that both the Congo and Rwanda are parties to the Genocide Convention; that however Rwanda's instrument of accession to the Convention, includes a reservation worded as follows: "The Rwandese Republic does not consider itself as bound by article IX [the dispute settlement clause] of the Convention." It also notes that in the present proceedings the Congo has challenged the validity of that reservation. The Court observes "that the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*" and that, as it already

had occasion to point out, "the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things" and that it does not follow from the mere fact that rights and obligations *erga omnes* are at issue in a dispute that the Court has jurisdiction to adjudicate upon that dispute. The Court then takes note of the fact that the Genocide Convention does not prohibit reservations; that the Congo did not object to Rwanda's reservation when it was made; and that that reservation does not bear on the substance of the law, but only on the Court's jurisdiction. The Court finds that that reservation therefore does not appear contrary to the object and purpose of the Convention.

- The Vienna Convention on the Law of Treaties

The Court considers that Article 66 of the Vienna Convention on the Law of Treaties must be read in conjunction with Article 65, entitled "Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty". It observes that the Congo does not maintain at the present time that there is a dispute, which could not be resolved under the procedure prescribed in Article 65 of the Vienna Convention, between it and Rwanda concerning a conflict between a treaty and a peremptory norm of international law; and that the object of Article 66 is not to allow for the substitution of the judicial settlement, arbitration and conciliation procedures under the Vienna Convention on the Law of Treaties for the settlement machinery for disputes relating to the interpretation or application of specific treaties, notably when a violation of those treaties has been alleged.

- The Convention on Discrimination against Women

The Court first notes that both the Congo and Rwanda are parties to the Convention on Discrimination against Women. It then considers that at this stage in the proceedings the Congo has not shown that its attempts to enter into negotiations or undertake arbitration proceedings with Rwanda concerned the application of Article 29 of the Convention on Discrimination against Women; and that neither has the Congo specified which rights protected by that Convention have allegedly been violated by Rwanda and should be the object of provisional measures. The Court concludes that the preconditions on the seisin of the Court set by Article 29 of the Convention therefore do not appear prima facie to have been satisfied.

- The WHO Constitution

The Court first notes that both the Congo and Rwanda are parties to the WHO Constitution and that both are thus members of that Organization. The Court considers however that at this stage in the proceedings the Congo has also not shown that the preconditions on the seisin of the Court set by Article 75 of the WHO Constitution have been satisfied; and that moreover an initial examination of that Constitution shows that Article 2 thereof, relied on by the Congo, places obligations on the Organization, not on the member States.

- The UNESCO Constitution

The Court notes that in its Application the Congo invokes Article I of the Constitution and maintains that "[o]wing to the war, the Democratic Republic of the Congo today is unable to fulfil its missions within UNESCO ...". It takes note of the fact that both the Congo and Rwanda are parties to the UNESCO Constitution.

The Court observes however that Article XIV, paragraph 2, provides for the referral, under the conditions established in that provision, of disputes concerning the UNESCO Constitution only in respect of the interpretation of that Constitution; that that does not appear to be the object of the Congo's Application; and that the Application does not therefore appear to fall within the scope of that Article.

- The Montreal Convention

The Court first notes that both the Congo and Rwanda are parties to the Montreal Convention. It considers that the Congo has not however asked the Court to indicate any provisional measure relating to the preservation of rights which it believes it holds under the Montreal Convention; and that accordingly the Court is not required, at this stage in the proceedings, to rule, even on a prima facie basis, on its jurisdiction under that Convention nor on the conditions precedent to the Court's jurisdiction contained therein.

Conclusions

The Court concludes that it follows from the preceding considerations taken together that the Court does not in the present case have the prima facie jurisdiction necessary to indicate those provisional measures requested by the Congo.

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However, the findings reached by the Court in the present proceedings in no way prejudge 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 they leave unaffected the right of the Governments of the Congo and of Rwanda to submit their arguments in respect of those questions; in the absence of a manifest lack of jurisdiction, the Court finds that it cannot grant Rwanda's request that the case be removed from the List.

The Court finally recalls that "there is a fundamental distinction between the question of the acceptance by a State of the Court's jurisdiction and the compatibility of particular acts with international law; the former requires consent; the latter question can only be reached when the Court deals with the merits after having established its jurisdiction and having heard full legal arguments by both parties".

It underlines that whether or not States accept the jurisdiction of the Court, they remain in any event responsible for acts attributable to them that violate

international law; that in particular they are required to fulfil their obligations under the United Nations Charter; that the Court cannot but note in this respect that the Security Council has adopted a great number of resolutions concerning the situation in the region, in particular resolutions 1234 (1999), 1291 (2000), 1304 (2000), 1316 (2000), 1323 (2000), 1332 (2000), 1341 (2001), 1355 (2001), 1376 (2001), 1399 (2002) and 1417 (2002); that the Security Council has demanded on many occasions that "all the parties to the conflict put an ... end to violations of human rights and international humanitarian law"; and that it has inter alia reminded "all parties of their obligations with respect to the security of civilian populations under the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949", and added that "all forces present on the territory of the Democratic Republic of the Congo are responsible for preventing violations of international humanitarian law in the territory under their control". The Court stresses the necessity for the Parties to these proceedings to use their influence to prevent the repeated grave violations of human rights and international humanitarian law which have been observed even recently.

Declaration of Judge Koroma

Judge Koroma voted in favour of the Order because, in his view, it has attempted to address some of the concerns at the heart of the request.

Referring to the allegations and contentions of each of the Parties, he observes that from the information submitted to the Court it is apparent that real, serious threats do exist to the population of the region concerned, including the threat to life.

Judge Koroma is aware that the Court has set out certain criteria to be satisfied before granting a request for the indication of provisional measures. Among these are that there must be prima facie or potential jurisdiction, urgency, and the risk of irreparable harm if an order is not granted. But these criteria, in his view, have to be considered in the context of Article 41, which authorizes the Court to "indicate", if it considers that the *circumstances* so require, any provisional measure which ought to be taken to preserve the respective rights of either party, and of the Court's role in maintaining international peace and security, including human security and the right to life.

In Judge Koroma's view, the Court, although it has been unable to grant the request for want of prima facie jurisdiction, has, in paragraphs 54, 55, 56 and 93 of the Order, rightly and judiciously expressed its deep concern over the deplorable human tragedy, loss of life and enormous suffering in the east of the Democratic Republic of the Congo resulting from the fighting there. It has also rightly emphasized that whether or not States accept the jurisdiction of the Court, they remain, in any event, responsible for acts attributable to them that violate international law and that they are required to fulfil their obligations under the United Nations Charter and in respect of the relevant Security Council resolutions.

Judge Koroma concludes by stating that, if ever a dispute warranted the indication of interim measures of protection, this is it. But he is of the opinion that, while it was not possible for the Court to grant the request owing to certain missing elements, the Court has, in accordance with its *obiter dicta* in the cited paragraphs, nevertheless discharged its responsibilities in maintaining international peace and security and preventing the aggravation of the dispute. The position taken by the Court can only be viewed as constructive, without however prejudging the merits of the case. It is a judicial position and it is in the interest of all concerned to hearken to the call of the Court.

Declaration of Judge Higgins

I do not agree with one of the limbs relied on by the Court in paragraph 79 of its Order. It is well established in international human rights case law that it is not necessary, for the purpose of establishing jurisdiction over the merits, for an applicant to identify which specific provisions of the treaty said to found jurisdiction are alleged to be breached. See, for example, the findings of the Human Rights Committee on *Stephens* v. *Jamaica* (United Nations, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 40* (A/51/40)); *B.d.B. et al. v. The Netherlands (ibid., Forty-fourth Session, Supplement No. 40* (A/45/40)); and many other cases. *A fortiori* is there no reason for the International Court of Justice, in establishing whether it has prima facie jurisdiction for purposes of the indication of provisional measures, to suggest a more stringent test. It should rather be for the Court itself, in accordance with the usual practice, to see whether the claims made by the Congo and the facts alleged could prima facie constitute violations of any particular clause in the Convention on the Elimination of All Forms of Discrimination against Women, the instrument relied on by the Congo as providing the Court with jurisdiction over the merits.

However, as I agree with the other elements in paragraph 79, and with the legal consequence that flows from them, I have voted in favour of the Order.

Declaration of Judge Buergenthal

While agreeing with the Court's decision, Judge Buergenthal disagrees with the inclusion in the Court's Order of the language found in its paragraphs 54-56 and 93. He does not object to the high-minded propositions they express, but considers that they deal with matters the Court has no jurisdiction to address once it has ruled that it lacks prima facie jurisdiction to issue the requested provisional measures.

In his view, the Court's function is to pronounce itself on matters within its jurisdiction and not to voice personal sentiments or to make comments, general or specific, which, despite their admittedly "feel-good" qualities, have no legitimate place in this Order.

Judge Buergenthal emphasizes that the Court's own "responsibilities in the maintenance of peace and security

under the Charter", which it invokes in paragraph 55, are not general. They are strictly limited to the exercise of its judicial functions in cases over which it has jurisdiction. Hence, when the Court, without having the requisite jurisdiction, makes pronouncements such as those found in paragraph 55, for example, which read like preambles to resolutions of the United Nations General Assembly or Security Council, it is not acting like a judicial body.

As for paragraph 56, Judge Buergenthal believes that the fact that this statement is even-handed in that it addresses both Parties to the case, does not make it any more appropriate than it would be if it had been addressed to only one of them. It is inappropriate, first, because the Court has no jurisdiction in this case to call on the States parties to respect the Geneva Conventions or the other legal instruments and principles mentioned in the paragraph. Second, since the request for preliminary measures by the Democratic Republic of the Congo sought a cessation by Rwanda of activities that might be considered to be violations of the Geneva Conventions, the Court's pronouncement in paragraph 56 can be deemed to lend some credence to this claim. The latter conclusion is strengthened by the language of paragraph 93, which bears close resemblance to some of the language the Court would most likely employ if it had granted the provisional measures request. The fact that the paragraph is addressed to both Parties is irrelevant, for in comparable circumstances the Court has issued provisional measures formulated in similar language addressed to both Parties although they were requested by only one of them.

Judge Buergenthal considers that, whether intended or not, the Court's pronouncements, particularly those in paragraphs 56 and 93, might be deemed to lend credence to the factual allegations submitted by the party seeking the provisional measures. In the future, they might also encourage States to file provisional measures requests, knowing that, even though they would be unable to sustain the burden of demonstrating the requisite prima facie jurisdiction, they would obtain from the Court some pronouncements that could be interpreted as supporting their claim against the other party.

Declaration of Judge Elaraby

1. He voted against the rejection of the request for the indication of provisional measures submitted by the Democratic Republic of the Congo, principally because, in accordance with its Statute and its present jurisprudence, the Court should, in principle grant a request for provisional measures once the requirements of urgency on the one hand and likelihood of irreparable damage to the rights of one or both parties to a dispute, on the other, have been established. He is of the opinion that the Court has, under Article 41 of the Statute, a wide-ranging power of discretion to indicate provisional measures.

The jurisprudence of the Court has progressively, albeit gradually, advanced from its earlier strict insistence on established jurisdiction to acceptance of prima facie jurisdiction as the threshold for the exercise of the Court's powers under Article 41 of the Statute. This progressive shift has not, in his view, been reflected in the Order.

2. His reading of the two subparagraphs together convinces him that the Court is vested with a wide scope of discretion to decide on the circumstances warranting the indication of provisional measures. The reference to the Security Council underlines the prominence of the link between the Court and the Council in matters related to the maintenance of international peace and security. The Statute moreover does not attach additional conditions to the authority of the Court to grant provisional measures. In point of fact, the jurisdiction of the Court need not be established at this early stage of the proceedings.

3. In his view, the Montreal Convention should have been regarded as a suitable instrumental basis to provide a prima facie jurisdiction for the indication of provisional measures.

4. He is of the opinion that the circumstances of the case reflect an urgent need to protect the rights and interests of the Democratic Republic of the Congo.

Separate opinion of Judge Dugard

In his separate opinion Judge Dugard endorses the Court's Order that the Congo has failed to show, prima facie, a basis on which the jurisdiction of the Court might be established and that, as a consequence, its request for provisional measures should be rejected. He disagrees, however, with the Court's Order that the case should not be removed from its List.

Judge Dugard maintains that a case should be removed from the Court's List where there is no reasonable possibility that the applicant might in future be able to establish the jurisdiction of the Court in the dispute submitted to it on the basis of the treaties invoked for jurisdiction, on the ground that in such a case there is a manifest lack of jurisdiction — the test employed by the Court in previous decisions for moving a case from its List.

An examination of the treaties invoked by the Congo to found jurisdiction in this case leads him to conclude that they manifestly cannot provide a basis for jurisdiction. Consequently, he maintains that the case should have been removed from the List.

Judge Dugard warns that, as a result of the finding of the Court in the *LaGrand* case in 2001 that an Order for provisional measures is legally binding, there is a likelihood that the Court will be inundated with requests for provisional measures. In order to guard against an abuse of this procedure the Court should adopt a strict approach to applications in which the basis for jurisdiction is manifestly unfounded by removing such cases from the List.

Judge Dugard expresses his support for the general comments made by the Court on the tragic situation in the eastern Congo. He stresses that these comments deploring the suffering of people in the eastern Congo resulting from the conflict in that region and calling upon States to act in conformity with international law are addressed to both

Rwanda and the Congo, and in no way prejudge the issues in this case.

Separate opinion of Judge Mavungu

Judge Mavungu approves of the general terms of the Order of the Court. However, owing to the nature of the dispute, the Court, in his view, could have prescribed provisional measures notwithstanding the narrowness of the bases of the Court's jurisdiction.

His opinion addresses two main questions: the basis of the Court's jurisdiction and the requirements governing the indication of provisional measures. In respect of the first question, he notes that the Democratic Republic of the Congo advanced several legal grounds to establish the Court's jurisdiction: the Congo's February 1989 declaration recognizing the compulsory jurisdiction of the Court, certain compromissory clauses and norms of jus cogens. Several of the grounds asserted by the Applicant could not found the jurisdiction of the Court: the Congo's 1989 declaration, the UNESCO Constitution of 1946 and the 1984 Convention against Torture. In accordance with the Court's settled jurisprudence, its jurisdiction can be established only on the basis of States' consent.

On the other hand, he considers that the Court's jurisdiction could be founded prima facie under the compromissory clauses appearing in the WHO Constitution, the Montreal Convention of 1971 and the 1979 Convention on Discrimination against Women. The Rwandese Republic's reservation in respect of the jurisdictional clause in Article IX of the 1948 Genocide Convention is, in his view, contrary to the object and purpose of that Convention.

In accordance with Article 41 of the Statute and Article 73 of the Rules of Court, as well as the Court's well-settled jurisprudence, the granting of provisional measures is dependent on various factors: urgency, preservation of the rights of the parties, non-aggravation of the dispute and prima facie jurisdiction. He believes that those conditions have been satisfied in the present case and that this should have led the Court to indicate several provisional measures.

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138. LAND AND MARITIME BOUNDARY BETWEEN CAMEROON AND NIGERIA (CAMEROON *v.* NIGERIA: EQUATORIAL GUINEA INTERVENING) (MERITS)

Judgment of 10 October 2002

In its Judgment on the case concerning Land and Maritime Boundary between Cameroon and Nigeria, the Court fixed the course of the land and maritime boundaries between Cameroon and Nigeria.

The Court requested Nigeria expeditiously and without condition to withdraw its administration and its military or police forces from the area of Lake Chad falling within Cameroonian sovereignty and from the Bakassi Peninsula. It also requested Cameroon expeditiously and without condition to withdraw any administration or military or police forces which may be present along the land boundary from Lake Chad to the Bakassi Peninsula on territories which pursuant to the judgment fall within the sovereignty of Nigeria. The latter has the same obligation in regard to territories in that area which fall within the sovereignty of Cameroon.

The Court took note of Cameroon's undertaking, given the hearings, to "continue to afford protection to Nigerians living in the [Bakassi] Peninsula and in the Lake Chad area".

Finally, the Court rejected Cameroon's submissions regarding the State responsibility of Nigeria. It likewise rejected Nigeria's counterclaims.

The Court was composed as follows: President Guillaume; Vice-President Shi; Judges Oda, Ranjeva, Herczegh, Fleischhauer, Koroma, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby; Judges ad hoc Mbaye, Ajibola; Registrar Couvreur.

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

"325. For these reasons,

THE COURT,

I. (A) By fourteen votes to two,

Decides that the boundary between the Republic of Cameroon and the Federal Republic of Nigeria in the Lake Chad area is delimited by the Thomson-Marchand Declaration of 1929-1930, as incorporated in the Henderson-Fleuriau Exchange of Notes of 1931;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Oda, Ranjeva, Herczegh, Fleischhauer, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby; Judge ad hoc Mbaye;

AGAINST: Judge Koroma; Judge ad hoc Ajibola;

(B) By fourteen votes to two,

Decides that the line of the boundary between the Republic of Cameroon and the Federal Republic of Nigeria in the Lake Chad area is as follows:

From a tripoint in Lake Chad lying at 14°04'59"9999 longitude east and 13°05' latitude north, in a straight line to the mouth of the River Ebeji, lying at 14°12'12" longitude east and 12°32'17" latitude north; and from there in a straight line to the point where the River Ebeji

bifurcates, located at 14°12'03" longitude east and 12°30'14" latitude north;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Oda, Ranjeva, Herczegh, Fleischhauer, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby; Judge ad hoc Mbaye;

AGAINST: Judge Koroma; Judge ad hoc Ajibola;

II. (A) By fifteen votes to one,

Decides that the land boundary between the Republic of Cameroon and the Federal Republic of Nigeria is delimited, from Lake Chad to the Bakassi Peninsula, by the following instruments:

(i) from the point where the River Ebeji bifurcates as far as Tamnyar Peak, by paragraphs 2 to 60 of the Thomson-Marchand Declaration of 1929-1930, as incorporated in the Henderson-Fleuriau Exchange of Notes of 1931;

(ii) from Tamnyar Peak to pillar 64 referred to in Article XII of the Anglo-German Agreement of 12 April 1913, by the British Order in Council of 2 August 1946;

(iii) from pillar 64 to the Bakassi Peninsula, by the Anglo-German Agreements of 11 March and 12 April 1913;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Oda, Ranjeva, Herczegh, Fleischhauer, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby; Judges ad hoc Mbaye, Ajibola;

AGAINST: Judge Koroma;

(B) Unanimously,

Decides that the aforesaid instruments are to be interpreted in the manner set out in paragraphs 91, 96, 102, 114, 119, 124, 129, 134, 139, 146, 152, 155, 160, 168, 179, 184 and 189 of the present Judgment;

III. (A) By thirteen votes to three,

Decides that the boundary between the Republic of Cameroon and the Federal Republic of Nigeria in Bakassi is delimited by Articles XVIII to XX of the Anglo-German Agreement of 11 March 1913;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Oda, Ranjeva, Herczegh, Fleischhauer, Higgins, Parra-Aranguren, Kooijmans, Al-Khasawneh, Buergenthal, Elaraby; Judge ad hoc Mbaye;

AGAINST: Judges Koroma, Rezek; Judge ad hoc Ajibola;

(B) By thirteen votes to three,

Decides that sovereignty over the Bakassi Peninsula lies with the Republic of Cameroon;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Oda, Ranjeva, Herczegh, Fleischhauer, Higgins, Parra-Aranguren, Kooijmans, Al-Khasawneh, Buergenthal, Elaraby; Judge ad hoc Mbaye;

AGAINST: Judges Koroma, Rezek; Judge ad hoc Ajibola;

(C) By thirteen votes to three,

Decides that the boundary between the Republic of Cameroon and the Federal Republic of Nigeria in Bakassi follows the thalweg of the Akpakorum (Akwayafe) River, dividing the Mangrove Islands near Ikang in the way shown on map TSGS 2240, as far as the straight line joining Bakassi Point and King Point;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Oda, Ranjeva, Herczegh, Fleischhauer, Higgins, Parra-Aranguren, Kooijmans, Al-Khasawneh, Buergenthal, Elaraby; Judge ad hoc Mbaye;

AGAINST: Judges Koroma, Rezek; Judge ad hoc Ajibola;

IV. (A) By thirteen votes to three,

Finds, having addressed Nigeria's eighth preliminary objection, which it declared in its Judgment of 11 June 1998 not to have an exclusively preliminary character in the circumstances of the case, that it has jurisdiction over the claims submitted to it by the Republic of Cameroon regarding the delimitation of the maritime areas appertaining respectively to the Republic of Cameroon and to the Federal Republic of Nigeria, and that those claims are admissible;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Ranjeva, Herczegh, Fleischhauer, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby; Judge ad hoc Mbaye;

AGAINST: Judges Oda, Koroma; Judge ad hoc Ajibola;

(B) By thirteen votes to three,

Decides that, up to point G below, the boundary of the maritime areas appertaining respectively to the Republic of Cameroon and to the Federal Republic of Nigeria takes the following course:

- starting from the point of intersection of the centre of the navigable channel of the Akwayafe River with the straight line joining Bakassi Point and King Point as referred to in point III (C) above, the boundary follows the "compromise line" drawn jointly at Yaoundé on 4 April 1971 by the Heads of State of Cameroon and Nigeria on British Admiralty Chart 3433 (Yaoundé II Declaration) and passing through 12 numbered points, whose coordinates are as follows:

	Longitude	*Latitude*
point 1:	8° 30' 44" E,	4° 40' 28" N
point 2:	8° 30' 00" E,	4° 40' 00" N
point 3:	8° 28' 50" E,	4° 39' 00" N
point 4:	8° 27' 52" E,	4° 38' 00" N
point 5:	8° 27' 09" E,	4° 37' 00" N
point 6:	8° 26' 36" E,	4° 36' 00" N
point 7:	8° 26' 03" E,	4° 35' 00" N
point 8:	8° 25' 42" E,	4° 34' 18" N
point 9:	8° 25' 35" E,	4° 34' 00" N
point 10:	8° 25' 08" E,	4° 33' 00" N
point 11:	8° 24' 47" E,	4° 32' 00" N
point 12:	8° 24' 38" E,	4° 31' 26" N;

- from point 12, the boundary follows the line adopted in the Declaration signed by the Heads of State of Cameroon and Nigeria at Maroua on 1 June 1975 (Maroua Declaration), as corrected by the exchange of letters between the said Heads of State of 12 June and 17 July 1975; that line passes through points A to G, whose coordinates are as follows:

	Longitude	*Latitude*
point A:	8° 24' 24" E,	4° 31' 30" N
point A1:	8° 24' 24" E,	4° 31' 20" N
point B:	8° 24' 10" E,	4° 26' 32" N
point C:	8° 23' 42" E,	4° 23' 28" N
point D:	8° 22' 41" E,	4° 20' 00" N
point E:	8° 22' 17" E,	4° 19' 32" N
point F:	8° 22' 19" E,	4° 18' 46" N
point G:	8° 22' 19" E,	4° 17' 00" N;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Oda, Ranjeva, Herczegh, Fleischhauer, Higgins, Parra-Aranguren, Kooijmans, Al-Khasawneh, Buergenthal, Elaraby; Judge ad hoc Mbaye;

AGAINST: Judges Koroma, Rezek; Judge ad hoc Ajibola;

(C) Unanimously,

Decides that, from point G, the boundary line between the maritime areas appertaining respectively to the Republic of Cameroon and to the Federal Republic of Nigeria follows a loxodrome having an azimuth of 270° as far as the equidistance line passing through the midpoint of the line joining West Point and East Point; the boundary meets this equidistance line at a point X, with coordinates 8°21'20" longitude east and 4°17'00" latitude north;

(D) Unanimously,

Decides that, from point X, the boundary between the maritime areas appertaining respectively to the Republic of Cameroon and to the Federal Republic of Nigeria follows a loxodrome having an azimuth of 187°52'27";

V. (A) By fourteen votes to two,

Decides that the Federal Republic of Nigeria is under an obligation expeditiously and without condition to withdraw its administration and its military and police forces from the territories which fall within the sovereignty of the Republic of Cameroon pursuant to points I and III of this operative paragraph;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Oda, Ranjeva, Herczegh, Fleischhauer, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby; Judge ad hoc Mbaye;

AGAINST: Judge Koroma; Judge ad hoc Ajibola;

(B) Unanimously,

Decides that the Republic of Cameroon is under an obligation expeditiously and without condition to withdraw any administration or military or police forces which may be present in the territories which fall within the sovereignty of the Federal Republic of Nigeria pursuant to point II of this operative paragraph. The Federal Republic of Nigeria has the same obligation in respect of the territories which fall within the sovereignty of the Republic of Cameroon pursuant to point II of this operative paragraph;

(C) By fifteen votes to one,

Takes note of the commitment undertaken by the Republic of Cameroon at the hearings that, "faithful to its traditional policy of hospitality and tolerance", it "will continue to afford protection to Nigerians living in the [Bakassi] Peninsula and in the Lake Chad area";

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Oda, Ranjeva, Herczegh, Fleischhauer, Koroma, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby; Judges ad hoc Mbaye, Ajibola;

AGAINST: Judge Parra-Aranguren;

(D) Unanimously,

Rejects all other submissions of the Republic of Cameroon regarding the State responsibility of the Federal Republic of Nigeria;

(E) Unanimously,

Rejects the counter-claims of the Federal Republic of Nigeria."

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* *

Judge Oda appended a declaration to the Judgment of the Court; Judge Ranjeva appended a separate opinion to the Judgment of the Court; Judge Herczegh appends a declaration to the Judgment of the Court; Judge Koroma appended a dissenting opinion to the Judgment of the Court; Judge Parra-Aranguren appended a separate opinion to the Judgment of the Court; Judge Rezek appended a declaration to the Judgment of the Court; Judge Al-Khasawneh and Judge ad hoc Mbaye append separate opinions to the Judgment of the Court; Judge ad hoc Ajibola appends a dissenting opinion to the Judgment of the Court.

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I. *History of the proceedings and submissions of the Parties*
(paras. 1-29)

On 29 March 1994 Cameroon filed an Application instituting proceedings against Nigeria concerning a dispute described as "relat[ing] essentially to the question of sovereignty over the Bakassi Peninsula". Cameroon further stated in its Application 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". Consequently, it requested the Court, "[i]n 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".

In order to found the jurisdiction of the Court, the Application relied on the declarations made by the two Parties accepting the jurisdiction of the Court under Article 36, paragraph 2, of the Statute of the Court.

On 6 June 1994 Cameroon filed an Additional Application "for the purpose of extending the subject of the dispute" to a further dispute described as "relat[ing] essentially to the question of sovereignty over a part of the territory of Cameroon in the area of Lake Chad". 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".

After at a meeting held by the President of the Court with the representatives of the Parties, the Agent of Nigeria had declared that his Government did not object to the Additional Application being treated as an amendment to the initial Application so that the Court might examine the whole in a single case, the Court, by an Order of 16 June 1994, indicated that it had no objection to such a procedure and fixed the time limits for the filing of written proceedings.

Within the time limit fixed for the filing of its Counter-Memorial, Nigeria filed preliminary objections to the jurisdiction of the Court and the admissibility of the Application.

In its Judgment of 11 June 1998 on the preliminary objections raised by Nigeria the Court found that it had jurisdiction to adjudicate upon the merits of the dispute and that Cameroon's requests were admissible. The Court rejected seven of the preliminary objections raised by Nigeria and declared that the eighth did not have an exclusively preliminary character, and that it would rule on it in the Judgment to be rendered on the merits.

On 28 October 1998 Nigeria submitted a request for interpretation of the Judgment delivered by the Court on 11 June 1998 on the preliminary objections; that request became a new case, separate from the present proceedings. By Judgment dated 25 March 1999 the Court decided that Nigeria's request for interpretation was inadmissible.

Nigeria's Counter-Memorial, filed within the extended time limit of 31 May 1999, included counterclaims.

By an Order of 30 June 1999 the Court declared Nigeria's counterclaims admissible, and fixed time limits for the subsequent procedure.

On 30 June 1999 the Republic of Equatorial Guinea filed in the Registry an Application for permission to intervene in the case pursuant to Article 62 of the Statute. According to that Application, the object of the intervention sought was to "protect the legal rights of the Republic of Equatorial Guinea in the Gulf of Guinea by all legal means available" and to "inform the Court of the nature of the legal rights and interests of Equatorial Guinea that could be affected by the Court's decision in the light of the maritime boundary claims advanced by the parties to the case before the Court". Equatorial Guinea further indicated that it "d[id] *not* seek to become a party to the case".

By an Order of 21 October 1999 the Court, considering that Equatorial Guinea had sufficiently established that it had an interest of a legal nature which could be affected by any judgment which the Court might hand down for the purpose of determining the maritime boundary between Cameroon and Nigeria, authorized it to intervene in the case to the extent, in the manner and for the purposes set out in its Application and fixed time limits for the subsequent intervention proceedings (Art. 85, para. 1, of the Rules of Court).

Public hearings were held from 18 February to 21 March 2002.

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

On behalf of the Government of Cameroon,

"Pursuant to the provisions of Article 60, paragraph 2, of the Rules of Court the Republic of Cameroon has the honour to request that the International Court of Justice be pleased to adjudge and declare:

(*a*) That the land boundary between Cameroon and Nigeria takes the following course:

- from the point designated by the coordinates 13°05' north and 14°05' east, the boundary follows a straight line as far as the mouth of the Ebeji, situated at the point located at the coordinates 12°32'17" north and 14°12'12" east, as defined within the framework of the LCBC and constituting an authoritative interpretation of the Milner-Simon Declaration of 10 July 1919 and the Thomson-Marchand Declarations of 29 December 1929 and 31 January 1930, as confirmed by the Exchange of Letters of 9 January 1931; in the alternative, the mouth of the Ebeji is situated at the point located at the coordinates 12°31'12" north and 14°11'48" east;
- from that point it follows the course fixed by those instruments as far as the 'very prominent peak' described in paragraph 60 of the Thomson-Marchand Declaration and called by the usual name of 'Mount Kombon';
- from 'Mount Kombon' the boundary then runs to 'Pillar 64' mentioned in paragraph 12 of the Anglo-German Agreement of Obokum of 12 April 1913 and follows, in that sector, the course described in Section 6 (1) of the British Nigeria (Protectorate and Cameroons) Order in Council of 2 August 1946;
- from Pillar 64 it follows the course described in paragraphs 13 to 21 of the Obokum Agreement of 12 April 1913 as far as Pillar 114 on the Cross River;
- thence, as far as the intersection of the straight line from Bakassi Point to King Point with the centre of the navigable channel of the Akwayafe, the boundary is determined by paragraphs XVI to XXI of the Anglo-German Agreement of 11 March 1913.

(*b*) That in consequence, inter alia, sovereignty over the peninsula of Bakassi and over the disputed parcel

occupied by Nigeria in the area of Lake Chad, in particular over Darak and its region, is Cameroonian.

(*c*) That the boundary of the maritime areas appertaining respectively to the Republic of Cameroon and to the Federal Republic of Nigeria takes the following course:

- from the intersection of the straight line from Bakassi Point to King Point with the centre of the navigable channel of the Akwayafe to point '12', that boundary is confirmed by the 'compromise line' entered on British Admiralty Chart No. 3433 by the Heads of State of the two countries on 4 April 1971 (Yaoundé II Declaration) and, from that point 12 to point 'G', by the Declaration signed at Maroua on 1 June 1975;
- from point G the equitable line follows the direction indicated by points G, H (coordinates 8°21'16" east and 4°17' north), I (7°55'40" east and 3°46' north), J (7°12'08" east and 3°12'35" north), K (6°45'22" east and 3°01''05" north), and continues from K up to the outer limit of the maritime zones which international law places under the respective jurisdiction of the two Parties.

(*d*) That in attempting to modify unilaterally and by force the courses of the boundary defined above under (*a*) and (*c*), the Federal Republic of Nigeria has violated and is violating the fundamental principle of respect for frontiers inherited from colonization (*uti possidetis juris*), as well as its legal obligations concerning the land and maritime delimitation.

(*e*) That by using force against the Republic of Cameroon and, in particular, by militarily occupying parcels of Cameroonian territory in the area of Lake Chad and the Cameroonian peninsula of Bakassi, and by making repeated incursions throughout the length of the boundary between the two countries, the Federal Republic of Nigeria has violated and is violating its obligations under international treaty law and customary law.

(*f*) That the Federal Republic of Nigeria has the express duty of putting an end to its administrative and military presence in Cameroonian territory and, in particular, of effecting an immediate and unconditional evacuation of its troops from the occupied area of Lake Chad and from the Cameroonian peninsula of Bakassi and of refraining from such acts in the future.

(*g*) That in failing to comply with the Order for the indication of provisional measures rendered by the Court on 15 March 1996 the Federal Republic of Nigeria has been in breach of its international obligations.

(*h*) That the internationally wrongful acts referred to above and described in detail in the written pleadings and oral argument of the Republic of Cameroon engage the responsibility of the Federal Republic of Nigeria.

(*i*) That, consequently, on account of the material and moral injury suffered by the Republic of Cameroon reparation in a form to be determined by the Court is due from the Federal Republic of Nigeria to the Republic of Cameroon.

The Republic of Cameroon further has the honour to request the Court to permit it, at a subsequent stage of the proceedings, to present an assessment of the amount of compensation due to it as reparation for the injury suffered by it as a result of the internationally wrongful acts attributable to the Federal Republic of Nigeria.

The Republic of Cameroon also asks the Court to declare that the counter-claims of the Federal Republic of Nigeria are unfounded both in fact and in law, and to reject them."

On behalf of the Government of Nigeria,

"The Federal Republic of Nigeria respectfully requests that the Court should

1. *as to the Bakassi Peninsula*, adjudge and declare:

(*a*) that sovereignty over the Peninsula is vested in the Federal Republic of Nigeria;

(*b*) that Nigeria's sovereignty over Bakassi extends up to the boundary with Cameroon described in Chapter 11 of Nigeria's Counter-Memorial;

2. *as to Lake Chad*, adjudge and declare:

(*a*) that the proposed delimitation and demarcation under the auspices of the Lake Chad Basin Commission, not having been accepted by Nigeria, is not binding upon it;

(*b*) that sovereignty over the areas in Lake Chad defined in paragraph 5.9 of Nigeria's Rejoinder and depicted in Figs. 5.2 and 5.3 facing page 242 (and including the Nigerian settlements identified in paragraph 4.1 of Nigeria's Rejoinder) is vested in the Federal Republic of Nigeria;

(*c*) that in any event the process which has taken place within the framework of the Lake Chad Basin Commission, and which was intended to lead to an overall delimitation and demarcation of boundaries on Lake Chad, is legally without prejudice to the title to particular areas of the Lake Chad region inhering in Nigeria as a consequence of the historical consolidation of title and the acquiescence of Cameroon;

3. *as to the central sectors of the land boundary*, adjudge and declare:

(*a*) that the Court's jurisdiction extends to the definitive specification of the land boundary between Lake Chad and the sea;

(*b*) that the mouth of the Ebeji, marking the beginning of the land boundary, is located at the point where the north-east channel of the Ebeji flows into the feature marked 'Pond' on the map shown as Fig. 7.1 of Nigeria's Rejoinder, which location is at latitude 12°31'45" N, longitude 14°13'00" E (Adindan Datum);

(*c*) that subject to the interpretations proposed in Chapter 7 of Nigeria's Rejoinder, the land boundary between the mouth of the Ebeji and the point on the thalweg of the Akpa Yafe which is opposite the midpoint of the mouth of Archibong Creek is delimited

by the terms of the relevant boundary instruments, namely:

(i) paragraphs 2-61 of the Thomson-Marchand Declaration, confirmed by the Exchange of Letters of 9 January 1931;

(ii) the Nigeria (Protectorate and Cameroons) Order in Council of 2 August 1946 (Section 6 (1) and the Second Schedule thereto);

(iii) paragraphs 13-21 of the Anglo-German Demarcation Agreement of 12 April 1913; and

(iv) Articles XV to XVII of the Anglo-German Treaty of 11 March 1913; and

(*d*) that the interpretations proposed in Chapter 7 of Nigeria's Rejoinder, and the associated action there identified in respect of each of the locations where the delimitation in the relevant boundary instruments is defective or uncertain, are confirmed;

4. *as to the maritime boundary*, adjudge and declare:

(*a*) that the Court lacks jurisdiction over Cameroon's maritime claim from the point at which its claim line enters waters claimed against Cameroon by Equatorial Guinea, or alternatively that Cameroon's claim is inadmissible to that extent;

(*b*) that Cameroon's claim to a maritime boundary based on the global division of maritime zones in the Gulf of Guinea is inadmissible, and that the parties are under an obligation, pursuant to Articles 74 and 83 of the United Nations Law of the Sea Convention, to negotiate in good faith with a view to agreeing on an equitable delimitation of their respective maritime zones, such delimitation to take into account, in particular, the need to respect existing rights to explore and exploit the mineral resources of the continental shelf, granted by either party prior to 29 March 1994 without written protest from the other, and the need to respect the reasonable maritime claims of third States;

(*c*) in the alternative, that Cameroon's claim to a maritime boundary based on the global division of maritime zones in the Gulf of Guinea is unfounded in law and is rejected;

(*d*) that, to the extent that Cameroon's claim to a maritime boundary may be held admissible in the present proceedings, Cameroon's claim to a maritime boundary to the west and south of the area of overlapping licenses, as shown in Fig. 10.2 of Nigeria's Rejoinder, is rejected;

(*e*) that the respective territorial waters of the two States are divided by a median line boundary within the Rio del Rey;

(*f*) that, beyond the Rio del Rey, the respective maritime zones of the parties are to be delimited by a line drawn in accordance with the principle of equidistance, until the approximate point where that line meets the median line boundary with Equatorial Guinea, i.e. at approximately 4°6' N, 8°30' E;

5. *as to Cameroon's claims of State responsibility*, adjudge and declare:

that, to the extent to which any such claims are still maintained by Cameroon, and are admissible, those claims are unfounded in fact and law; and,

6. *as to Nigeria's counterclaims* as specified in part VI of Nigeria's Counter-Memorial and in Chapter 18 of Nigeria's Rejoinder, adjudge and declare:

that Cameroon bears responsibility to Nigeria in respect of each of those claims, the amount of reparation due therefor, if not agreed between the parties within six months of the date of judgment, to be determined by the Court in a further judgment."

At the end of the oral observations submitted by it with respect to the subject matter of the intervention in accordance with Article 85, paragraph 3, of the Rules of Court, Equatorial Guinea stated inter alia:

"[W]e ask the Court not to delimit a maritime boundary between Cameroon and Nigeria in areas lying closer to Equatorial Guinea than to the coasts of the two Parties or to express any opinion which could prejudice our interests in the context of our maritime boundary negotiations with our neighbours ... Safeguarding the interests of the third State in these proceedings means that the delimitation between Nigeria and Cameroon decided by the Court must necessarily remain to the north of the median line between Equatorial Guinea's Bioko Island and the mainland."

Geographical context
(para. 30)

The Court subsequently describes the geographical context of the dispute as follows:

Cameroon and Nigeria are States situated on the west coast of Africa. Their land boundary extends from Lake Chad in the north to the Bakassi Peninsula in the south. Their coastlines are adjacent and are washed by the waters of the Gulf of Guinea.

Four States border Lake Chad: Cameroon, Chad, Niger and Nigeria. The waters of the lake have varied greatly over time.

In its northern part, the land boundary between Cameroon and Nigeria passes through hot dry plains around Lake Chad, at an altitude of about 300 m. It then passes through mountains, cultivated high ground or pastures, watered by various rivers and streams. It then descends in stages to areas of savannah and forest until it reaches the sea.

The coastal region where the southern part of the land boundary ends is the area of the Bakassi Peninsula. This peninsula, situated in the hollow of the Gulf of Guinea, is bounded by the River Akwayafe to the west and by the Rio del Rey to the east. It is an amphibious environment, characterized by an abundance of water, fish stocks and mangrove vegetation. The Gulf of Guinea, which is concave in character at the level of the Cameroonian and Nigerian coastlines, is bounded by other States, in particular by

Equatorial Guinea, whose Bioko Island lies opposite the Parties' coastlines.

Historical background
(paras. 31-38)

The Court then observes that the dispute between the Parties as regards their land boundary falls within an historical framework marked initially, in the nineteenth and early twentieth centuries, by the actions of the European Powers with a view to the partitioning of Africa, followed by changes in the status of the relevant territories under the League of Nations mandate system, then the United Nations trusteeships, and finally by the territories' accession to independence. This history is reflected in a number of conventions and treaties, diplomatic exchanges, certain administrative acts, maps of the period and various documents, which have been supplied to the Court by the Parties.

The delimitation of the Parties' maritime boundary is an issue of more recent origin, the history of which likewise involves various international instruments.

The Court then gives some particulars of the principal instruments which are relevant for purposes of determining the course of the land and maritime boundary between the Parties.

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Having described the geographical and historical background to the dispute, the Court addresses the delimitation of the different sectors of the boundary between Cameroon and Nigeria. It begins by defining the boundary line in the Lake Chad area. It then determines the line from Lake Chad to the Bakassi Peninsula, before examining the question of the boundary in Bakassi and of sovereignty over the peninsula. It then addresses the question of the delimitation between the two States' respective maritime areas. The last part of the Judgment is devoted to the issues of State responsibility raised by the Parties.

Delimitation of the boundary line in the Lake Chad area
(paras. 40-70)

Since Cameroon and Nigeria disagree on the existence of a definitive delimitation in the Lake Chad area, the Court first examines whether the 1919 Milner-Simon Declaration and the subsequent instruments which bear on delimitation in this area have established a frontier that is binding on the Parties. The Court subsequently addresses the argument of Nigeria based on the historical consolidation of its claimed title.

Whether a frontier binding on the Parties has been established
(paras. 41-55)

The Court recalls that Cameroon contends that the boundary in the Lake Chad area runs from the point designated by the coordinates 13°05' N and 14°05' E in a straight line to the mouth of the Ebeji. Cameroon regards the governing instruments as the Milner-Simon Declaration of 1919, and the Thomson-Marchand Declaration of 1929-1930, as incorporated in the 1931 Henderson-Fleuriau Exchange of Notes. Nigeria, on the other hand, argues that there is not a fully delimited boundary in the Lake Chad area and that, through historical consolidation of title and the acquiescence of Cameroon, Nigeria has title over the areas, including 33 named settlements, depicted in its Rejoinder.

The Court recalls that in the late nineteenth and early twentieth centuries the colonial boundaries in the Lake Chad area had been the subject of a series of bilateral agreements entered into between Germany, France and Great Britain. After the First World War a strip of territory to the east of the western frontier of the former German Cameroon became the British Mandate over the Cameroons. It was thus necessary to re-establish a boundary, commencing in the lake itself, between the newly created British and French mandates. This was achieved through the Milner-Simon Declaration of 1919, which has the status of an international agreement. By this Declaration, France and Great Britain agreed:

> "to determine the frontier, separating the territories of the Cameroons placed respectively under the authority of their Governments, as it is traced on the map Moisel 1:300,000, annexed to the present declaration and defined in the description in three articles also annexed hereto".

No definite tripoint in Lake Chad could be determined from previous instruments, on the basis of which it might be located either at 13°00' or at 13°05' north, whilst the meridian of longitude was described simply as situated "35' east of the centre of Kukawa". These aspects were clarified and rendered more precise by the Milner-Simon Declaration, which provided:

> "The frontier will start from the meeting-point of the three old British, French and German frontiers situated in Lake Chad in latitude 13°05' N and in approximately longitude 14°05' E of Greenwich.
>
> Thence the frontier would be determined as follows:
>
> 1. A straight line to the mouth of the Ebeji; ..."

The Moisel 1:300,000 map was stated to be the map "to which reference is made in the description of the frontier" and was annexed to the Declaration; a further map of the Cameroons, scale 1:2,000,000, was attached "to illustrate the description of the ... frontier".

The Court observes that Article 1 of the Mandate conferred on Great Britain by the League of Nations confirmed the line specified in the Milner-Simon Declaration; the entitlement provided for in the mandate, to make by mutual agreement, modest alterations to the line, either by reason of any shown inaccuracies of the Moisel map or of the interests of the inhabitants, was already provided for in the Milner-Simon Declaration. This, together with the line itself, was approved by the Council of the League of Nations. In the Court's view, these provisions

in no way suggest a frontier line that is not fully delimited. The Court further considers that "delimitation on the spot of this line ... in accordance with the provisions of the said Declaration" is a clear reference to demarcation notwithstanding the terminology chosen. Also carried forward from the Milner-Simon Declaration was the idea of a boundary commission. The anticipated detailed demarcation by this Commission equally presupposes a frontier already regarded as essentially delimited.

Although the two Mandatory Powers did not in fact "delimit on the spot" in Lake Chad or the vicinity, they did continue in various sectors of the frontier to make the agreement as detailed as possible. Thus the Thomson-Marchand Declaration of 1929-1930, later approved and incorporated in the Henderson-Fleuriau Exchange of Notes of 1931, described the frontier separating the two mandated territories in considerably more detail than hitherto. The Court considers that the fact that this Declaration and Exchange of Notes were preliminary to the future task of demarcation by a boundary commission does not mean, as Nigeria claims, that the 1931 Agreement was merely "programmatic" in nature. The Court further points out that the Thomson-Marchand Declaration, as approved and incorporated in the Henderson-Fleuriau Exchange of Notes, has the status of an international agreement. It acknowledges that the Declaration does have some technical imperfections and that certain details remained to be specified. However, it finds that the Declaration provided for a delimitation that was sufficient in general for demarcation.

Despite the uncertainties in regard to the longitudinal reading of the tripoint in Lake Chad and the location of the mouth of the Ebeji, and while no demarcation had taken place in Lake Chad before the independence of Nigeria and of Cameroon, the Court is of the view that the governing instruments show that, certainly by 1931, the frontier in the Lake Chad area was indeed delimited and agreed by Great Britain and France. It, moreover, cannot fail to observe that Nigeria was consulted during the negotiations for its independence, and again during the plebiscites that were to determine the future of the populations of the Northern and Southern Cameroons. At no time did Nigeria suggest, either so far as the Lake Chad area was concerned, or elsewhere, that the frontiers there remained to be delimited.

The Court is further of the view that the work of the Lake Chad Basin Commission (LCBC), from 1983 to 1991, affirms such an interpretation. It is unable to accept Nigeria's contention that the LCBC was from 1983 to 1991 engaged in both delimitation and demarcation. The records show that, although the term "delimitation" was used from time to time, in introducing clauses or in agenda headings, it was the term "demarcation" that was most frequently used. Moreover, the nature of the work was that of demarcation. The Court observes in this respect that the LCBC had engaged for seven years in a technical exercise of demarcation, on the basis of instruments that were agreed to be the instruments delimiting the frontier in Lake Chad. The issues of the location of the mouth of the Ebeji, and the designation of the tripoint longitude in terms other than "approximate", were assigned to the LCBC. There is no indication that Nigeria regarded these issues as so grave that the frontier was to be viewed as "not delimited" by the designated instruments. The Court notes that as regards the land boundary southwards from the mouth of the Ebeji, Nigeria accepts that the designated instruments defined the boundary, but that certain uncertainties and defects should be confirmed and cured. In the view of the Court Nigeria followed this same approach in participating in the demarcation work of the LCBC from 1984 to 1990.

The Court agrees with the Parties that Nigeria is not bound by the Marking Out Report. Nonetheless, this finding of law implies neither that the governing legal instruments on delimitation were put in question, nor that Nigeria did not continue to be bound by them. In sum, the Court finds that the Milner-Simon Declaration of 1919, as well as the 1929-1930 Thomson-Marchand Declaration as incorporated in the Henderson-Fleuriau Exchange of Notes of 1931, delimit the boundary between Cameroon and Nigeria in the Lake Chad area. The map attached by the parties to the Exchange of Notes is to be regarded as an agreed clarification of the Moisel map. The Lake Chad border area is thus delimited, notwithstanding that there are two questions that remain to be examined by the Court, namely the precise location of the longitudinal coordinate of the Cameroon-Nigeria-Chad tripoint in Lake Chad and the question of the mouth of the Ebeji.

Coordinates of Cameroon-Nigeria-Chad tripoint and Ebeji mouth
(paras. 56-61)

Cameroon, while accepting that the Report of the Marking Out of the International Boundaries in Lake Chad is not binding on Nigeria, nonetheless asks the Court to find that the proposals of the LCBC as regards the tripoint and the mouth of the Ebeji "constitut[e] an authoritative interpretation of the Milner-Simon Declaration and the Thomson-Marchand Declaration, as confirmed by the Exchange of Letters of 9 January 1931".

The Court finds that it cannot accept this request. At no time was the LCBC asked to act by the successors to those instruments as their agent in reaching an authoritative interpretation of them. Moreover, the very fact that the outcome of the technical demarcation work was agreed in March 1994 to require adoption under national laws indicates that it was in no position to engage in "authoritative interpretation" *sua sponte*.

However, having examined the Moisel map annexed to the Milner-Simon Declaration of 1919 and the map attached to the Henderson-Fleuriau Exchange of Notes of 1931, the Court reaches the same conclusions as the LCBC and considers that the longitudinal coordinate of the tripoint is situated at 14°04'59"9999 longitude east, rather than at "approximately" 14°05'. In the Court's view, the minimal difference between these two specifications confirms, moreover, that this never presented an issue so significant as to leave the frontier in this area undetermined.

The Court then takes note of the fact that the text of the Thomson-Marchand Declaration of 1929-1930, incorporated in 1931 in the Henderson-Fleuriau Exchange of Notes, refers to "the mouth of the Ebeji". The Court considers that the text of the above instruments as well as the Moisel map annexed to the Milner-Simon Declaration and the map attached to the Henderson-Fleuriau Exchange of Notes show that the parties only envisaged one mouth. The Court further notes that the coordinates for the mouth of the Ebeji in the area just north of the site indicated as that of Wulgo, as calculated on the two maps, are strikingly similar. Moreover these coordinates are identical with those used by the LCBC when, in reliance on those same maps, it sought to locate the mouth of the Ebeji as it was understood by the parties in 1931. The point there identified is north both of the "mouth" suggested by Cameroon for the western channel in its alternative argument and of the "mouth" proposed by Nigeria for the eastern channel. On the basis of the above factors, the Court concludes that the mouth of the Ebeji, as referred to in the instruments confirmed in the Henderson-Fleuriau Exchange of Notes of 1931, lies at 14°12'12" longitude east and 12°32'17" latitude north. From this point the frontier must run in a straight line to the point where the River Ebeji bifurcates into two branches, the Parties being in agreement that that point lies on the boundary. The geographical coordinates of that point are 14°12'03" longitude east and 12°30'14" latitude north.

Historical consolidation of title claimed by Nigeria (paras. 62-70)

The Court then turns to Nigeria's claim based on its presence in certain areas of Lake Chad. It recalls that Nigeria claims sovereignty over areas in Lake Chad which include certain named villages. Nigeria explains that these villages have been established either on what is now the dried up lake bed, or on islands which are surrounded by water perennially or on locations which are islands in the wet season only. Nigeria contends that its claim rests on three bases, which each apply both individually and jointly and one of which would be sufficient on its own:

> "(1) long occupation by Nigeria and by Nigerian nationals constituting an historical consolidation of title;
>
> (2) effective administration by Nigeria, acting as sovereign and an absence of protest; and
>
> (3) manifestations of sovereignty by Nigeria together with the acquiescence by Cameroon in Nigerian sovereignty over Darak and the associated Lake Chad villages".

For its part, Cameroon contends that, as the holder of a conventional territorial title to the disputed areas, it does not have to demonstrate the effective exercise of its sovereignty over those areas, since a valid conventional title prevails over any *effectivités* to the contrary.

The Court first observes that the work of the LCBC was intended to lead to an overall demarcation of a frontier already delimited. Although the result of the demarcation process is not binding on Nigeria, that fact has no legal implication for the pre-existing frontier delimitation. It necessarily follows that Nigeria's claim based on the theory of historical consolidation of title and on the acquiescence of Cameroon must be assessed by reference to this initial determination of the Court. During the oral pleadings Cameroon's assertion that Nigerian *effectivités* were contra *legem* was dismissed by Nigeria as "completely question-begging and circular". The Court notes, however, that now that it has made its findings that the frontier in Lake Chad was delimited long before the work of the LCBC began, it necessarily follows that any Nigerian *effectivités* are indeed to be evaluated for their legal consequences as acts *contra legem*.

The Court then points out that the theory of historical consolidation is highly controversial and cannot replace the established modes of acquisition of title under international law, which take into account many other important variables of fact and law. Moreover, the facts and circumstances put forward by Nigeria concern a period of some 20 years, which is in any event far too short, even according to the theory relied on by it. The Court concludes that Nigeria's arguments on this point cannot therefore be upheld.

The Court observes that some of Nigeria's activities — the organization of public health and education facilities, policing, the administration of justice — could, as argued by it, normally be considered to be acts *à titre de souverain*. The Court notes, however, that, as there was a pre-existing title held by Cameroon in this area of the lake, the pertinent legal test is whether there was thus evidenced acquiescence by Cameroon in the passing of title from itself to Nigeria.

The Court observes that it has already ruled on a number of occasions on the legal relationship between "*effectivités*" and titles. In the *Frontier Dispute (Burkina Faso/Republic of Mali)*, it pointed out that in this regard "a distinction must be drawn among several eventualities", stating inter alia that:

> "Where the act does not correspond to the law, where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing the legal title, preference should be given to the holder of the title. In the event that the *effectivité* does not coexist with any legal title, it must invariably be taken into consideration." (*I.C.J. Reports 1986*, p. 587, para. 63.) (See also *Territorial Dispute (Libyan Arab Jamahiriya/Chad), I.C.J. Reports 1994*, pp. 75-76, para. 38.)

The Court points out that it is this first eventuality here envisaged, and not the second, which corresponds to the situation obtaining in the present case. Thus Cameroon held the legal title to territory lying to the east of the boundary as fixed by the applicable instruments. Hence the conduct of Cameroon in that territory has pertinence only for the question of whether it acquiesced in the establishment of a change in treaty title, which cannot be wholly precluded as a possibility in law.

The Court further finds that the evidence presented to it as reflected in the case file, shows that there was no acquiescence by Cameroon in the abandonment of its title in

the area in favour of Nigeria. It therefore concludes that the situation was essentially one where the *effectivités* adduced by Nigeria did not correspond to the law, and that accordingly "preference should be given to the holder of the title".

Accordingly, the Court concludes that, as regards the settlements situated to the east of the frontier confirmed in the Henderson-Fleuriau Exchange of Notes of 1931, sovereignty has continued to lie with Cameroon.

The course of the land boundary from Lake Chad to the Bakassi Peninsula
(paras. 71-192)

Having examined the question of the delimitation in the area of Lake Chad, the Court then considers the course of the land boundary from Lake Chad to the Bakassi Peninsula.

Relevant instruments and task of the Court
(paras. 72-86)

After summarizing the arguments of the Parties, the Court notes that Cameroon and Nigeria agree that the land boundary between their respective territories from Lake Chad onwards has already been delimited, partly by the Thomson-Marchand Declaration incorporated in the Henderson-Fleuriau Exchange of Notes of 1931, partly by the British Order in Council of 2 August 1946 and partly by the Anglo-German Agreements of 11 March and 12 April 1913. The Court likewise notes that, with the exception of the provisions concerning Bakassi contained in Articles XVIII *et seq.* of the Anglo-German Agreement of 11 March 1913, Cameroon and Nigeria both accept the validity of the four above-mentioned legal instruments which effected this delimitation. The Court finds that it will therefore not be required to address these issues further in relation to the sector of the boundary from Lake Chad to the point defined *in fine* in Article XVII of the Anglo-German Agreement of March 1913. It will, however, have to return to them in regard to the sector of the land boundary situated beyond that point, in the part of its Judgment dealing with the Bakassi Peninsula.

The Court points out that independently of the issues which have just been mentioned, a problem has continued to divide the Parties in regard to the land boundary. It concerns the nature and extent of the role which the Court is called upon to play in relation to the sectors of the land boundary in respect of which there has been disagreement between the Parties at various stages of the proceedings, either on the ground that the relevant instruments of delimitation were claimed to be defective or because the interpretation of those instruments was disputed. The Court notes that, while the positions of the Parties on this issue have undergone a significant change and have clearly become closer in the course of the proceedings, they still appear unable to agree on what the Court's precise task should be in this regard.

The Parties have devoted lengthy arguments to the difference between delimitation and demarcation and to the Court's power to carry out one or other of these operations. The Court observes that, as noted by it in the case concerning the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (*I.C.J. Reports 1994*, p. 28, para. 56), the delimitation of a boundary consists in its "*definition*", whereas the demarcation of a boundary, which presupposes its prior delimitation, consists of operations marking it out on the ground. In the present case, the Parties have acknowledged the existence and validity of the instruments whose purpose was to effect the delimitation between their respective territories; moreover, both Parties have insisted time and again that they are not asking the Court to carry out demarcation operations, for which they themselves will be responsible at a later stage. The Court's task is thus neither to effect a delimitation *de novo* of the boundary nor to demarcate it.

The task which Cameroon referred to the Court in its Application is "*to specify definitively*" (emphasis added by the Court) the course of the land boundary as fixed by the relevant instruments of delimitation. In the Court's views since the land boundary has already been delimited by various legal instruments, it is indeed necessary, in order to specify its course definitively, to confirm that those instruments are binding on the Parties and are applicable. However, contrary to what Cameroon appeared to be arguing at certain stages in the proceedings, the Court cannot fulfil the task entrusted to it in this case by limiting itself to such confirmation. Thus, when the actual content of these instruments is the subject of dispute between the Parties, the Court, in order to specify the course of the boundary in question definitively, is bound to examine them more closely. The dispute between Cameroon and Nigeria over certain points on the land boundary between Lake Chad and Bakassi is in reality simply a dispute over the interpretation or application of particular provisions of the instruments delimiting that boundary. It is this dispute which the Court will undertake to settle. In order to do so, the Court addresses in succession each of the points in dispute.

Limani
(paras. 87-91)

The Court notes that in the Limani area the interpretation of the Thomson-Marchand Declaration raises difficulties in that it simply refers to "a river" in this area, whereas there are in fact several river channels between the Agzabame marsh and the "confluence at about 2 kilometres to the north-west [of the village of Limanti (Limani)]" (para. 14 of the Declaration).

A careful study of the wording of the Thomson-Marchand Declaration and of the map and other evidence provided by the Parties leads the Court to the following conclusions. In the first place, the Court observes that the second channel from the north, proposed by Cameroon as the course of the boundary, is unacceptable. The southern channel proposed by Nigeria poses other problems. The Court cannot therefore accept this channel either. The Court notes, however, that the river has another channel, called Nargo on DOS sheet "Ybiri N.W.", reproduced at page 23

of the atlas annexed to Nigeria's Rejoinder, which meets the conditions specified in the Thomson-Marchand Declaration. Accordingly, the Court concludes that the "river" mentioned in paragraph 14 of the Thomson-Marchand Declaration is the channel running between Narki and Tarmoa, and that from the Agzabame marsh the boundary must follow that channel to its confluence with the Ngassaoua River.

The Keraua (Kirewa or Kirawa) River
(paras. 92-96)

The Court notes that, in the area of the Keraua (Kirewa or Kirawa) River, the interpretation of paragraph 18 of the Thomson-Marchand Declaration raises difficulties, since the wording of this provision merely makes the boundary follow "the Keraua", whereas at this point that river splits into two channels: a western channel and an eastern channel. The Court finds that its task is thus to identify the channel which the boundary is to follow pursuant to the Thomson-Marchand Declaration.

After rejecting some of each of the Parties' contentions, the Court notes that according to the Moisel map the boundary runs, as Nigeria maintains, just to the east of two villages called Schriwe and Ndeba, which are on the site now occupied by the villages of Chérivé and Ndabakora, and which the map places on Nigerian territory. Only the eastern channel meets this condition. The Court accordingly concludes that paragraph 18 of the Thomson-Marchand Declaration must be interpreted as providing for the boundary to follow the eastern channel of the Keraua River.

The Kohom River
(paras. 97-102)

The Court notes that the initial problem posed by paragraph 19 of the Thomson-Marchand Declaration consists in the identification of the course of the River Kohom, along which the boundary is to pass. After a detailed study of the map evidence available to it, the Court reaches the conclusion that, as Nigeria contends, it is indeed the River Bogaza which has its source in Mount Ngosi, and not the River Kohom. The Court's task is accordingly to determine where the drafters of the Thomson-Marchand Declaration intended the boundary to run in this area when they described it as following the course of a river called "Kohom".

In order to locate the course of the Kohom, the Court first examines the text of the Thomson-Marchand Declaration, finding that it does not provide a decisive answer. The Court points out that it therefore had to have recourse to other means of interpretation. Thus it has carefully examined the sketch-map prepared in March 1926 by the French and British officials which served as the basis for the drafting of paragraphs 18 and 19 of the Thomson-Marchand Declaration. The Court finds that it is able to determine, on the basis of a comparison of the indications provided by the sketch-map with the maps provided by the Parties, that the Kohom whose course the Thomson-Marchand Declaration provides for the boundary to follow is that indicated by Cameroon. It notes, however, that the boundary line claimed by Cameroon in this area runs on past the source of the river which the Court has identified as the Kohom. Nor does the Court consider that it can disregard the fact that the Thomson-Marchand Declaration expressly provides that the boundary must follow a river which has its source in Mount Ngosi. In order to comply with the Thomson-Marchand Declaration, it is therefore necessary to join the source of the River Kohom, as identified by the Court, to the River Bogaza, which rises on Mount Ngosi. The Court accordingly concludes that paragraph 19 of the Thomson-Marchand Declaration should be interpreted as providing for the boundary to follow the course of the River Kohom, as identified by the Court, as far as its source at 13°44'24" longitude east and 10°59'09" latitude north, and then to follow a straight line in a southerly direction until it reaches the peak shown as having an elevation of 861 m on the 1:50,000 map in Figure 7.8 at page 334 of Nigeria's Rejoinder and located at 13°45'45" longitude east and 10°59'45" latitude north, before following the River Bogaza in a south-westerly direction as far as the summit of Mount Ngosi.

The watershed from Ngosi to Humsiki (Roumsiki)/ Kamale/Turu (the Mandara Mountains)
(paras. 103-114)

The Court notes that the problem in the area between Ngosi and Humsiki derives from the fact that Cameroon and Nigeria apply the provisions of paragraphs 20 to 24 of the Thomson-Marchand Declaration in different ways. In this sector of the boundary the Court's task is thus to determine the course of the boundary by reference to the terms of the Thomson-Marchand Declaration, that is to say by reference essentially to the crest line, to the line of the watershed and to the villages which are to lie to either side of the boundary. The Court addresses this question section by section, and concludes that in the area between Ngosi and Humsiki the boundary follows the course described by paragraphs 20 to 24 of the Thomson-Marchand Declaration as clarified by the Court.

From Mount Kuli to Bourha/Maduguva (incorrect watershed line on Moisel's map)
(paras. 115-119)

The Court notes that the text of paragraph 25 of the Thomson-Marchand Declaration, on the application of which the two Parties disagree, provides quite expressly that the boundary is to follow "the incorrect line of the watershed shown by Moisel on his map". Since the authors of the Declaration prescribed a clear course for the boundary, the Court cannot deviate from that course.

From careful study of the Moisel map the Court concludes that paragraph 25 of the Thomson-Marchand Declaration should be interpreted as providing for the boundary to run from Mount Kuli to the point marking the beginning of the "incorrect line of the watershed", located at 13°31'47" longitude east and 10°27'48" latitude north,

having reached that point by following the correct line of the watershed. Then, from that point, the boundary follows the "incorrect line of the watershed" to the point marking the end of that line, located at 13° 30' 55" longitude east and 10° 15' 46" latitude north. Between these two points the boundary follows the course indicated on the map annexed to this Judgment, which was prepared by the Court by transposing the "incorrect line of the watershed" from the Moisel map to the first edition of sheet "Uba N.E." of the DOS 1:50,000 map of Nigeria. From this latter point, the boundary will again follow the correct line of the watershed in a southerly direction.

Kotcha (Koja)
(paras. 120-124)

The Court finds that, in the Kotcha area, the difficulty derives solely from the fact, as Nigeria recognizes, that the Nigerian village of Kotcha has spread over onto the Cameroonian side of the boundary. As the Court has already had occasion to point out in regard to the village of Turu, it has no power to modify a delimited boundary line, even in a case where a village previously situated on one side of the boundary has spread beyond it. It is instead up to the Parties to find a solution to any resultant problems, with a view to respecting the rights and interests of the local population.

The Court accordingly concludes that the boundary in the Kotcha area, as described in paragraphs 26 and 27 of the Thomson-Marchand Declaration, follows the line of the watershed, including where it passes close to the village of Kotcha, the cultivated land lying on the Cameroonian side of the watershed remaining on Cameroonian territory.

Source of the Tsikakiri River
(paras. 125-129)

The Court notes that the interpretation of paragraph 27 of the Thomson-Marchand Declaration poses problems because the Tsikakiri River has more than one source, whereas the Declaration simply states that the boundary passes through "the source" of the Tsikakiri without providing any indication as to which source is to be chosen.

The Court observes that it may reasonably be assumed that the drafters of the Declaration, in referring to the source of the Tsikakiri, intended to designate a point which could be readily identified, both on maps and on the ground and notes that one of the sources of the Tsikakiri, namely the one having the highest elevation, stands out from the others. It accordingly concludes that, in the area referred to in paragraph 27 of the Thomson-Marchand Declaration, the boundary starts from a point having coordinates 13°17'50" longitude east and 10°03'32" latitude north, which is located in the vicinity of Dumo. From there, the boundary runs in a straight line to the point which the Court has identified as the "source of the Tsikakiri" as referred to in the Declaration, and then follows that river.

From Beacon 6 to Wamni Budungo
(paras. 130-134)

The Court notes that the interpretation of paragraphs 33 and 34 of the Thomson-Marchand Declaration raises a problem in that those provisions describe the line of the boundary as passing through three beacons of which at least two have now disappeared.

After careful study of the text of the Anglo-German Agreement of 1906 and the cartographic material provided by the Parties in order to discover the location of these three beacons, the Court concludes that paragraphs 33 and 34 of the Thomson-Marchand Declaration must be interpreted as providing for the boundary to pass through the points having the following coordinates: 12°53'15" longitude east and 9°04'19" latitude north; 12°51'55" longitude east and 9°01'03" latitude north; and 12°49'22" longitude east and 8°58'18" latitude north.

Maio Senche
(paras. 135-139)

The Court notes that, in the Maio Senche area, covered by paragraph 35 of the Thomson-Marchand Declaration, the difficulty lies in identifying the line of the watershed, of which the two Parties have proposed differing cartographic representations.

After studying the cartographic material provided to it by the Parties, the Court observes that the watershed line passes, as Nigeria contends, between the basin of the Maio Senche and that of the two rivers to the south.

Jimbare and Sapeo
(paras. 140-146)

The Court notes that the interpretation of paragraphs 35 to 38 of the Thomson-Marchand Declaration poses problems, since the description of the boundary therein appears both to contain a series of material errors and, in certain places, to contradict the representation of that boundary on the 1931 map appended to the Declaration. The Court notes, however, that, as regards the area to the north of Nananoua as referred to in paragraph 36 of the Thomson-Marchand Declaration, the Parties agree that the rivers whose courses form the boundary are the Leinde and the Sassiri. Similarly, the cartographic representations of this section of the boundary proposed by the Parties correspond in every respect. To the south of Nananoua, on the other hand, there is no agreement between Cameroon and Nigeria.

The Court concludes, first, that paragraphs 35 and 36 of the Thomson-Marchand Declaration must be interpreted as providing for the boundary to pass over Hosere Bila, which it has identified as the "south peak of the Alantika Mountains" referred to in paragraph 35, and then from that point along the River Leinde and the River Sassiri "as far as the confluence with the first stream coming from the Balakossa Range". It further concludes that paragraphs 37 and 38 of the Thomson-Marchand Declaration must be interpreted as providing for the boundary to follow the

course described in paragraph 1 of the Logan-Le Brun *procès-verbal*, as shown by Nigeria in Figures 7.15 and 7.16 at pages 346 and 350 of its Rejoinder.

Noumberou-Banglang
(paras. 147-152)

The Court notes that the final part of paragraph 38 of the Thomson-Marchand Declaration poses problems of interpretation in that it contains fundamental errors of a material nature; it further notes that it is, however, only the part of the boundary situated to the south of the source of the Noumberou which poses any problem. To the north of that point, Cameroon and Nigeria agree that the boundary should follow the course of the Noumberou. The course of the boundary shown on the Cameroonian and Nigerian maps confirm that agreement.

The Court considers that, to the south of the source, it is the boundary line proposed by Nigeria which is to be preferred. That line is moreover more favourable to Cameroon than the line shown on its own maps, and Cameroon has not opposed it. The Court accordingly concludes that the final part of paragraph 38 of the Thomson-Marchand Declaration must be interpreted as providing for the boundary to follow the course of the River Noumberou as far as its source, and then from that point to run in a straight line as far as Hosere Tapere as identified by the Court.

Tipsan
(paras. 153-155)

The Court observes that at the hearings the Parties agreed that the boundary must follow a line running parallel to the Fort Lamy-Baré road some 2 km to the west thereof, as paragraph 41 of the Thomson-Marchand Declaration provides. The Court takes note of that agreement. However, the Court considers that, in order to remove any doubt, it should identify the terminal point of this section of the boundary — namely the point situated on the Mayo Tipsal "2 kilometres to the south-west of the point at which the road crosses said Mayo Tipsal" — as corresponding to the coordinates 12°12'45" longitude east and 7°58'49" latitude north.

Crossing the Maio Yin
(paras. 156-160)

The Court confirms that the boundary in the area where it crosses the Maio Yin follows the course described in paragraphs 48 and 49 of the Thomson-Marchand Declaration.

The Hambere Range area
(paras. 161-168)

The Court notes that paragraphs 60 and 61 of the Thomson-Marchand Declaration raise problems of interpretation, since they provide for the boundary to pass over "a fairly prominent peak" without any further clarification and the Parties have differing views as to the location of that peak.

The Court observes that paragraphs 60 and 61 contain a number of indications which are helpful in locating the "fairly prominent, pointed peak" referred to therein. Having studied with the greatest care the maps provided by the Parties, the Court concludes that paragraph 60 of the Thomson-Marchand Declaration must be interpreted as providing for the boundary to follow the line of the watershed through the Hosere Hambere or Gesumi, as shown on sheet NB-32-XVIII-3a-3b of the 1955 IGN 1:50,000 map of Cameroon, produced in the proceedings by Nigeria, as far as the foot of Tamnyar Peak, which the Court has identified as the "fairly prominent, pointed peak" referred to in the Declaration.

From the Hambere Range to the Mburi River (Lip and Yang)
paras. 169-179)

The Court notes that the interpretation of the Order in Council of 1946 raises two fundamental difficulties in the area between the "fairly prominent pointed peak" referred to in the Thomson-Marchand Declaration and the River Mburi. The first lies in joining up the lines prescribed by the two texts and, in particular, in identifying the peak described in the Order in Council as "prominent", without further clarification. The second consists in determining the course of the boundary beyond that point.

The Court observes that, while unable to designate a specific peak, it has nonetheless been able to identify the crest line of which that peak must form part. This crest begins at the point where the watershed through the Hosere Hambere turns suddenly to the south at the locality named Galadima Wanderi on Figure 7.37 in Nigeria's Rejoinder, then runs due south until it approaches the point named Tonn Hill on that same Figure. The intention of the drafters of the Order in Council was to have the boundary follow this crest line. As a result, what the Court finds it has to do is to trace a line joining the peak referred to in paragraph 60 of the Thomson-Marchand Declaration, namely Tamnyar Peak, to that crest line. The Court points out that the watershed through the Hosere Hambere, on which Tamnyar Peak lies, extends naturally as far as the crest line marking the former Franco-British frontier, starting point of the sector of the boundary delimited by the 1946 Order in Council. It is thus possible to link the boundary sectors delimited by the two texts by following, from Tamnyar Peak, that watershed as represented on sheet NB-32-XVIII-3a-3b of the 1955 IGN 1:50,000 map of Cameroon, produced in the proceedings by Nigeria.

The Court then addresses the question of the course of the boundary from that crest line. It observes that the 1946 Order in Council contains a great deal of information on the course of the boundary in this area. After careful study of the maps provided to it by the Parties, the Court concludes that, from east to west, the boundary first follows the watershed line through the Hosere Hambere from Tamnyar Peak to the point where that line reaches the crest line

marking the former Franco-British frontier. In accordance with the 1946 Order in Council, the boundary then follows this crest line southward, then west-south-west to the source of the River Namkwer and then follows the course of that river to its confluence with the River Mburi, 1 mile north of Nyan. From that point, the boundary follows the course of the River Mburi. It first runs northwards for a distance of approximately 2 km, and then takes a south-westerly course for some 3 km and then west-north-west along a stretch where the river is also called the Maven or the Ntem. Then, some 2 km further on, it turns to run due north where the River Mburi is also called the Manton or Ntem.

Bissaula-Tosso
(paras. 180-184)

The Court notes that the problem in the Bissaula-Tosso area consists in determining which tributary of the River Akbang crosses the Kentu-Bamenda road and is thus the tributary which the Order in Council provides for the boundary to follow.

The Court concludes that the 1946 Order in Council should be interpreted as providing for the boundary to run through the point where the southern tributary of the River Akbang, as identified by the Court, crosses the Kentu-Bamenda road, and then from that point along the southern tributary until its junction with the River Akbang.

The Sama River
(paras. 185-189)

The Court notes that the interpretation of the Order in Council poses problems in regard to the River Sama, since the river has two tributaries, and hence two places where it "divides into two" as the Order in Council prescribes, but the Order does not specify which of those two places is to be used in order to determine the course of the boundary.

The Court finds that a reading of the text of the Order in Council of 1946 permits it to conclude that this Order must be interpreted as providing for the boundary to run up the River Sama to the confluence of its first tributary, that being the point, with coordinates 10°10'23" longitude east and 6°56'29" latitude north, which the Court has identified as the one specified in the Order in Council where the River Sama "divides into two"; and then, from that point, along a straight line to the highest point of Mount Tosso.

Boundary in Bakassi and question of sovereignty over the Peninsula
(paras. 193-225)

Having recalled each of the Parties' final submissions, the Court notes that according to Cameroon the Anglo-German Agreement of 11 March 1913 fixed the course of the boundary between the Parties in the area of the Bakassi Peninsula, placing the latter on the German side of the boundary. Cameroon relies for this purpose on Articles XVIII to XXI of the said Agreement, and adds that hence, when Cameroon and Nigeria acceded to independence, this boundary became that between the two countries, successor States to the colonial powers and bound by the principle of *uti possidetis*. The Court further notes that Nigeria, for its part, does not contest that the meaning of these provisions was to allocate the Bakassi Peninsula to Germany. It does, however, insist that the said terms were never put into effect, and indeed were invalid on various grounds, though the other Articles of the Agreement of 11 March 1913 remained valid. Nigeria contends rather, that the title to sovereignty over Bakassi on which it relies was originally vested in the Kings and Chiefs of Old Calabar. It considers that, the Treaty of Protection signed on 10 September 1884 between Great Britain and the Kings and Chiefs of Old Calabar only conferred certain limited rights on Great Britain; in no way did it transfer sovereignty to Britain over the territories of the Kings and Chiefs of Old Calabar. Nigeria argues that, since Great Britain did not have sovereignty over those territories in 1913, it could not cede them to a third party. The Court notes in this connection that, in Cameroon's view, the treaty signed on 10 September 1884 between Great Britain and the Kings and Chiefs of Old Calabar established a "colonial protectorate" and, "in the practice of the period, there was little fundamental difference at international level, in terms of territorial acquisition, between colonies and colonial protectorates". According to Cameroon substantive differences between the status of colony and that of a colonial protectorate were matters of the national law of the colonial Powers rather than of international law.

The key element of the colonial protectorate was the "assumption of external sovereignty by the protecting State", which manifested itself principally through "the acquisition and exercise of the capacity and power to cede part of the protected territory by international treaty, without any intervention by the population or entity in question".

The Court begins by observing that during the era of the Congress of Berlin the European Powers entered into many treaties with local rulers, and that Great Britain concluded some 350 treaties with the local chiefs of the Niger delta. Among these were the treaties concluded in July 1884 with the Kings and Chiefs of Opobo and, in September 1884, with the Kings and Chiefs of Old Calabar. The latter Treaty did not specify the territory to which the British Crown was to extend "gracious favour and protection", nor did it indicate the territories over which each of the Kings and Chiefs signatory to the Treaty exercised his powers. In the view of the Court, Great Britain had, however, a clear understanding of the area ruled at different times by the Kings and Chiefs of Old Calabar, and of their standing.

Nigeria has contended that the very title of the 1884 Treaty and the reference in Article I to the undertaking of "protection", shows that Britain had no entitlement to do more than protect, and in particular had no entitlement to cede the territory concerned to third States: "*nemo dat quod non habet*". The Court in this respect calls attention to the fact that the international legal status of a "Treaty of Protection" entered into under the law obtaining at the time cannot be deduced from its title alone. Some treaties of

protection were entered into with entities which retained thereunder a previously existing sovereignty under international law. This was the case whether the protected party was henceforth termed "protectorat" or "a protected State". In sub-Saharan Africa, treaties termed "treaties of protection" were entered into not with States, but rather with important indigenous rulers exercising local rule over identifiable areas of territory. In relation to a treaty of this kind in another part of the world, Max Huber, sitting as sole arbitrator in the *Island of Palmas* case, explained that such a treaty

> "is not an agreement between equals; it is rather a form of internal organisation of a colonial territory, on the basis of autonomy of the natives ... And thus suzerainty over the native States becomes the basis of territorial sovereignty as towards other members of the community of nations." (*RIIA*, Vol. II, pp. 858-859).

The Court observes that these concepts also found expression in the *Western Sahara* Advisory Opinion. There the Court stated that in territories that were not *terra nullius*, but were inhabited by tribes or people having a social and political organization, "agreements concluded with local rulers ... were regarded as derivative roots of title" (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 39, para. 80). The Court points out that even if this mode of acquisition does not reflect current international law, the principle of intertemporal law requires that the legal consequences of the treaties concluded at that time in the Niger delta be given effect today, in the present dispute.

In the view of the Court many factors point to the 1884 Treaty signed with the Kings and Chiefs of Old Calabar as not establishing an international protectorate. Nigeria itself has been unable to point to any role, in matters relevant to the present case, played by the Kings and Chiefs of Old Calabar after the conclusion of the 1884 Treaty. The Court further notes that a characteristic of an international protectorate is that of ongoing meetings and discussions between the protecting Power and the Rulers of the Protectorate. In the present case the Court was informed that "Nigeria can neither say that no such meetings ever took place, or that they did take place ... the records which would enable the question to be answered probably no longer exist ..." The Court also notes that there is no reference to Old Calabar in any of the various British Orders in Council, of whatever date, which list protectorates and protected States. Moreover, the Court has been presented with no evidence of any protest in 1913 by the Kings and Chiefs of Old Calabar; nor of any action by them to pass territory to Nigeria as it emerged to independence in 1960. The Court thus concludes that, under the law at the time, Great Britain was in a position in 1913 to determine its boundaries with Germany in respect of Nigeria, including in the southern section.

The Court then examines the treatment, in the period 1913 to 1960, of the southern sector of the boundary as defined by the Anglo-German Agreement of 11 March 1913.

Cameroon contends that the mandate and trusteeship period, and the subsequent independence process, show recognition on the part of the international community of Cameroon's attachment to the Bakassi Peninsula. Nigeria for its part argues that, at all times while the 1884 Treaty remained in force, Great Britain continued to lack power to give Bakassi away. As such, it claims that no amount of British activity in relation to Bakassi in the mandate or trusteeship periods could have severed Bakassi from the Nigeria protectorate.

The Court notes that after the First World War Germany renounced its colonial possessions. Under the Versailles Treaty the German possessions of Cameroon were divided between Great Britain and France. In 1922 Great Britain accepted the mandate of the League of Nations for "that part [of the former German colony] of the Cameroons which lay to the west of the line laid down in the [Milner-Simon] Declaration signed on the 10th July, 1919". Bakassi was necessarily comprised within the mandate. When, after the Second World War and the establishment of the United Nations, the mandate was converted to a trusteeship, the territorial situation remained exactly the same. Thus for the entire period from 1922 until 1961 (when the Trusteeship was terminated), Bakassi was comprised within British Cameroon. The boundary between Bakassi and Nigeria, notwithstanding the administrative arrangements, remained an international boundary.

The Court is unable to accept Nigeria's contention that until its independence in 1961, and notwithstanding the Anglo-German Agreement of 11 March 1913, the Bakassi Peninsula had remained under the sovereignty of the Kings and Chiefs of Old Calabar. Neither the League of Nations nor the United Nations considered that to be the position. Equally, the Court observes that it has seen no evidence that Nigeria thought that upon independence it was acquiring Bakassi from the Kings and Chiefs of Old Calabar. Nigeria itself raised no query as to the extent of its territory in this region upon attaining independence. The Court notes in particular that there was nothing which might have led Nigeria to believe that the plebiscite which took place in the Southern Cameroons in 1961 under United Nations supervision did not include Bakassi. The Court further observes that this frontier line was acknowledged in turn by Nigeria when it voted in favour of General Assembly resolution 1608 (XV), which both terminated the Trusteeship and approved the results of the plebiscite. Shortly after, in Note Verbale No. 570 of 27 March 1962 addressed to Cameroon, Nigeria referred to certain oil licensing blocks. A sketch-map was appended to the Note, from which it is clear that the block "N" referred to lay directly south of the Bakassi Peninsula. The block was described as offshore Cameroon. This common understanding of where title lay in Bakassi continued through until the late 1970s, when the Parties were engaging in discussions on their maritime frontier. The Court finds that it is clear from the ensuing discussions and agreements that the Parties took it as a given that Bakassi belonged to Cameroon. Nigeria, drawing on the full weight of its experts as well as its most senior political figures, understood

Bakassi to be under Cameroon sovereignty. Accordingly, the Court finds that at that time Nigeria accepted that it was bound by Articles XVIII to XXII of the Anglo-German Agreement of 11 March 1913, and that it recognized Cameroonian sovereignty over the Bakassi Peninsula. In the view of the Court, this common understanding of the Parties is also reflected by the geographic pattern of the oil concessions granted by the two Parties up to 1991. The Court further takes account of certain formal requests up until the 1980s submitted by the Nigerian Embassy in Yaoundé, or by the Nigerian consular authorities, before going to visit their nationals residing in Bakassi.

For all of these reasons the Court finds that the Anglo-German Agreement of 11 March 1913 was valid and applicable in its entirety.

The Court then turns to further claims to Bakassi relied on by Nigeria. Nigeria advances "three distinct but interrelated bases of title over the Bakassi Peninsula":

"(i) Long occupation by Nigeria and by Nigerian nationals constituting an historical consolidation of title and confirming the original title of the Kings and Chiefs of Old Calabar, which title vested in Nigeria at the time of independence in 1960;

(ii) peaceful possession by Nigeria, acting as sovereign, and an absence of protest by Cameroon; and

(iii) manifestations of sovereignty by Nigeria together with acquiescence by Cameroon in Nigerian sovereignty over the Bakassi Peninsula."

Nigeria particularly emphasizes that the title on the basis of historical consolidation, together with acquiescence, in the period since the independence of Nigeria, "constitutes an independent and self-sufficient title to Bakassi". Cameroon for its part argues that a legal treaty title cannot be displaced by what in its view amounts to no more than a number of alleged *effectivités*.

The Court first recalls its finding above regarding the claim to an ancient title to Bakassi derived from the Kings and Chiefs of Old Calabar. It observes that it follows therefrom that at the time of Nigeria's accession to independence there existed no Nigerian title capable of being confirmed subsequently by "long occupation". On the contrary, on the date of its independence Cameroon succeeded to title over Bakassi as established by the Anglo-German Agreement of 11 March 1913. The Court also finds that invocation of the theory of consolidation of historic titles cannot in any event vest title to Bakassi in Nigeria, where its "occupation" of the peninsula is adverse to Cameroon's prior treaty title and where, moreover, the possession has been for a limited period.

The Court then deals with other aspects of the second and third bases of title advanced by Nigeria together.

It points out that the legal question of whether *effectivités* suggest that title lies with one country rather than another is not the same legal question as whether such *effectivités* can serve to displace an established treaty title. As the Chamber of the Court made clear in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case, where there is a conflict between title and *effectivités*, preference will be given to the former (*I.C.J. Reports 1986, Judgment*, pp. 586-587, para. 63). In the view of the Court the more relevant legal question in this case is whether the conduct of Cameroon, as the title holder, can be viewed as an acquiescence in the loss of the treaty title that it inherited upon independence. The Court recalls that in 1961-1962, Nigeria clearly and publicly recognized Cameroon title to Bakassi. That continued to be the position until at least 1975, when Nigeria signed the Maroua Declaration. No Nigerian *effectivités* in Bakassi before that time can be said to have legal significance for demonstrating a Nigerian title; this may in part explain the absence of Cameroon protests regarding health, education and tax activity in Nigeria. The Court also notes that Cameroon had since its independence engaged in activities which made clear that it in no way was abandoning its title to Bakassi. The Court considers that the foregoing shows that Nigeria could not have been acting *à titre de souverain* before the late 1970s, as it did not consider itself to have title over Bakassi; and in the ensuing period the evidence does not indicate an acquiescence by Cameroon in the abandonment of its title in favour of Nigeria. For all of these reasons the Court is also unable to accept the second and third bases of title to Bakassi advanced by Nigeria.

The Court accordingly concludes that the boundary between Cameroon and Nigeria in Bakassi is delimited by Articles XVIII to XX of the Anglo-German Agreement of 11 March 1913, and that sovereignty over the peninsula lies with Cameroon.

The maritime boundary between Cameroon and Nigeria
(paras. 226-307)

The Court then turns to the maritime boundary between Cameroon and Nigeria.

In its final submissions presented to the Court at the end of the oral proceedings on 21 March 2002, Cameroon requests that the Court confirm that "[t]he boundary of the maritime areas appertaining respectively to the Republic of Cameroon and the Federal Republic of Nigeria takes the following course", which Cameroon describes in detail in the two subparagraphs of paragraph (*c*) of its submissions. Nigeria claims that the Court should refuse to carry out in whole or in part the delimitation requested by Cameroon, first, because the delimitation affects areas claimed by third States (eighth preliminary exception) and, secondly, because the requirement of prior negotiations has not been satisfied.

The Court first deals with these arguments of Nigeria.

Nigeria's eighth preliminary objection
(paras. 237-238)

After summarizing the contentions and arguments of each of the Parties, the Court first observes that its finding in its Judgment of 11 June 1998 on the eighth preliminary objection of Nigeria that that preliminary objection did "not have, in the circumstances of the case, an exclusively

preliminary character" requires it to deal now with the preliminary objection before proceeding further on the merits. Since Nigeria maintains its objection, the Court must rule on it.

The Court begins by observing that its jurisdiction is founded on the consent of the parties. The Court cannot therefore decide upon legal rights of third States not parties to the proceedings. In the present case there are States other than the parties to these proceedings whose rights might be affected, namely Equatorial Guinea and Sao Tome and Principe. Those rights cannot be determined by decision of the Court unless Equatorial Guinea and Sao Tome and Principe have become parties to the proceedings. Equatorial Guinea has indeed requested — and has been granted — permission to intervene, but as a non-party intervener only. Sao Tome and Principe has chosen not to intervene on any basis.

The Court considers that, in particular in the case of maritime delimitations where the maritime areas of several States are involved, the protection afforded by Article 59 of the Statute may not always be sufficient. In the present case, Article 59 may not sufficiently protect Equatorial Guinea and/or Sao Tome and Principe from the effects — even if only indirect — of a judgment affecting their legal rights. It follows that, in fixing the maritime boundary between Cameroon and Nigeria, the Court must ensure that it does not adopt any position which might affect the rights of Equatorial Guinea and Sao Tome and Principe. Moreover, in relation to the specific issue of the tripoint, the Court notes that both Parties agree that it should not fix one. It is indeed not entitled to do so. In determining any line, the Court must take account of this.

The Court concludes that it cannot rule on Cameroon's claims insofar as they might affect rights of Equatorial Guinea and Sao Tome and Principe. Nonetheless, the mere presence of those two States, whose rights might be affected by the decision of the Court, does not in itself preclude the Court from having jurisdiction over a maritime delimitation between the Parties to the case before it, namely Cameroon and Nigeria, although it must remain mindful, as always in situations of this kind, of the limitations on its jurisdiction that such presence imposes.

Nigeria's argument that the requirement of prior negotiations has not been satisfied
(paras. 239-245)

Nigeria further argues that Article 74, paragraph 1, and Article 83, paragraph 1, of the United Nations Convention on the Law of the Sea require that the parties to a dispute over maritime delimitation should first attempt to resolve their dispute by negotiation. According to Nigeria, these provisions lay down a substantive rule, not a procedural prerequisite. Negotiation is prescribed as the proper and primary way of achieving an equitable maritime delimitation, and the Court is not a forum for negotiations. Nigeria accepts that, to the extent that the dispute over the maritime boundary pertains to areas around point G and to the areas of overlapping licences, this requirement has been satisfied. However, it maintains that waters to the south "of 4° N and 3° N and even 2° N" have never been the subject of any attempt at negotiation with Nigeria or, as far as Nigeria is aware, with any other affected State.

The Court points out that, in its Judgment of 11 June 1998, it noted that negotiations between the Governments of Cameroon and Nigeria concerning the entire maritime delimitation — up to point G and beyond — were conducted as far back as the 1970s. These negotiations did not lead to an agreement. In the Court's view, however, Articles 74 and 83 of the United Nations Law of the Sea Convention do not require that delimitation negotiations should be successful; like all similar obligations to negotiate in international law, the negotiations have to be conducted in good faith. The Court reaffirms its finding in regard to the preliminary objections that negotiations have indeed taken place. Moreover, if, following unsuccessful negotiations, judicial proceedings are instituted and one of the parties then alters its claim, Articles 74 and 83 of the Law of the Sea Convention would not require that the proceedings be suspended while new negotiations were conducted. It is of course true that the Court is not a negotiating forum. In such a situation, however, the new claim would have to be dealt with exclusively by judicial means. Any other solution would lead to delays and complications in the process of delimitation of continental shelves and exclusive economic zones. The Law of the Sea Convention does not require such a suspension of the proceedings.

As to negotiations with Equatorial Guinea and Sao Tome and Principe, the Court does not find that it follows from Articles 74 and 83 of the Law of the Sea Convention that the drawing of the maritime boundary between Cameroon and Nigeria presupposes that simultaneous negotiations between all four States involved have taken place.

The Court concludes that it is therefore in a position to proceed to the delimitation of the maritime boundary between Cameroon and Nigeria insofar as the rights of Equatorial Guinea and Sao Tome and Principe are not affected.

The maritime boundary up to point G
(paras. 247-268)

The Court then turns to Cameroon's request for the tracing of a precise line of maritime delimitation. It first addresses the sector of the maritime boundary up to point G.

The Court notes that, according to Cameroon, the maritime boundary between Cameroon and Nigeria is divided into two sectors. The first, from the mouth of the Akwayafe River to point G fixed by the Maroua Declaration of 1 June 1975, is said to have been delimited by valid international agreements between the Parties. In relation to this sector, Cameroon asks the Court merely to confirm that delimitation, which it says that Nigeria is now seeking to reopen. The sector beyond point G remains to be delimited, and Cameroon requests the Court to fix the limits of the Parties' respective areas in this sector, so as to put a complete and final end to the dispute between them. The

delimitation of the first sector, from the mouth of the Akwayafe River to point G, is said by Cameroon to be based mainly on three international legal instruments, namely the Anglo-German Agreement of 11 March 1913, the Cameroon-Nigeria Agreement of 4 April 1971, comprising the Yaoundé II Declaration and the appended Chart 3433, and the Maroua Declaration of 1 June 1975. The Court then notes that Nigeria for its part draws no distinction between the area up to point G and the area beyond. It denies the existence of a maritime delimitation up to that point, and maintains that the whole maritime delimitation must be undertaken *de novo*. Nonetheless, Nigeria does advance specific arguments regarding the area up to point G, which in the Court's view it is appropriate to address in this part of the Judgment. In the first place, on the basis of its claim to sovereignty over the Bakassi Peninsula, Nigeria contends that the line of the maritime boundary between itself and Cameroon will commence in the waters of the Rio del Rey and run down the median line towards the open sea. Since the Court has already found that sovereignty over the Bakassi Peninsula lies with Cameroon and not with Nigeria, it is unnecessary to deal any further with this argument of Nigeria. Nigeria further contends that, even if Cameroon's claim to Bakassi were valid, Cameroon's claim to a maritime boundary should have taken into account the wells and other installations on each side of the line established by the oil practice and should not change the status quo in this respect. In relation to the Yaoundé II Declaration, Nigeria contends that it was not a binding agreement. Nigeria likewise regards the Maroua Declaration as lacking legal validity.

The Court begins by pointing out that it has already found that the Anglo-German Agreement of 11 March 1913 is valid and applicable in its entirety and that, in consequence, territorial title to the Bakassi Peninsula lies with Cameroon. It follows from these findings that the maritime boundary between Cameroon and Nigeria lies to the west of the Bakassi Peninsula and not to the east, in the Rio del Rey. It also follows from these findings that the maritime boundary between the Parties is "anchored" to the mainland at the intersection of the straight line from Bakassi Point to King Point with the centre of the navigable channel of the Akwayafe River in accordance with Articles XVIII and XXI of the said Anglo-German Agreement.

The Court observes that it is apparent from the documents provided to the Court by the Parties that, irrespective of what may have been the intentions of its original signatories, the Yaoundé II Declaration was called into question on a number of occasions by Nigeria subsequently to its signature and to the Joint Boundary Commission meeting of June 1971. However, it is unnecessary to determine the status of the Declaration in isolation, since the line described therein is confirmed by the terms of the Maroua Declaration, which refers in its third paragraph to "Point 12 ... situated at the end of the line of the maritime boundary adopted by the two Heads of State on April 4, 1971".

The Court considers that the Maroua Declaration constitutes an international agreement concluded between States in written form and tracing a boundary; it is thus governed by international law and constitutes a treaty in the sense of the Vienna Convention on the Law of Treaties (see Art. 2, para. 1), to which Nigeria has been a party since 1969 and Cameroon since 1991, and which in any case reflects customary international law in this respect. The Court further considers that it cannot accept the argument that the Maroua Declaration was invalid under international law because it was signed by the Nigerian Head of State of the time but never ratified. It observes that, while in international practice a two-step procedure consisting of signature and ratification is frequently provided for in provisions regarding entry into force of a treaty, there are also cases where a treaty enters into force immediately upon signature. In the Court's opinion, the Maroua Declaration entered into force immediately upon its signature.

The Court then addresses Nigeria's argument that its constitutional rules regarding the conclusion of treaties were not complied with. In this regard the Court recalls that Article 46, paragraph 1, of the Vienna Convention provides that "[a] State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent". It is true that the paragraph goes on to say "unless that violation was manifest and concerned a rule of its internal law of fundamental importance", while paragraph 2 of Article 46 provides that "[a] violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith". The rules concerning the authority to sign treaties for a State are constitutional rules of fundamental importance. However, a limitation of a Head of State's capacity in this respect is not manifest in the sense of Article 46, paragraph 2, unless at least properly publicized. This is particularly so because Heads of State belong to the group of persons who, in accordance with Article 7, paragraph 2, of the Convention "[i]n virtue of their functions and without having to produce full powers" are considered as representing their State. With regard to the Nigerian argument that Cameroon knew, or ought to have known, that the Head of State of Nigeria had no power legally to bind Nigeria without consulting the Nigerian Government, the Court notes that there is no general legal obligation for States to keep themselves informed of legislative and constitutional developments in other States which are or may become important for the international relations of these States.

In these circumstances the Maroua Declaration, as well as the Yaoundé II Declaration, have to be considered as binding and as establishing a legal obligation on Nigeria. It follows that it is unnecessary for the Court to address Nigeria's argument regarding the oil practice in the sector up to point G. Thus the maritime boundary between Cameroon and Nigeria up to and including point G must be considered to have been established on a conventional basis by the Anglo-German Agreement of 11 March 1913, the Yaoundé II Declaration of 4 April 1971 and the Maroua

Declaration of 1 June 1975, and takes the following course: starting from the straight line joining Bakassi Point and King Point, the line follows the "compromise line" jointly drawn at Yaoundé on 4 April 1971 by the Heads of State of Cameroon and Nigeria on British Admiralty Chart 3433 appended to the Yaoundé II Declaration of 4 April 1971, and consisting of 12 numbered points, whose precise coordinates were determined by the two countries' Joint Commission meeting in Lagos in June 1971; from point 12 on that compromise line the course of the boundary follows the line to point G specified in the Maroua Declaration of 1 June 1975, as corrected by the exchange of letters between the Heads of State of Cameroon and Nigeria of 12 June and 17 July 1975.

The maritime boundary beyond point G
(paras. 269-307)

The Court then addresses the maritime boundary beyond point G, where no maritime boundary delimitation has been agreed.

The Court notes that in Cameroon's view this is a classic case of maritime delimitation between States with adjacent coasts which have been unable to reach agreement on the line to be drawn between their respective exclusive economic zones and continental shelves, although in this case the special circumstances of the geographical situation are particularly marked, and the Court is also required to take account of the interests of third States. As regards the exercise of delimitation, Cameroon argues that the law on the delimitation of maritime boundaries is dominated by the fundamental principle that any delimitation must lead to an equitable solution. In support of this contention, it cites paragraph 1 of Articles 74 and 83 of the 1982 Law of the Sea Convention and a number of decisions of this Court or of arbitral tribunals. Cameroon concludes that there is no single method of maritime delimitation; the choice of method depends on the circumstances specific to each case. Cameroon insists on the fact that the equidistance principle is not a principle of customary law that is automatically applicable in every maritime boundary delimitation between States whose coasts are adjacent, observing that, if a strict equidistance line were drawn, it would be entitled to practically no exclusive economic zone or continental shelf, despite the fact that it has a longer relevant coastline than Nigeria. The Court observes that Nigeria agrees that it is appropriate in the present case to determine a single maritime boundary, but that it rejects Cameroon's line. Nigeria describes that line as fanciful and constructed in defiance of the basic concepts and rules of international law. It criticizes both the line's construction and the "equitableness" of the result in light of the jurisprudence. It directs its criticism of the construction essentially to five points: the actual nature of the line; the relevant coasts used in its construction; the treatment of the islands in this construction; the definition of the area relevant to the delimitation; the method followed in the construction of the line. Nigeria further argues that the Parties' conduct in respect of the granting and exploitation of oil concessions, leading to the establishment of de facto lines, plays a very important role in establishing maritime boundaries. It contends that, within the area to be delimited, the Court cannot redistribute the oil concessions established by the practice of Nigeria, Equatorial Guinea and Cameroon, and that it must respect the configuration of the concessions in its determination of the course of the maritime boundary. Equatorial Guinea, the Court notes, requests that the boundary to be fixed by the Court should nowhere encroach upon the median line between its own coasts and those of Cameroon and Nigeria, which it regards as "a reasonable expression of its legal rights and interests that must not be transgressed in proceedings to which Equatorial Guinea is not a party". It has a number of specific criticisms of the "equitable line" proposed by Cameroon, of which, moreover, it claims it only became aware in December 1998.

The Court begins by observing that the maritime areas on whose delimitation it is to rule in this part of the Judgment lie beyond the outer limit of the respective territorial seas of the two States. The Court further recalls that the Parties agree that it is to rule on the maritime delimitation in accordance with international law. Both Cameroon and Nigeria are parties to the United Nations Law of the Sea Convention of 10 December 1982, which they ratified on 19 November 1985 and 14 August 1986 respectively. Accordingly the relevant provisions of that Convention are applicable, and in particular Articles 74 and 83 thereof, which concern delimitation of the continental shelf and the exclusive economic zone between States with opposite or adjacent coasts. Paragraph 1 of those Articles provides that such delimitation must be effected in such a way as to "achieve an equitable solution". The Court also notes that the Parties agreed in their written pleadings that the delimitation between their maritime areas should be effected by a single line.

The Court points out that it has on various occasions made it clear what the applicable criteria, principles and rules of delimitation are when a line covering several zones of coincident jurisdictions is to be determined. They are expressed in the so-called equitable principles/relevant circumstances method. This method, which is very similar to the equidistance/special circumstances method applicable in delimitation of the territorial sea, involves first drawing an equidistance line, then considering whether there are factors calling for the adjustment or shifting of that line in order to achieve an "equitable result". The Court observes that it will apply the same method in the present case.

Before it can draw an equidistance line and consider whether there are relevant circumstances that might make it necessary to adjust that line, the Court must, however, define the relevant coastlines of the Parties by reference to which the location of the base points to be used in the construction of the equidistance line will be determined. In the present case the Court cannot accept Cameroon's contention, on the one hand, that account should be taken of the coastline of the Gulf of Guinea from Akasso (Nigeria) to Cap Lopez (Gabon) in order to delimit Cameroon's

maritime boundary with Nigeria, and, on the other, that no account should be taken of the greater part of the coastline of Bioko Island. Once the base points have been established in accordance with the above-mentioned principles, it will be possible to determine the equidistance line between the relevant coastlines of the two States. As the Court has already had occasion to explain, this equidistance line cannot be extended beyond a point where it might affect rights of Equatorial Guinea.

The Court then considers whether there are circumstances that might make it necessary to adjust this equidistance line in order to achieve an equitable result. The Court feels bound to stress in this connection that delimiting with a concern to achieving an equitable result, as required by current international law, is not the same as delimiting in equity. The Court's jurisprudence shows that, in disputes relating to maritime delimitation, equity is not a method of delimitation, but solely an aim that should be borne in mind in effecting the delimitation. The geographical configuration of the maritime areas that the Court is called upon to delimit is a given. It is not an element open to modification by the Court but a fact on the basis of which the Court must effect the delimitation.

The Court notes in this respect that Cameroon contends that the concavity of the Gulf of Guinea in general, and of Cameroon's coastline in particular, creates a virtual enclavement of Cameroon, which constitutes a special circumstance to be taken into account in the delimitation process. Nigeria, for its part, argues that it is not for the Court to compensate Cameroon for any disadvantages suffered by it as a direct consequence of the geography of the area. It stresses that it is not the purpose of international law to refashion geography.

The Court finds that although it does not deny that the concavity of the coastline may be a circumstance relevant to delimitation, it nevertheless should stress that this can only be the case when such concavity lies within the area to be delimited. It notes that the sectors of coastline relevant to the present delimitation as determined above exhibit no particular concavity.

The Court then observes that Cameroon further contends that the presence of Bioko Island constitutes a relevant circumstance which should be taken into account by the Court for purposes of the delimitation. It argues that Bioko Island substantially reduces the seaward projection of Cameroon's coastline. Here again Nigeria takes the view that it is not for the Court to compensate Cameroon for any disadvantages suffered by it as a direct consequence of the geography of the area.

The Court points out that in the present case Bioko Island is subject to the sovereignty of Equatorial Guinea, a State which is not a party to the proceedings. Consequently the effect of Bioko Island on the seaward projection of the Cameroonian coastal front is an issue between Cameroon and Equatorial Guinea and not between Cameroon and Nigeria, and is not relevant to the issue of delimitation before the Court. The Court does not therefore regard the presence of Bioko Island as a circumstance that would justify the shifting of the equidistance line as Cameroon claims.

Lastly, Cameroon invokes the disparity between the length of its coastline and that of Nigeria in the Gulf of Guinea as a relevant circumstance that justifies shifting the delimitation line towards the north-west. For its part, Nigeria considers that Cameroon fails to respect the criteria of proportionality of coastline length, which would operate rather in Nigeria's favour.

The Court notes that in the present case, whichever coastline of Nigeria is regarded as relevant, the relevant coastline of Cameroon, as described in paragraph 291, is not longer than that of Nigeria. There is therefore no reason to shift the equidistance line in favour of Cameroon on this ground.

The Court finds that, before ruling on the delimitation line between Cameroon and Nigeria, it must still address the question raised by Nigeria whether the oil practice of the Parties provides helpful indications for purposes of the delimitation of their respective maritime areas.

Thus Nigeria contends that State practice with regard to oil concessions is a decisive factor in the establishment of maritime boundaries. In particular it takes the view that the Court cannot, through maritime delimitation, redistribute such oil concessions between the States party to the delimitation. Cameroon, for its part, maintains that the existence of oil concessions has never been accorded particular significance in matters of maritime delimitation in international law.

The Court concludes that overall, it follows from its own case law and that of arbitral tribunals that, although the existence of an express or tacit agreement between the parties on the siting of their respective oil concessions may indicate a consensus on the maritime areas to which they are entitled, oil concessions and oil wells are not in themselves to be considered as relevant circumstances justifying the adjustment or shifting of the provisional delimitation line. Only if they are based on express or tacit agreement between the parties may they be taken into account. In the present case there is no agreement between the Parties regarding oil concessions. The Court is therefore of the opinion that the oil practice of the Parties is not a factor to be taken into account in the maritime delimitation in the present case.

Having further concluded that there were no other reasons that might have made an adjustment of the equidistance line necessary in order to achieve an equitable result, the Court decides that the equidistance line represents an equitable result for the delimitation of the area in respect of which it has jurisdiction to give a ruling.

The Court notes, however, that point G, which was determined by the two Parties in the Maroua Declaration of 1 June 1975, does not lie on the equidistance line between Cameroon and Nigeria, but to the east of that line. Cameroon is therefore entitled to request that from point G the boundary of the Parties' respective maritime areas should return to the equidistance line. The Court considers that from point G the delimitation line should directly join

the equidistance line at a point with coordinates 8°21'20" longitude east and 4°17'00" latitude north, which will be called X. The boundary will turn at point X and continue southwards along the equidistance line.

However, the equidistance line adopted by the Court cannot be extended very far. The Court has already stated that it can take no decision that might affect rights of Equatorial Guinea, which is not a party to the proceedings. In these circumstances the Court considers that it can do no more than indicate the general direction, from point X, of the boundary between the Parties' maritime areas. The boundary will follow a loxodrome having an azimuth of 187°52'27".

Cameroon's submissions on Nigeria's State responsibility and Nigeria's counter-claims regarding Cameroon's State responsibility
(paras. 308-324)

The Court finally addresses Cameroon's submissions concerning Nigeria's State responsibility and Nigeria's counter-claims concerning Cameroon's State responsibility. In this connection, Cameroon puts forward two separate series of submissions concerning, on the one hand, the Lake Chad area and the Bakassi Peninsula and, on the other, the remaining sectors of the boundary.

The Court recalls that in paragraphs 57, 60, 61 and 225 of its Judgment it fixed the boundary between the two States in the Lake Chad area and the Bakassi Peninsula. It observes that Nigeria does not deny that Nigerian armed forces and a Nigerian administration are currently in place in these areas which the Court has determined are Cameroonian territory, adding in respect of the establishment of the municipality of Bakassi that, if the Court were to recognize Cameroon's sovereignty over such areas, there is nothing irreversible in the relevant arrangements made by Nigeria. The same reasoning clearly applies to other spheres of civil administration, as well as to military or police forces. The Court notes that Nigeria is under an obligation expeditiously and without condition to withdraw its administration and its military and police forces from that area of Lake Chad which falls within Cameroon's sovereignty and from the Bakassi Peninsula.

The Court further observes that Cameroon is under an obligation expeditiously and without condition to withdraw any administration or military or police forces which may be present in areas along the land boundary from Lake Chad to the Bakassi Peninsula which pursuant to the present Judgment fall within the sovereignty of Nigeria. Nigeria has the same obligation in regard to any administration or military or police forces which may be present in areas along the land boundary from Lake Chad to the Bakassi Peninsula which pursuant to the present Judgment fall within the sovereignty of Cameroon.

The Court also notes that the implementation of the present Judgment will afford the Parties a beneficial opportunity to cooperate in the interests of the population concerned, in order notably to enable it to continue to have access to educational and health services comparable to those it currently enjoys. Such cooperation will be especially helpful, with a view to the maintenance of security, during the withdrawal of the Nigerian administration and military and police forces. Moreover, on 21 March 2002 the Agent of Cameroon stated before the Court that "over three million Nigerians live on Cameroonian territory, where, without any restriction, they engage in various activities, and are well integrated into Cameroonian society". He went on to declare that, "faithful to its traditional policy of hospitality and tolerance, Cameroon will continue to afford protection to Nigerians living in the [Bakassi] Peninsula and in the Lake Chad area". The Court takes note with satisfaction of the commitment thus undertaken in respect of these areas where many Nigerian nationals reside.

The Court, moreover, does not uphold Cameroon's submissions with regard to obtaining guarantees of non-repetition in the future, considering that it could not envisage a situation where either Party would fail to respect the territorial sovereignty of the other Party, now that the land and maritime boundary between the two States had been specified by the Court in definitive and mandatory terms.

In the circumstances of the case, the Court considers moreover that, by the very fact of its Judgment and of the evacuation of the Cameroonian territory occupied by Nigeria, the injury suffered by Cameroon by reason of the occupation of its territory will in all events have been sufficiently addressed. The Court does not therefore seek to ascertain whether and to what extent Nigeria's responsibility to Cameroon has been engaged as a result of that occupation.

Finally, concerning various boundary incidents, the Court finds that neither of the Parties sufficiently proves the facts which it alleges, or their imputability to the other Party. The Court is therefore unable to uphold either Cameroon's submissions or Nigeria's counter-claims based on the incidents cited.

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Declaration of Judge Oda

Judge Oda fully supports the conclusions reached by the Court on the *main issues* of the present case, namely the Bakassi Peninsula and the land boundaries in Lake Chad and between Lake Chad and the sea, although he does express some reservations on technical matters.

Judge Oda holds stronger reservations concerning the Court's decision in subparagraph IV, on the "maritime boundary" issues, which cannot be considered main issues in the present dispute. He shares very few of the Court's views and only voted in favour of points IV (B), (C) and (D) because the lines drawn therein are not wholly inappropriate and do not in fact cause any harm. He identifies both procedural and substantive errors made not only by the Applicant but also by the Court.

From the procedural perspective, Judge Oda stresses the fact that in its 1994 Applications Cameroon could not be

seen as asking the Court to adjudge on any "legal dispute" concerning a maritime boundary within the meaning of Article 36 (2) of the Court's Statute. It only requested the drawing of a boundary course. In its 1998 Judgment, the Court erred in rejecting Nigeria's preliminary objections and in deciding that a dispute could be unilaterally submitted to the Court by Cameroon. The Applicant, Cameroon, altered its position in later proceedings by asserting its own maritime claim identified by map coordinates. This procedural error effected an essential change in the complexion of the entire case. In this light, Judge Oda voted against point IV (A) of the operative part of the Judgment.

From the substantive perspective, Judge Oda underlines the failure by the Court and the Applicant to recognize the essential difference between the territorial sea and the area of the continental shelf, which are regulated by two different legal régimes. Judge Oda submits that on the issue of the boundary within the territorial sea, the difference between the two Parties is, in fact, an issue relating *solely* to the status of the Bakassi Peninsula (whether the boundary between Cameroon and Nigeria lies to the west or to the east of the Bakassi Peninsula) and not to a maritime boundary. After stating that Bakassi is part of Cameroon, the Court's Judgment should have had nothing more to add. It is senseless for the Court to present the two tables of coordinates referring to the territorial sea, as neither Party raised this particular issue.

As for the boundary of the continental shelf, the Court renders a decision establishing a line different from the Parties' respective claim lines. The Court's mistaken treatment of the maritime boundary may derive from its failure to understand the law governing this issue. According to Judge Oda, there is no legal rule or principle that mandates recognition of a given line as the *only* one acceptable under international law. The concrete boundary line of the continental shelf is to be chosen by negotiation provided that it remains within the bounds of equity. Judge Oda further states that the 1958 Geneva Convention on the Continental Shelf offers a guiding principle for parties' negotiations: they should seek an "equitable solution" under the so-called "equidistance (median) line + special circumstance" rule. The 1982 United Nations Convention on the Law of the Sea tried to further clarify the issue in its Article 83 (1), which provides for the delimitation of the continental shelf to be "effected by agreement on the basis of international law ... in order to achieve an equitable solution".

In Judge Oda's view, great misunderstanding prevails in academic circles regarding the interpretation of Article 83 (2) of the 1982 Convention. First, this provision does not constitute a compromissory clause such as is referred to in Article 36 (1) of the Court's Statute. Second, the fact that boundary negotiations have failed does not in itself mean that a "(legal) dispute" has arisen. Third, Article 83 (2) should not be interpreted as conferring compulsory jurisdiction on those institutions listed in Article 287, Part XV. Judge Oda asserts that the Court could act as a third-party authority if it were asked jointly by the Parties to draw the boundary line, but the present case was brought unilaterally by Cameroon and the Parties have not even started negotiations. The Court could not initiate compulsory procedures entailing a binding decision and could not "decide" any specific line.

Separate opinion of Judge Ranjeva

Subscribing to the operative part and to the conclusions set out in the Judgment, Judge Ranjeva is satisfied with the undertaking given by the two Parties, under the auspices of the Secretary-General of the United Nations, to abide by the Court's Judgment in the case concerning *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria)*, an undertaking which confirms their consent to jurisdiction under international procedural law.

Judge Ranjeva expresses reservations in respect of the analysis set out in paragraphs 203 and 209 of the Judgment. The Judgment relies on rules of intertemporal law to justify the conclusion that the United Kingdom had authority to determine Nigeria's boundary with Cameroon (para. 209). Did the refusal to accord international status to the agreements concluded by the United Kingdom with the chiefs of Old Calabar justify reference to the concept of "the law at the time"? No lawyer can help but be surprised at the Court's warping of the founding principle of international law. In effect, as far as agreements with leaders or eminent dignitaries of what international law terms "uncivilized nations" are concerned, *pacta non servanda sunt*. Legal "unilateralism" has already been the target of criticism by legal scholars. In the case concerning *Frontier Dispute (Burkina Faso/Republic of Mali)*, the Chamber directly applied colonial law, which it recognized as such and as the source of the applicable law. Thus, it would have been preferable to distinguish between the two spheres of law in the present case: international law in respect of relations between European colonial Powers and colonial law in respect of relations between the metropole and the colonial territories.

Declaration of Judge Herczegh

In his declaration Judge Herczegh expresses the view that the critical comments made in paragraph 238 in the reasoning in the Judgment, concerning the insufficient protection which Article 59 of the Statute may afford in some cases to third States' interests of a legal nature, are unjustified.

Dissenting opinion of Judge Koroma

Judge Koroma in his dissenting opinion acknowledged the important role of the Court as a forum for the peaceful settlement of disputes, particularly territorial and boundary disputes between neighbouring States, which have a propensity to escalate with destructive consequences for the States concerned. However, in his view, if the Court as a judicial organ is to effectively play its assigned role, its decision must be based on the application of the relevant conventions and relevant principles of international law,

foremost among which is the fundamental principle of *pacta sunt servanda*, that every treaty in force is binding upon the parties to it and must be performed in good faith. In his view, the Court cannot operate on a different set of principles. He regretted the fact that on this occasion, the majority of the Court departed from the law and legal principles enriching its decision which is therefore not sustainable.

Judge Koroma observed that, by failing to uphold the validity of the 1884 Treaty between the Kings and Chiefs of Old Calabar and Great Britain, which expressly provided for the "gracious protection" of the people of Old Calabar by Great Britain, but instead upholding the validity of the Anglo-German Agreement of 1913 which ceded the territory of the people of Old Calabar to Germany without their consent, the Court chose to consecrate political reality over legal validity. In his view, the 1884 Treaty did not entitle Great Britain to transfer the territory of the people of Old Calabar without their consent, and to the extent that the 1913 Anglo-German Treaty purportedly had this effect, it should have been declared defective by the Court. Hence, the Court was in error in upholding Cameroon's title based on the 1913 Anglo-German Agreement.

Judge Koroma also disagreed with the Court's response to the principal claim of Nigeria to Bakassi and settlements around Lake Chad based on historical consolidation and effective authority. In his view, historical consolidation, if established by the evidence, remains a valid basis of territorial title. In Judge Koroma's view, the acquisition of territorial title is not closed to what the Court described in the Judgment as "established" modes. If this were so, there would have been no place in international jurisprudence for "prescription", "recognition", "estoppel or preclusion", or "acquiescence". In other words, proven long usage, coupled with a complex of interests and relations which, in themselves, have the effect of attaching a territory, and when supported by evidence of acquiescence, constitutes a legal basis of territorial title. Such a basis to territorial title has been recognized in the jurisprudence of the Court. Accordingly, what was required in this case was proof of the claim and it is for the Court to examine the evidence if it substantiates such claim. Nigeria, he observes, presented substantial evidence to justify the claim of historical consolidation and *effectivités* linking the Bakassi Peninsula and the settlements around Lake Chad with Nigeria and with the necessary evidence of acquiescence. It should have been for the Court to examine such evidence, to determine whether it established title, and not to concentrate on the "label" under which the evidence was presented to it. The Court stated that apart from the Norwegian *Fisheries* case the "notion ... has never been used as a basis of title in other territorial disputes, whether in its own or in other case law". Even if this were so, which is not the case, what should have mattered most is the evidence and not the appellation applied to it.

In Judge Koroma's view, it is the approach taken by the Court in considering the law and material evidence before it which proved to be the flaw in the decision which it reached. This approach led the Court quite erroneously to uphold Cameroon's title based on the Anglo-German Agreement of 1913, and to reject Nigeria's claim to territorial sovereignty based on original title and historical consolidation. He took the view that on the basis of the evidence presented to the Court, if the issues of original title, historical consolidation and effective authority had been given their due consideration, a different conclusion would have been reached by the Court with regard to Bakassi and the settlements around Lake Chad.

In conclusion, Judge Koroma insisted that where the judicial settlement of territorial and boundary disputes is concerned, it is imperative for the Court to apply a valid treaty, and the relevant principles of international law, if the Judgment is to be regarded as based on law.

Separate opinion of Judge Parra-Aranguren

Judge Parra-Aranguren declared that his vote for the operative part of the Judgment, with the exception of point V (C), should not be understood as an agreement to each and every part of the reasoning followed by the Court in reaching its conclusions. He also explained that his vote against point V (C), is based on the well-established principle that "it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions", as was recalled by the Court very recently, on 14 February 2002 (case concerning the *Arrest Warrant of 11 April 2000, (Democratic Republic of Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, para. 43). Neither Cameroon nor Nigeria requested the Court in its submissions to take note of the commitment undertaken by Cameroon to afford protection to Nigerians living in the Bakassi Peninsula. Therefore, in his opinion, the Court should have abstained from taking note of such commitment in the operative part of the Judgment, even though the Court was entitled to address it in its reasoning, as it did in paragraph 317 of the Judgment.

Declaration of Judge Rezek

Judge Rezek did not join the majority in respect of the question of sovereignty over the Bakassi Peninsula and adjacent waters.

He sets out the main reason for that in his declaration: in his view, it is unacceptable for the treaty concluded in 1884 between Great Britain and the Kings and Chiefs of Old Calabar not to be considered a treaty, because it is obvious that at the time in question even the colonial Powers were required to show a minimum of good faith.

Separate opinion of Judge Al-Khasawneh

Judge Al-Khasawneh associates himself with the reasoning of the Court in paragraphs 214 to 216 of the Judgment; however he submits that it was unnecessary and unfortunate for the Court to revert to the questions of the 1913 Agreement between Great Britain and Germany and to

the 1884 Treaty of Protection between Great Britain and the Kings and Chiefs of Old Calabar. Indeed, it is morally and legally difficult to reconcile a duty of protection with the subsequent alienation of the entire territory of the protected entity.

In its Judgment, the Court fails to distinguish between protectorates and colonies and concludes that Great Britain has acquired sovereignty to the Bakassi Peninsula through a derivative root of title. The central questions of the case thus relate to the interpretation of the 1884 Treaty and of the subsequent practice of the Parties. These cannot be circumvented by the invention of a fictitious sub-category of protectorates named "colonial protectorates" where title is presumed to pass automatically and regardless of the terms of the treaty.

No support can be found to the Court's conclusion by reference to the *Western Sahara* or the *Island of Palmas* decisions. The latter especially mistakenly confounds inequality in status and inequality in power by concluding that suzerainty over a native State becomes the basis of territorial sovereignty by the protecting Power. In addition, its excessive generalization results in the assumption that local chiefs are deemed to have become virtual colonies or vassal of the States under the suzerainty of the protecting colonial Power regardless of the nominal control exercised by the protecting State and the fact that they were often recognized as sovereigns in their subsequent dealings with the protecting State. Besides, it is doubtful that the generalization about suzerainty and vassalage with regard to the colonial protectorates was in fact supported by State practice at that time. Moreover, this approach is based on the notion of otherness, and results in an almost regional application of intertemporal law. Judge Al-Khasawneh emphasizes that treaties of protection were sometimes a first step towards the development of a full colonial title, but until that happened and in the absence of provisions which may be interpreted as conveying title, they remained a lever and no more. This conclusion is supported by several examples of State practice — in particular by Great Britain — contemporaneous with the Berlin Conference.

Even assuming, *arguendo*, that the Berlin Conference did sanction the behaviour of colonial Powers vis-à-vis colonial protectorates, is this practice opposable to the Parties in the present dispute? This should be addressed within the principle of intertemporal law. Historically, protection, a concept traceable to the Roman jurist Ulpian, excludes notion of ownership and connotes elements of guardianship. After 1885, State practice began to deform the original classical concept and converted it into an instrument of colonialism. Should this deformation be taken into consideration in the application of the intertemporal rule? Besides, should not the rule *pacta sunt servanda*, one of the most important principles of international law, continue to be applied?

Intertemporal law is not as static as some jurists would like to think. Moreover, the intertemporal rule is not a well-defined rule capable of automatic application, it is rather a perplexing idea that was incapable of finding a place in the 1969 Vienna Convention on the Law of Treaties, and which was consistently rejected in successive decisions of the European Court of Human Rights, overcome by certain decisions of this Court and abandoned in the realm of grave crimes. In sum, the Court's hopes to find the basis for ceding Bakassi to Germany are misplaced on a truncated concept.

In conclusion, the 1884 Treaty had international legal standing: it concerned protection and not colonial title and the Kings and Chiefs of Old Calabar had capacity to enter into treaty relations. The plain words of the Treaty suggest that there was no intent to transfer territorial sovereignty. This situation was not altered until 1913, when Great Britain ceded Bakassi to Germany. The cession implied powers associated with territorial sovereignty that Great Britain did not possess. The case of the Kings and Chiefs of Old Calabar was not weakened by the Treaty itself. However, their subsequent behaviour and their failure to protest leave Judge Al-Khasawneh with no choice but to conclude that they had given their consent to that transfer: *volenti non fit injuria*.

Separate opinion of Judge Mbaye

In an endeavour to obtain greater insight into this dispute between two brother African countries, I have set out some general observations by way of introduction to my opinion.

I share the Court's conclusions as regards "the Lake Chad area and Bakassi". There are existing titles in respect of sovereignty over these areas of territory. It is Cameroon who holds these titles, which must prevail over *effectivités*.

However, I regret that the Court did not rely on the principle of "respect for colonial frontiers", since the Parties devoted lengthy and varied arguments to this matter, and it is of great importance in Africa.

As regards the land boundary between Lake Chad and Bakassi, the maritime delimitation and the issue of responsibility, my conclusions differ in minor respects from those reached by the Court.

Dissenting opinion of Judge Ajibola

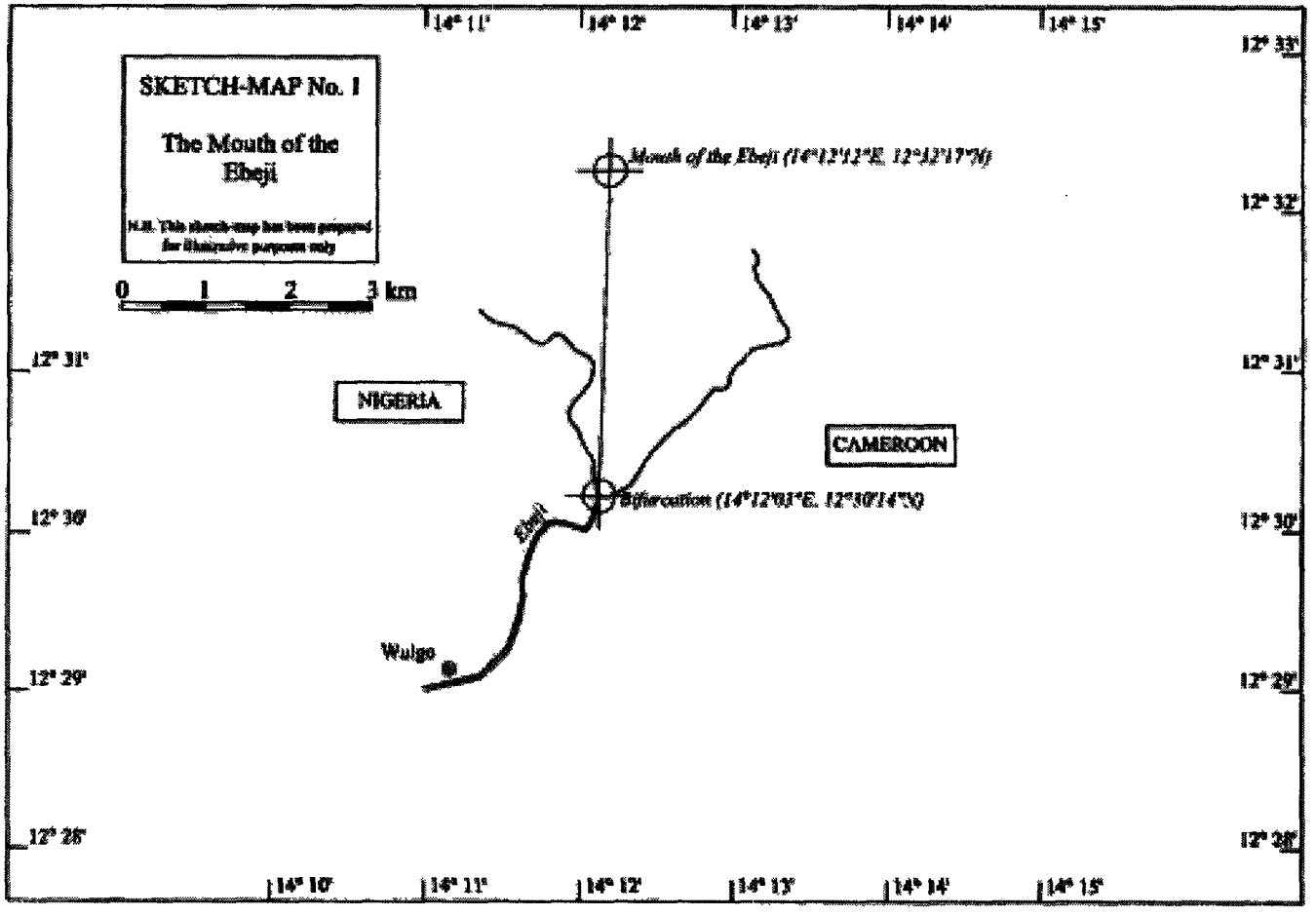
In the case concerning the Land and Maritime Boundary between Cameroon and Nigeria, Judge Ajibola votes in support of the Court's decision on the issue of maritime delimitation beyond point "G" which the Court based on its principle of equidistance in accordance with its jurisprudence and international law. He also supports the decision of the Court to deny Cameroon's claim of State responsibility against Nigeria. In his opinion, the claim is rather anticipatory in that it pertains to acts allegedly committed on a disputed territory and a dispute yet to be determined by the Court. It is for the same reason that Judge Ajibola supports the decision of the Court to dismiss Nigeria's counter-claim of State responsibility against Cameroon.

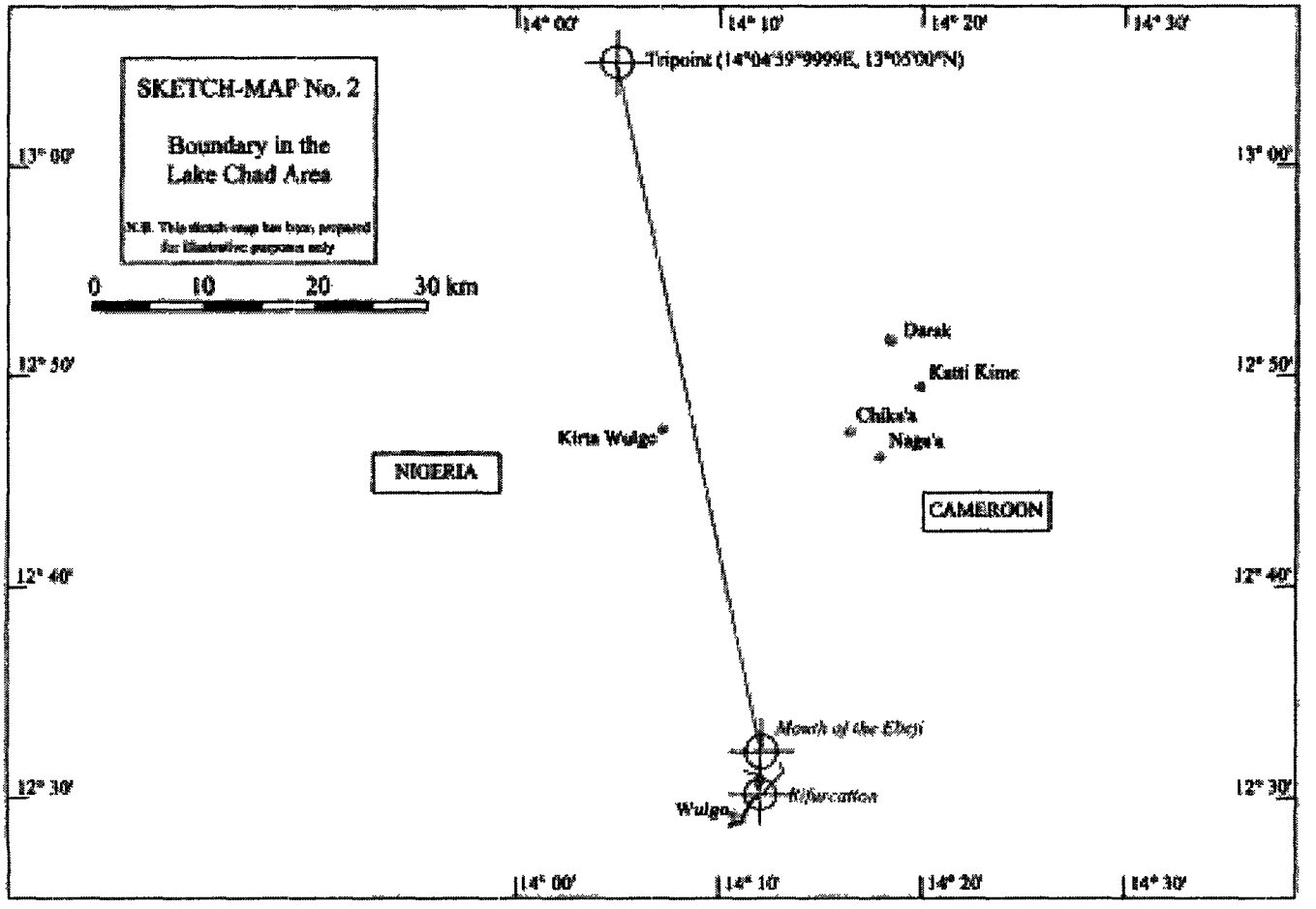
Judge Ajibola however disagrees with the decision of the Court, which declares that the territorial sovereignty over the Bakassi Peninsula belongs to Cameroon. In his own

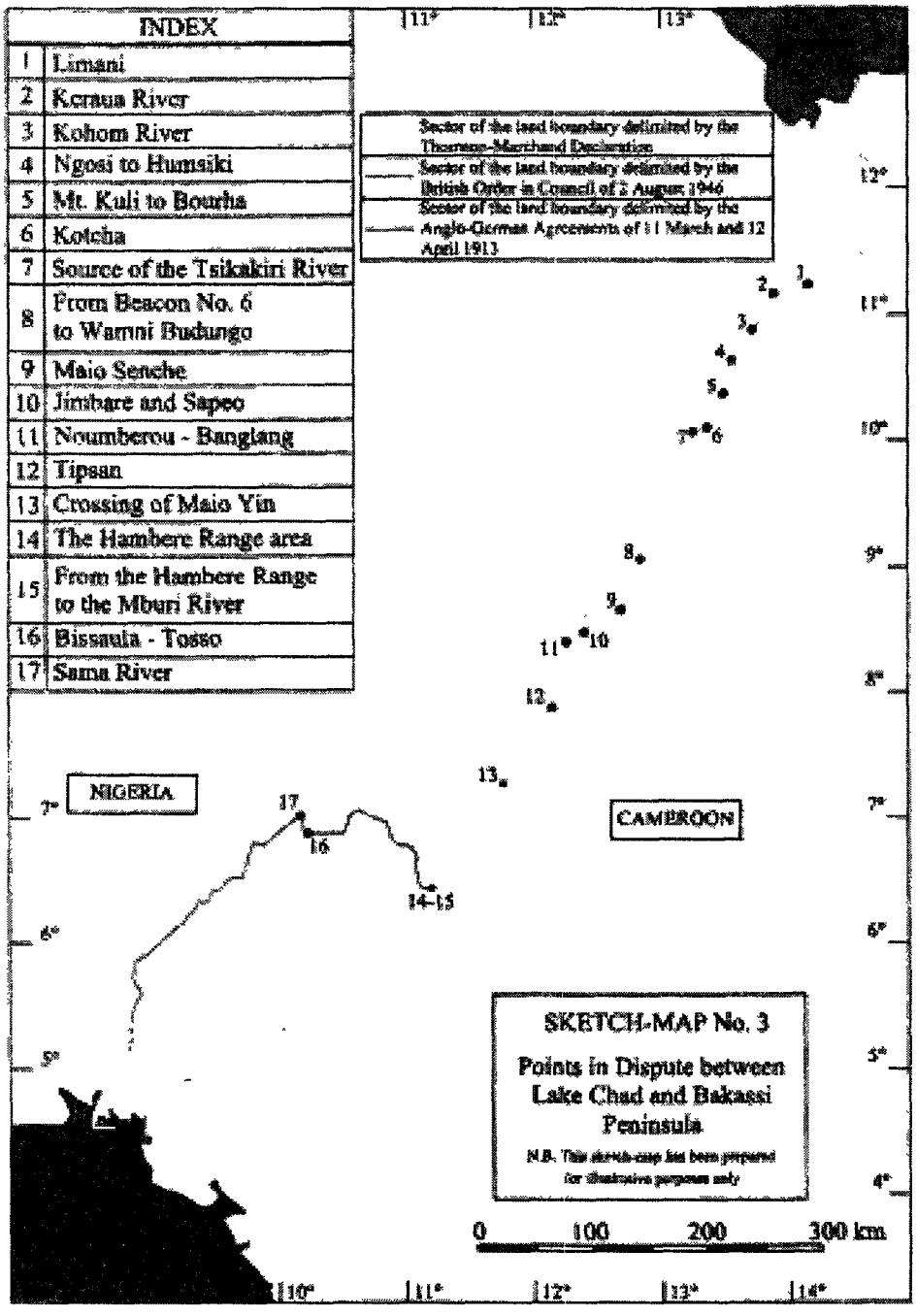
opinion, the Court's acceptance of Cameroon's title claim based on the 1913 Anglo-German Agreement can be faulted, because its Articles XVIII-XXII upon which Cameroon bases its claim are null and void, and those Articles are severable from the Agreement. He goes further to state that the Court failed in its Judgment to consider the effect of Nigeria's argument based on historical consolidation and *effectivités*. In his opinion, the evidential value of the Treaty of 10 September 1884, between the Kings and Chiefs of Old Calabar and Great Britain, is clearly in favour of Nigeria's case. It is a clear indication that at all relevant times before Nigeria's independence, the territorial sovereignty over the Bakassi Peninsula truly belonged to the Kings and Chiefs of Old Calabar and that the Treaty was a treaty of protection, which did not transfer any territorial sovereignty to Great Britain. Great Britain could not therefore transfer any territorial rights to Germany or to Cameroon, after its independence.

Judge Ajibola also votes against the decision of the Court on the delimitation of the Lake Chad boundary. In his opinion, the Court failed to give adequate consideration to Nigeria's claim based on historical consolidation and *effectivités* which entitles Nigeria to the 33 villages claimed.

In his view, Judge Ajibola opines that the conclusion reached by the Court in this case is not in line with the development of its own jurisprudence and in particular with regard to the case of the *Frontier Dispute (Burkina Faso/Mali)*. It is his view that the Court, in accepting Cameroon's one-sided argument, merely gave recognition to a part of paragraph 63 of the case mentioned above when reaching its decision. In Judge Ajibola's view, the Court failed to give cognizance to the last three sentences of that paragraph, which urged that *effectivités* must invariably be taken into consideration.


SKETCH-MAP No. 1
The Mouth of the Ebeji
N.B. This sketch-map has been prepared for illustrative purposes only
0 1 2 3 km
14° 11'
14° 12'
14° 13'
14° 14'
14° 15'
12° 33'
12° 32'
12° 31'
12° 30'
12° 29'
12° 28'
Mouth of the Ebeji (14°12'12"E. 12°32'17"N)
NIGERIA
CAMEROON
Bifurcation (14°12'03"E. 12°30'14"N)
EBEJI
Wulgo


SKETCH-MAP No. 2
Boundary in the Lake Chad Area
N.B. This sketch-map has been prepared for illustrative purposes only
0 10 20 30 km
14° 00'
14° 10'
14° 20'
14° 30'
Tripoint (14°04'39"9999E, 13°05'00"N)
13° 00'
12° 50'
12° 40'
12° 30'
Darak
Katti Kimo
Chika'a
Naga'a
Kirta Wulgo
NIGERIA
CAMEROON
Mouth of the Ebeji
Bifurcation
Wulgo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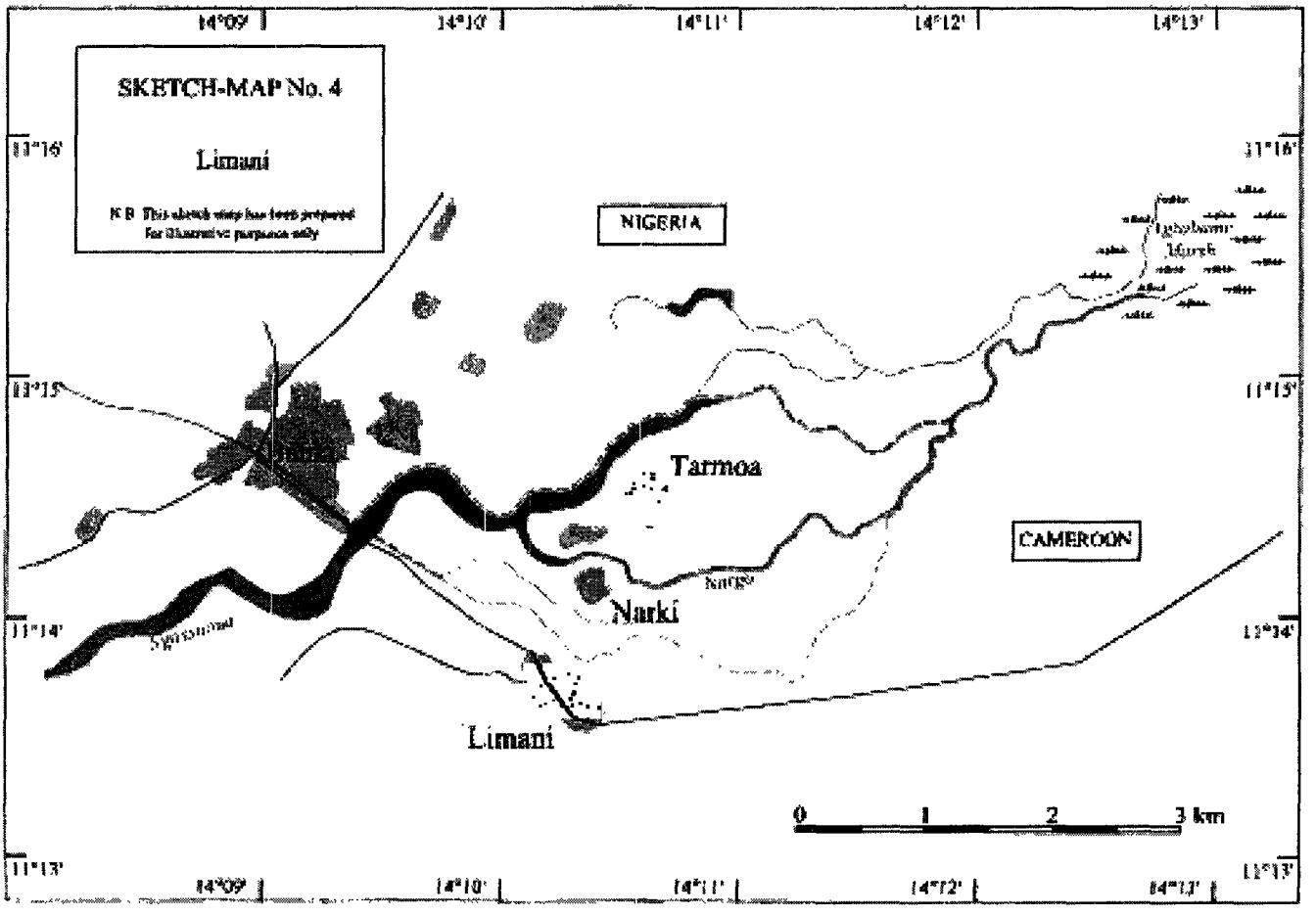
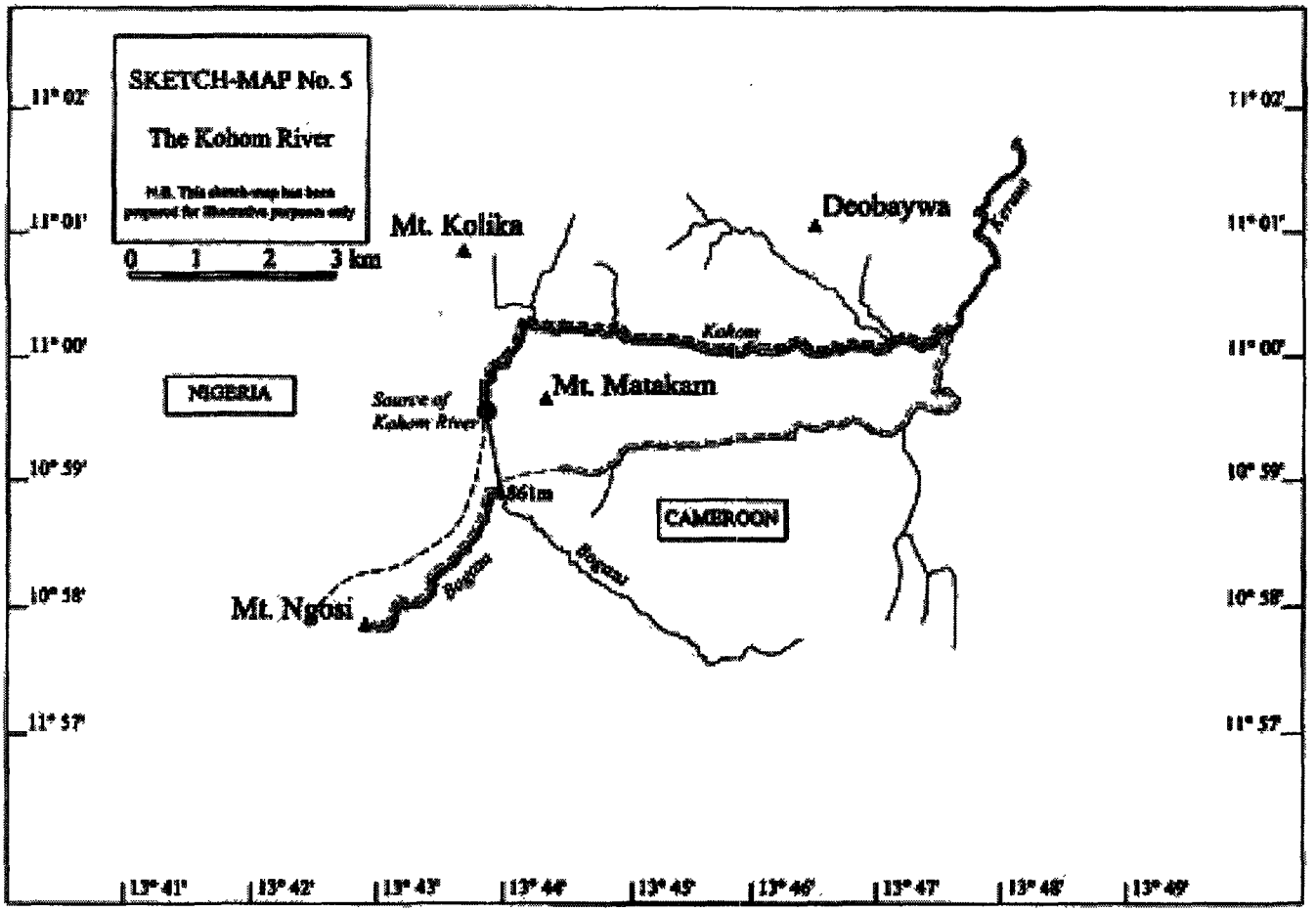
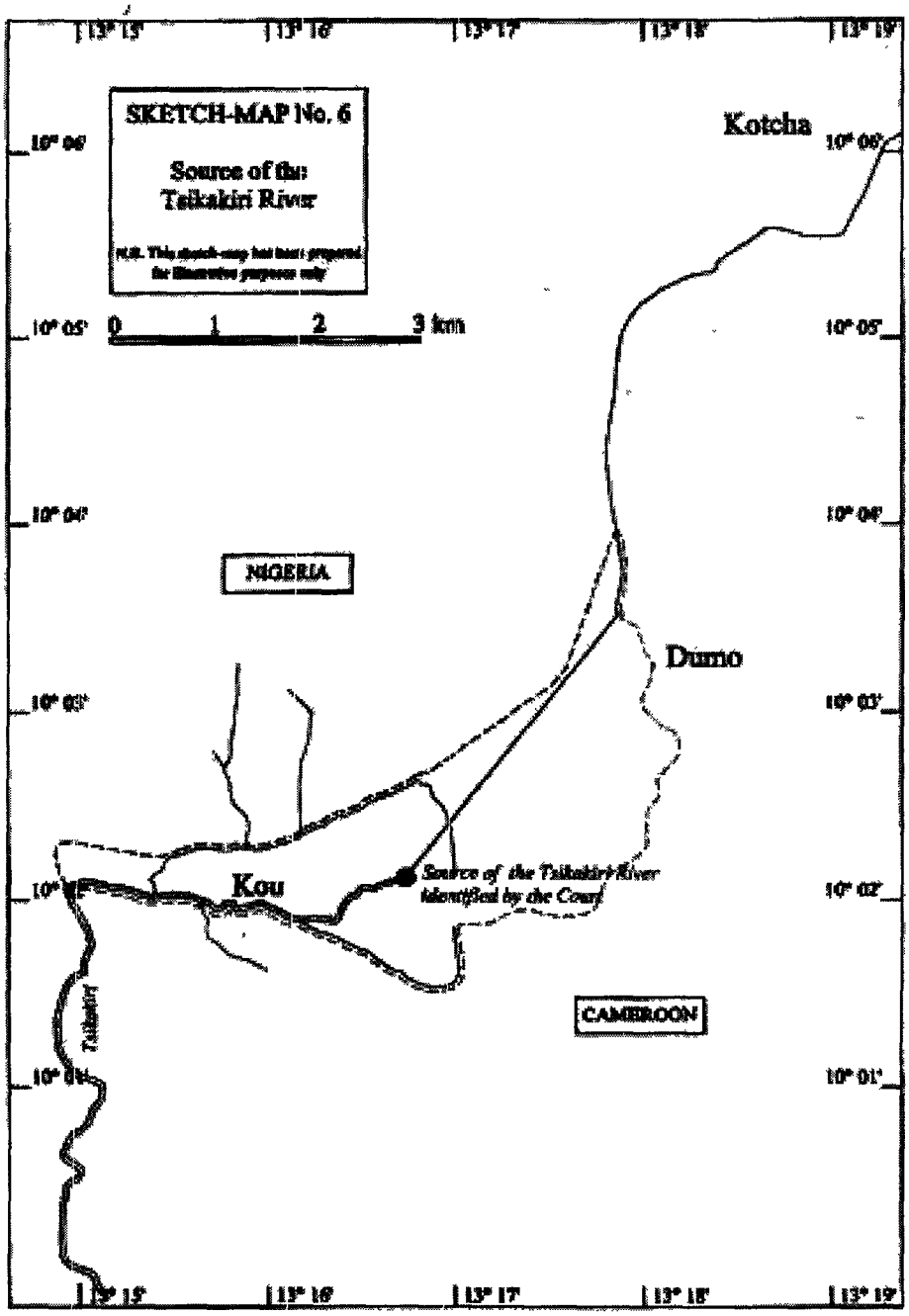
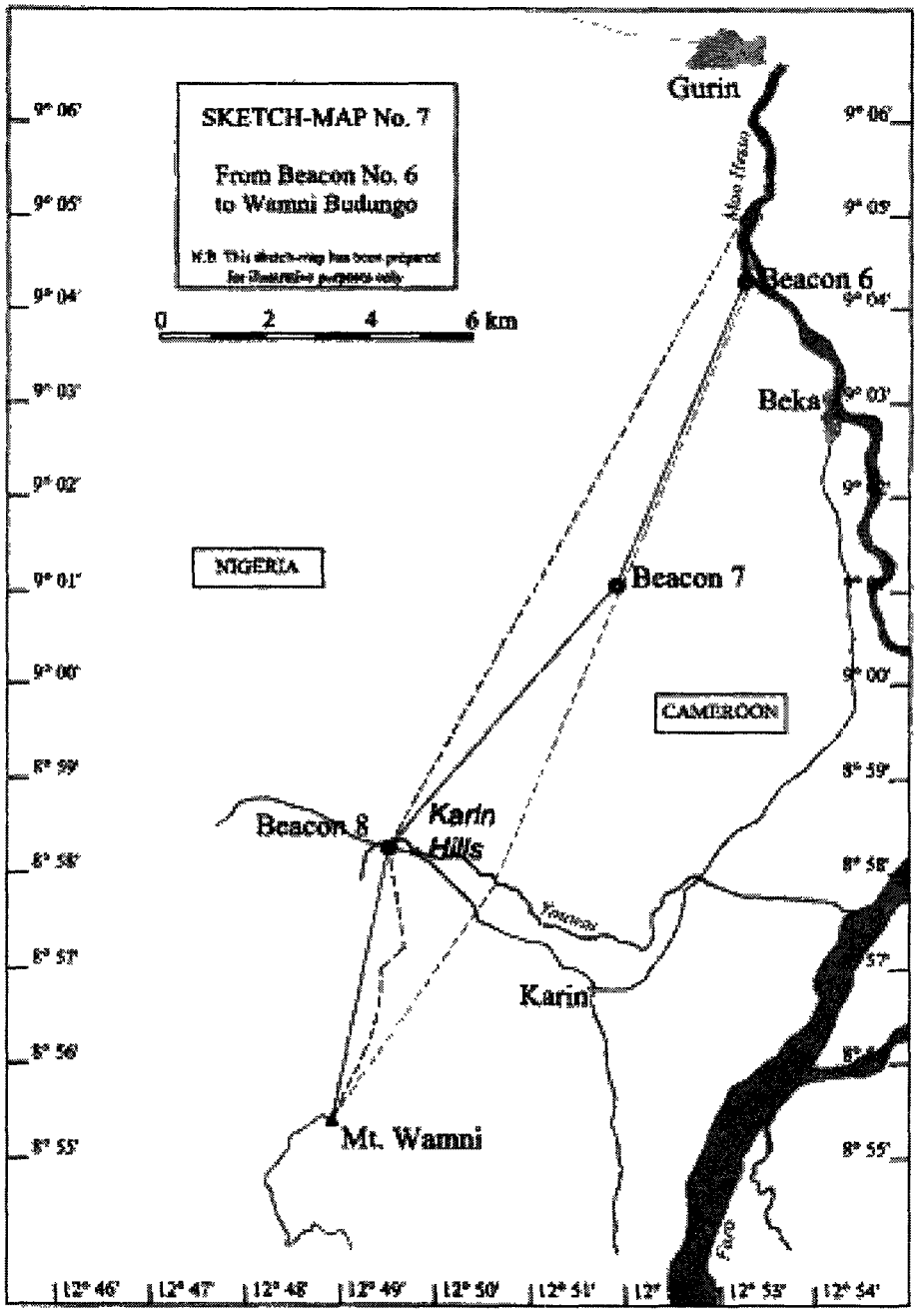
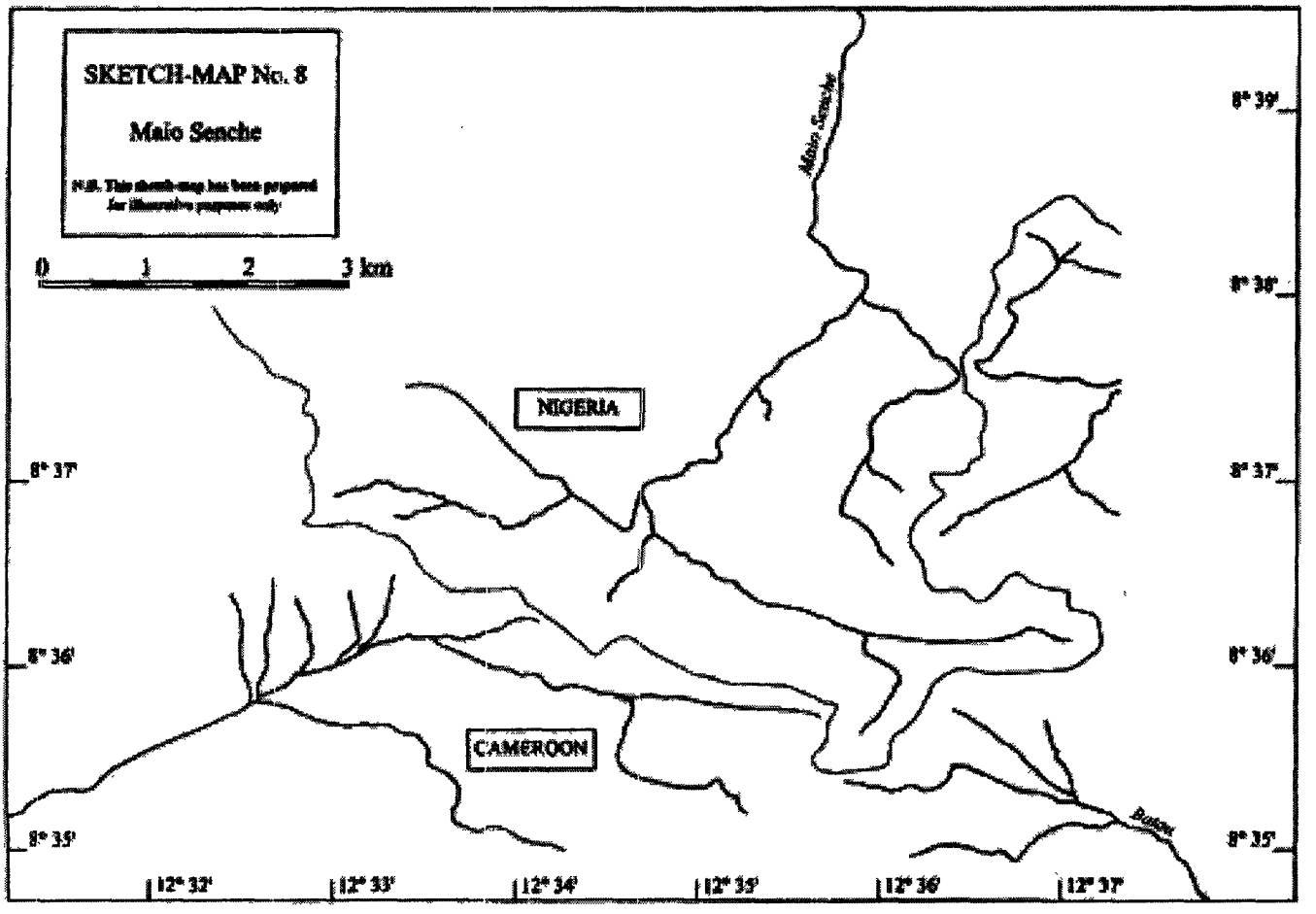
16 Bissaula - Tosso
17 Sama River
Sector of the land boundary delimited by the Thomson-Marchand Declaration
Sector of the land boundary delimited by the British Order in Council of 2 August 1946
Sector of the land boundary delimited by the Anglo-German Agreements of 11 March and 12 April 1913
NIGERIA
CAMEROON
SKETCH-MAP No. 3
Points in Dispute between Lake Chad and Bakassi Peninsula
N.B. This sketch-map has been prepared for illustrative purposes only
0 100 200 300 km

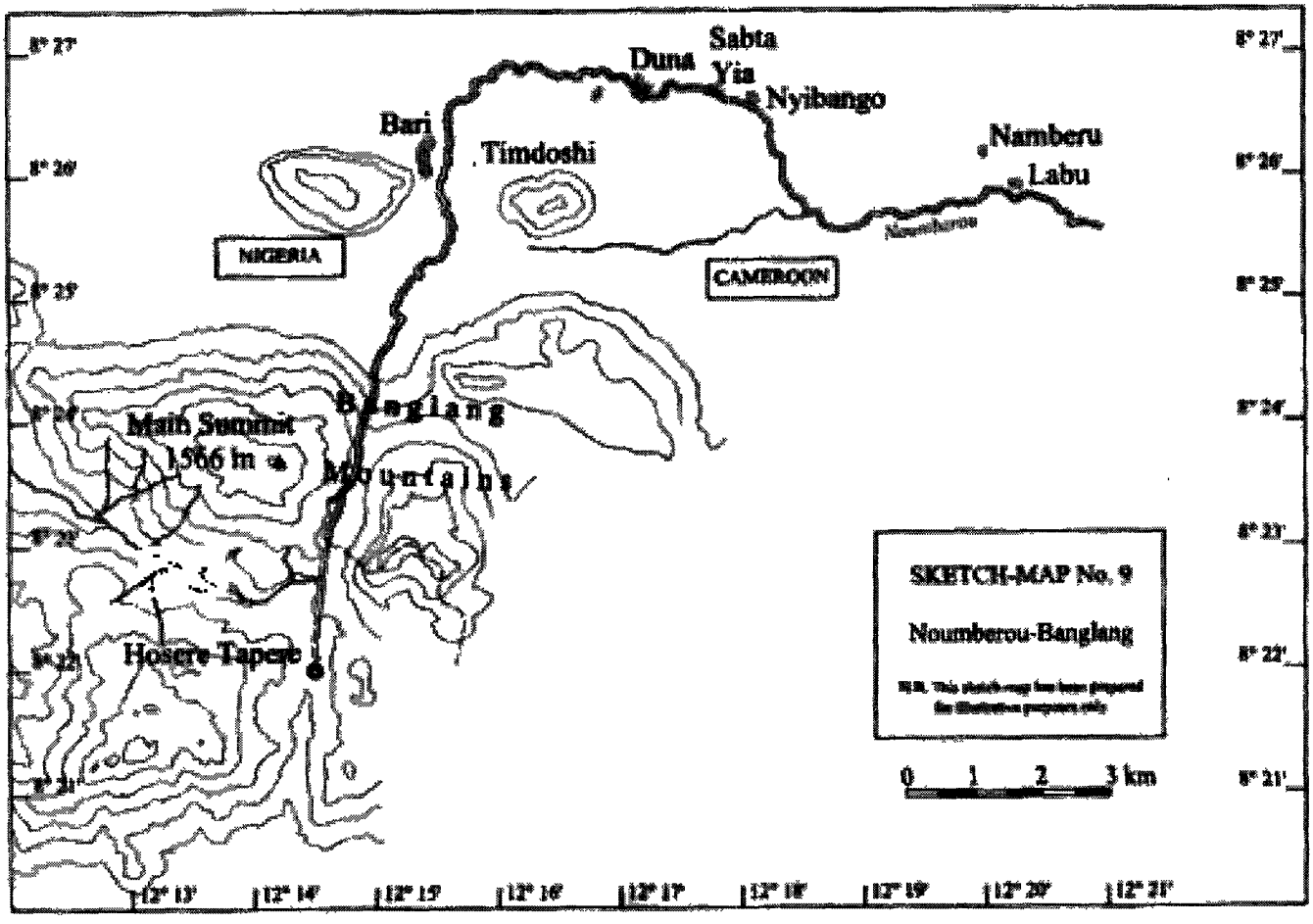

SKETCH-MAP No. 4
Limani
NB This sketch map has been prepared for illustrative purposes only
14°09'
14°10'
14°11'
14°12'
14°13'
11°16'
11°15'
11°14'
11°13'
NIGERIA
CAMEROON
Tarmoa
Narki
Limani
0
1
2
3 km

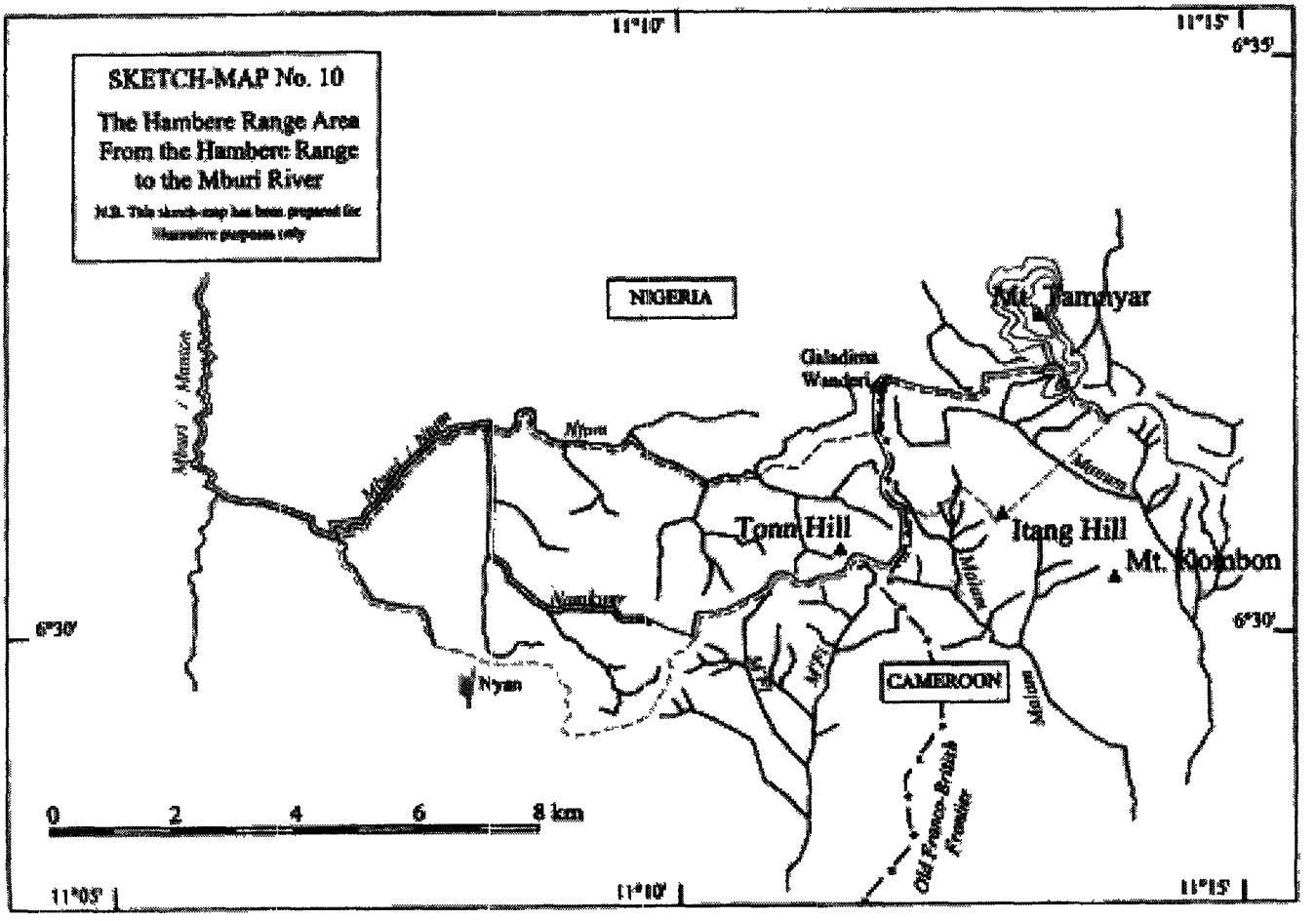

SKETCH-MAP No. 5
The Kobom River
N.B. This sketch-map has been prepared for illustrative purposes only
0 1 2 3 km
11° 02'
11° 01'
11° 00'
10° 59'
10° 58'
11° 57'
13° 41'
13° 42'
13° 43'
13° 44'
13° 45'
13° 46'
13° 47'
13° 48'
13° 49'
Mt. Kolika
Deobaywa
Kobom
Mt. Matakam
NIGERIA
Source of Kobom River
CAMEROON
Mt. Ngosi

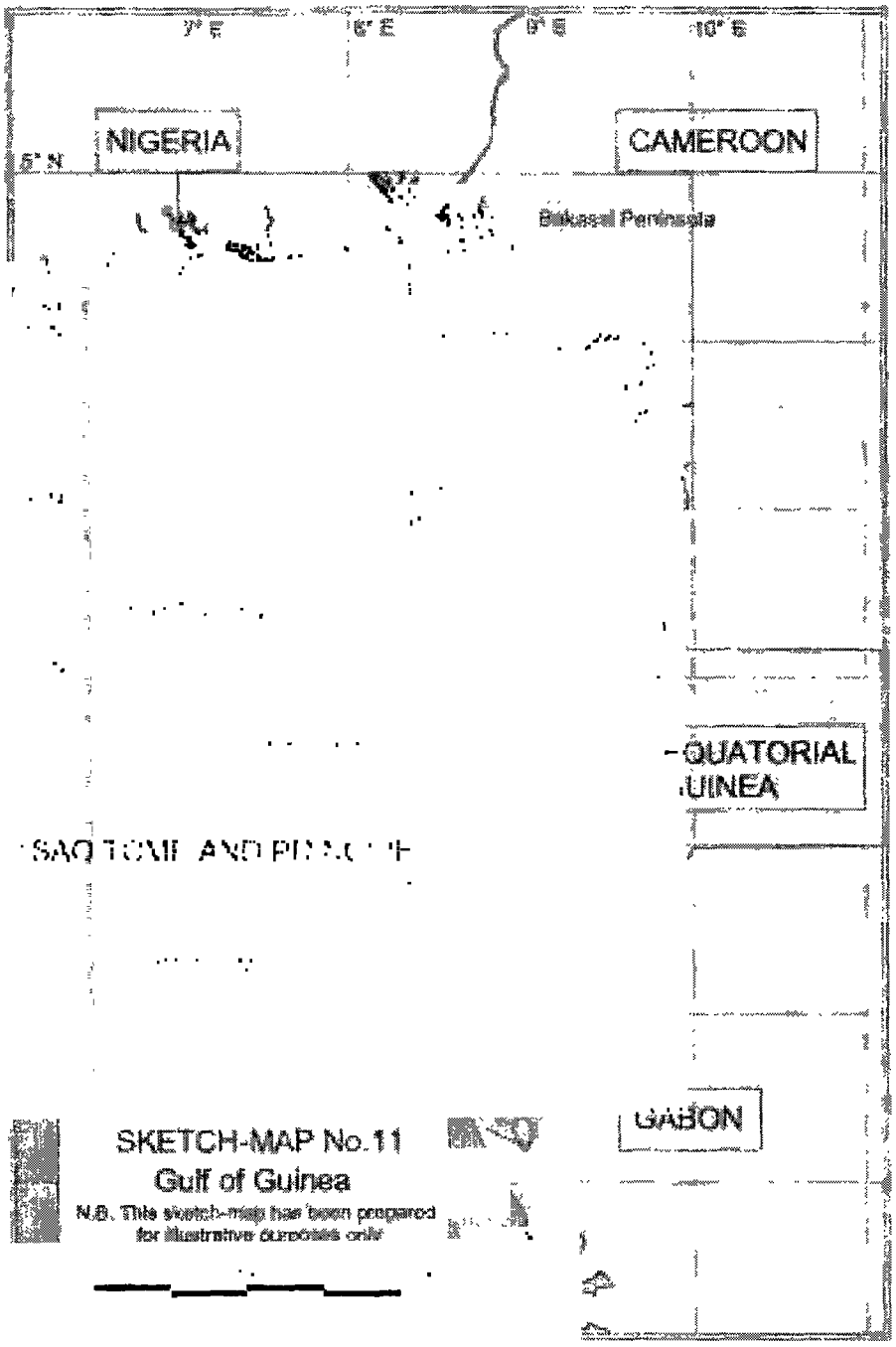

SKETCH-MAP No. 6
Source of the Taikakiri River
N.B. This sketch-map has been prepared for illustrative purposes only
0 1 2 3 km
Kotcha
Dumo
Kou
Source of the Taikakiri River identified by the Court
NIGERIA
CAMEROON
Taikakiri
13° 15'
13° 16'
13° 17'
13° 18'
13° 19'
10° 06'
10° 05'
10° 04'
10° 03'
10° 02'
10° 01'

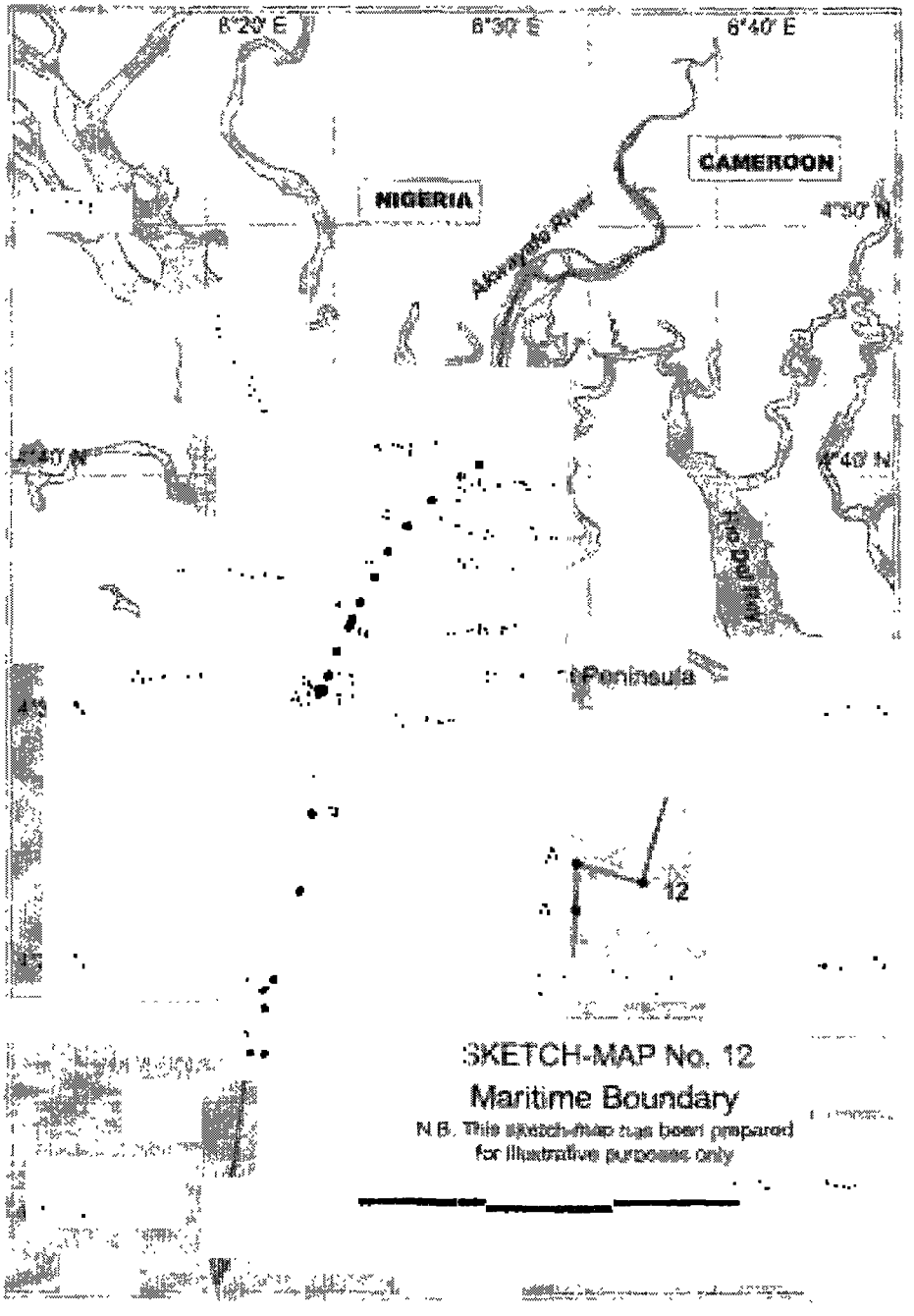

SKETCH-MAP No. 7
From Beacon No. 6
to Wamni Budungo
0 2 4 6 km
Gurin
Beacon 6
Beka
Beacon 7
NIGERIA
CAMEROON
Beacon 8
Karin Hills
Karin
Mt. Wamni
9° 06'
9° 05'
9° 04'
9° 03'
9° 02'
9° 01'
9° 00'
8° 59'
8° 58'
8° 57'
8° 56'
8° 55'
12° 46'
12° 47'
12° 48'
12° 49'
12° 50'
12° 51'
12° 53'
12° 54'

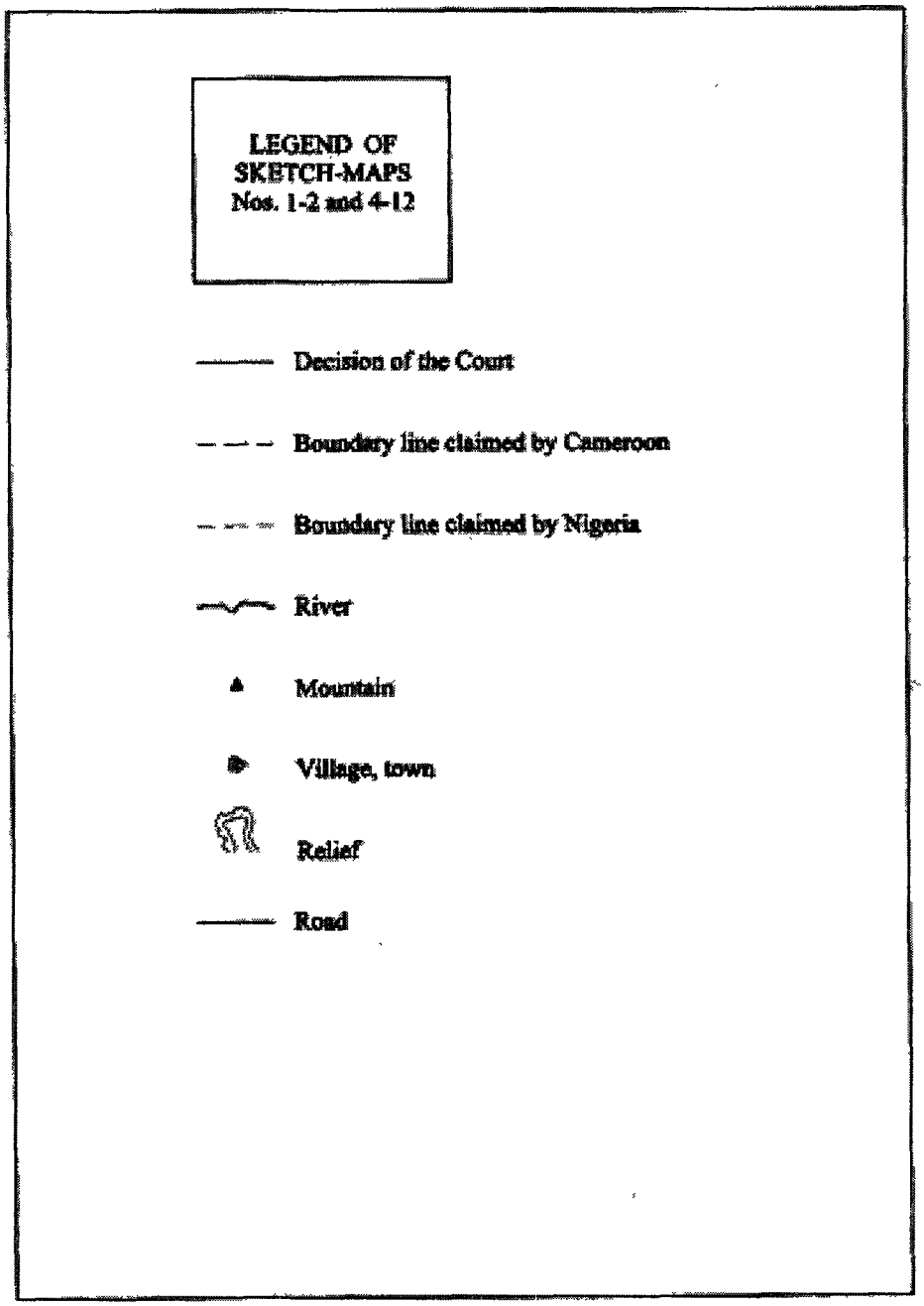

SKETCH-MAP No. 8
Maio Senche
0 1 2 3 km
NIGERIA
CAMEROON
Maio Senche
Bukur
8° 39'
8° 38'
8° 37'
8° 36'
8° 35'
12° 32'
12° 33'
12° 34'
12° 35'
12° 36'
12° 37'


Sabta
Duna
Y'ia
Nyibango
Bari
Timdoshi
Namberu
Labu
NIGERIA
CAMEROON
Math Summit
1566 m
Mountains
Hosere Tapere
SKETCH-MAP No. 9
Noumberou-Banglang
0 1 2 3 km
12° 13'
12° 14'
12° 15'
12° 16'
12° 17'
12° 18'
12° 19'
12° 20'
12° 21'


SKETCH-MAP No. 10
The Hambere Range Area
From the Hambere Range
to the Mburi River
N.B. This sketch-map has been prepared for illustrative purposes only
11°10'
11°15'
6°35'
6°30'
11°05'
NIGERIA
CAMEROON
Mt. Tamnyar
Galadima
Wandari
Tonn Hill
Itang Hill
Mt. Kombon
Nyan
Old Franco-British
Frontier
0 2 4 6 8 km


NIGERIA
CAMEROON
Bakassi Peninsula
-QUATORIAL
UINEA
GABON
SKETCH-MAP No.11
Gulf of Guinea
N.B. This sketch-map has been prepared
for illustrative purposes only


8°20' E
8°30' E
6°40' E
CAMEROON
NIGERIA
4°30' N
4°40' N
Peninsula
12
SKETCH-MAP No. 12
Maritime Boundary
N.B. This sketch-map has been prepared
for illustrative purposes only


LEGEND OF
SKETCH-MAPS
Nos. 1-2 and 4-12
Decision of the Court
Boundary line claimed by Cameroon
Boundary line claimed by Nigeria
River
Mountain
Village, town
Relief
Road

139. CASE CONCERNING SOVEREIGNTY OVER PULAU LIGITAN AND PULAU SIPADAN (INDONESIA *v.* MALAYSIA) (MERITS)

Judgment of 17 December 2002

In its Judgment in the case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), the Court found, by sixteen votes to one, that "sovereignty over Pulau Ligitan and Pulau Sipadan belongs to Malaysia". Ligitan and Sipadan are two very small islands located in the Celebes Sea, off the north-east coast of the island of Borneo.

The Court was composed as follows: President Guillaume; Vice-President Shi; Judges Oda, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal and Elaraby; Judges ad hoc Weeramantry and Franck; Registrar Couvreur.

*

* *

Judge Oda appended a declaration to the Judgment of the Court; Judge ad hoc Franck appended a dissenting opinion to the Judgment of the Court.

*

* *

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

For these reasons,

"THE COURT,

By sixteen votes to one,

Finds that sovereignty over Pulau Ligitan and Pulau Sipadan belongs to Malaysia.

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

AGAINST: Judge ad hoc Franck."

*

* *

History of the proceedings and claims of the Parties
(paras. 1-13)

On 2 November 1998 Indonesia and Malaysia notified to the Registrar of the Court a Special Agreement between the two States, signed at Kuala Lumpur on 31 May 1997 and having entered into force on 14 May 1998. In that Special Agreement they requested the Court to determine on the basis of the treaties, agreements and any other evidence furnished by the Parties, whether sovereignty over Pulau Ligitan and Pulau Sipadan belongs to the Republic of Indonesia or to Malaysia.

Each of the Parties duly filed a Memorial, Counter-Memorial and Reply within the time limits fixed by the Court.

Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to choose a judge ad hoc to sit in the case: Indonesia chose Mr. Mohamed Shahabuddeen and Malaysia Mr. Christopher Gregory Weeramantry. After Mr. Shahabuddeen had resigned, Indonesia chose Mr. Thomas Franck to replace him.

On 13 March 2001, the Republic of the Philippines filed in the Registry of the Court an Application for permission to intervene in the case, invoking Article 62 of the Statute of the Court. By a Judgment rendered on 23 October 2001, the Court found that the Application of the Philippines could not be granted.

Public hearings were held from 3 to 12 June 2002.

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

On behalf of the Government of Indonesia,

"On the basis of the facts and legal considerations presented in Indonesia's written pleadings and in its oral presentation, the Government of the Republic of Indonesia respectfully requests the Court to adjudge and declare that:

(i) sovereignty over Pulau Ligitan belongs to the Republic of Indonesia; and

(ii) sovereignty over Pulau Sipadan belongs to the Republic of Indonesia."

On behalf of the Government of Malaysia,

"The Government of Malaysia respectfully requests the Court to adjudge and declare that sovereignty over Pulau Ligitan and Pulau Sipadan belongs to Malaysia."

Geographical context
(para. 14)

The Court first describes the geographical context of the dispute as follows:

The islands of Ligitan and Sipadan (Pulau Ligitan and Pulau Sipadan) are both located in the Celebes Sea, off the north-east coast of the island of Borneo, and lie approximately 15.5 nautical miles apart. Ligitan is a very small island lying at the southern extremity of a large star-shaped reef extending southwards from the islands of Danawan and Si Amil. Its coordinates are 4°09' latitude north and 118°53' longitude east. The island is situated some 21 nautical miles from Tanjung Tutop, on the Semporna

Peninsula, the nearest area on Borneo. Permanently above sea level and mostly sand, Ligitan is an island with low-lying vegetation and some trees. It is not permanently inhabited.

Although bigger than Ligitan, Sipadan is also a small island, having an area of approximately 0.13 sq. km. Its coordinates are 4°06' latitude north and 118°37' longitude east. It is situated some 15 nautical miles from Tanjung Tutop, and 42 nautical miles from the east coast of the island of Sebatik. Sipadan is a densely wooded island of volcanic origin and the top of a submarine mountain some 600 to 700 m in height, around which a coral atoll has formed. It was not inhabited on a permanent basis until the 1980s, when it was developed into a tourist resort for scuba-diving.

Historical background
(paras. 15-31)

The Court then gives an overview of the complex historical background of the dispute between the Parties.

Bases of the Parties' claims
(paras. 32 and 33)

The Court notes that Indonesia's claim to sovereignty over the islands of Ligitan and Sipadan rests primarily on the Convention which Great Britain and the Netherlands concluded on 20 June 1891 for the purpose of "defining the boundaries between the Netherland possessions in the Island of Borneo and the States in that Island which [were] under British protection". Indonesia also relies on a series of *effectivités*, both Dutch and Indonesian, which it claims confirm its conventional title. At the oral proceedings Indonesia further contended, by way of alternative argument, that if the Court were to reject its title based on the 1891 Convention, it could still claim sovereignty over the disputed islands as successor to the Sultan of Bulungan, because he had possessed authority over the islands.

For its part, Malaysia contends that it acquired sovereignty over the islands of Ligitan and Sipadan following a series of alleged transmissions of the title originally held by the former sovereign, the Sultan of Sulu. Malaysia claims that the title subsequently passed, in succession, to Spain, to the United States, to Great Britain on behalf of the State of North Borneo, to the United Kingdom of Great Britain and Northern Ireland, and finally to Malaysia itself. It argues that its title, based on this series of legal instruments, is confirmed by a certain number of British and Malaysian *effectivités* over the islands. It argues in the alternative that, if the Court were to conclude that the disputed islands had originally belonged to the Netherlands, its *effectivités* would in any event have displaced any such Netherlands title.

The 1891 Convention between Great Britain and the Netherlands
(paras. 34-92)

The Court notes that Indonesia's main claim is that sovereignty over the islands of Ligitan and Sipadan belongs to it by virtue of the 1891 Convention. Indonesia maintains that "[t]he Convention, by its terms, its context, and its object and purpose, established the 4°10' N parallel of latitude as the dividing line between the Parties' respective possessions in the area now in question". It states in this connection that its position is not that "the 1891 Convention line was from the outset intended also to be, or in effect was, a maritime boundary ... east of Sebatik island" but that "the line must be considered an allocation line: land areas, including islands located to the north of 4°10' N latitude were ... considered to be British, and those lying to the south were Dutch". As the disputed islands lie to the south of that parallel, "[i]t therefore follows that under the Convention title to those islands vested in The Netherlands, and now vests in Indonesia".

Indonesia relies essentially on Article IV of the 1891 Convention in support of its claim to the islands of Ligitan and Sipadan. That provision reads as follows:

> "From 4°10' north latitude on the east coast the boundary-line shall be continued eastward along that parallel, across the Island of Sebittik: that portion of the island situated to the north of that parallel shall belong unreservedly to the British North Borneo Company, and the portion south of that parallel to the Netherlands."

The Parties disagree over the interpretation to be given to that provision.

- *Interpretation of the 1891 Convention*
  (paras. 37-92)

The Court notes that Indonesia is not a party to the Vienna Convention of 23 May 1969 on the Law of Treaties; the Court would nevertheless recall that, in accordance with customary international law, reflected in Articles 31 and 32 of that Convention:

> "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."

It further recalls that, with respect to Article 31, paragraph 3, it has had occasion to state that this provision also reflects customary law, stipulating that there shall be taken into account, together with the context, the subsequent conduct of the parties to the treaty, i.e., "any subsequent agreement" (subpara. (*a*)) and "any subsequent practice" (subpara. (*b*))

The Court observes that Indonesia does not dispute that these are the applicable rules.

- *The text of Article IV*
  (paras. 39-43)

With respect to the terms of Article IV, Indonesia maintains that this Article contains nothing to suggest that the line stops at the east coast of Sebatik Island. According to Malaysia, the plain and ordinary meaning of the words "across the Island of Sebittik" is to describe, "in English and in Dutch, a line that crosses Sebatik from the west coast to the east coast and goes no further".

The Court notes that the Parties differ as to how the preposition "across" (in the English) or "*over*" (in the Dutch) in the first sentence of Article IV of the 1891 Convention should be interpreted. It acknowledges that the word is not devoid of ambiguity and is capable of bearing either of the meanings given to it by the Parties. A line established by treaty may indeed pass "across" an island and terminate on the shores of such island or continue beyond it.

The Parties also disagree on the interpretation of the part of the same sentence which reads "the boundary-line shall be continued eastward along that parallel [4°10' north]". In the Court's view, the phrase "shall be continued" is also not devoid of ambiguity. Article I of the Convention defines the starting point of the boundary between the two States, whilst Articles II and III describe how that boundary continues from one part to the next. Therefore, when Article IV provides that "the boundary-line shall be continued" again from the east coast of Borneo along the 4°10' N parallel and across the island of Sebatik, this does not, contrary to Indonesia's contention, necessarily mean that the line continues as an allocation line beyond Sebatik.

The Court moreover considers that the difference in punctuation in the two versions of Article IV of the 1891 Convention does not as such help elucidate the meaning of the text with respect to a possible extension of the line out to sea, to the east of Sebatik Island.

The Court observes that any ambiguity could have been avoided had the Convention expressly stipulated that the 4°10' N parallel constituted, beyond the east coast of Sebatik, the line separating the islands under British sovereignty from those under Dutch sovereignty. In these circumstances, the silence in the text cannot be ignored. It supports the position of Malaysia.

- *The context*
  (paras. 44-48)

Having summarized the Parties' arguments concerning the context of the 1891 Convention, the Court considers that the Dutch Explanatory Memorandum appended to the draft Law submitted to the Netherlands States-General with a view to ratification of the Convention, the only document relating to the Convention to have been published during the period when the latter was concluded, provides useful information on a certain number of points.

First, the Memorandum refers to the fact that, in the course of the prior negotiations, the British delegation had proposed that the boundary line should run eastwards from the east coast of North Borneo, passing between the islands of Sebatik and East Nanukan. As regards Sebatik, the Memorandum explains that the island's partition had been agreed following a proposal by the Dutch Government and was considered necessary in order to provide access to the coastal regions allocated to each party. The Memorandum contains no reference to the disposition of other islands lying further to the east, and in particular there is no mention of Ligitan or Sipadan.

As regards the map appended to the Explanatory Memorandum, the Court notes that this shows four differently coloured lines, the boundary eventually agreed being represented by a red line. On the map, the red line continues out to the sea along parallel 4°10' N to the south of Mabul Island, such an extension out to sea having not been commented in the Memorandum, nor discussed in the Dutch Parliament. It also notes that this map shows only a number of islands situated to the north of parallel 4°10'; apart from a few reefs, no island is shown to the south of that line. It further notes that there is nothing in the case file either to suggest that Ligitan and Sipadan, or other islands such as Mabul, were territories disputed between Great Britain and the Netherlands at the time when the Convention was concluded. The Court cannot therefore accept the argument of Indonesia that the red line on the map was extended in order to settle any dispute in the waters beyond Sebatik, with the consequence that Ligitan and Sipadan were attributed to the Netherlands.

Nor does the Court accept Indonesia's argument regarding the legal value of the map appended to the Explanatory Memorandum. The Court observes that the Explanatory Memorandum and map were never transmitted by the Dutch Government to the British Government, but were simply forwarded to the latter by its diplomatic agent in The Hague. The British Government did not react to this internal transmission. The Court then notes that such a lack of reaction to the line on the map appended to the Memorandum cannot be deemed to constitute acquiescence in this line. The Court concludes from the foregoing that the map cannot be considered either an "agreement relating to [a] treaty which was made between all the parties in connection with the conclusion of the treaty", within the meaning of Article 31, paragraph 2 (a), of the Vienna Convention, or an "instrument which was made by [a] part[y] in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to that treaty", within the meaning of Article 31, paragraph 2 (*b*), of the Vienna Convention.

- *The object and purpose of the 1891 Convention*
  (paras. 49-51)

Having examined the arguments of Indonesia and Malaysia, the Court considers that the object and purpose of the 1891 Convention was the delimitation of boundaries between the parties' possessions within the island of Borneo

itself, as shown by the preamble to the Convention, which provides that the parties were "desirous of defining the boundaries between the Netherlands possessions *in* the Island of Borneo and the States *in that island* which are under British protection" (emphasis added by the Court). This interpretation is, in the Court's view, supported by the very scheme of the 1891 Convention. The Court does not find anything in the Convention to suggest that the parties intended to delimit the boundary between their possessions to the east of the islands of Borneo and Sebatik or to attribute sovereignty over any other islands.

The Court accordingly concludes that the text of Article IV of the 1891 Convention, when read in context and in the light of the Convention's object and purpose, cannot be interpreted as establishing an allocation line determining sovereignty over the islands out to sea, to the east of the island of Sebatik.

- *Supplementary means to seek possible confirmation of Court's interpretation: "travaux préparatoires" of the 1891 Convention and circumstances of its conclusion*
  (paras. 53-58)

In view of the foregoing, the Court considers that it is not necessary to resort to supplementary means of interpretation, such as the *travaux préparatoires* of the 1891 Convention and the circumstances of its conclusion, to determine the meaning of that Convention; however, as in other cases, it considers that it can have recourse to such supplementary means in order to seek a possible confirmation of its interpretation of the text of the Convention.

The Court observes that following its formation, in May 1882, the British North Borneo Company (BNBC) asserted rights which it believed it had acquired from Alfred Dent and Baron von Overbeck — who themselves acquired them from the Sultan of Sulu — to territories situated on the north-eastern coast of the island of Borneo (in the State of Tidoeng "as far south as the Sibuco River"); confrontations then occurred between the Company and the Netherlands, the latter asserting its rights to the Sultan of Bulungan's possessions, "with inclusion of the Tidoeng *territories*" (emphasis in the original). These were the circumstances in which Great Britain and the Netherlands set up a Joint Commission in 1889 to discuss the bases for an agreement to settle the dispute.

The Joint Commission met three times and devoted itself almost exclusively to questions relating to the disputed area of the north-east coast of the island of Borneo. It was only at the last meeting, held on 27 July 1889, that the British delegation proposed that the boundary should pass between the islands of Sebatik and East Nanukan. The Netherlands had rejected the British proposal. The specific idea of Sebatik Island being divided along the 4°10' N parallel was only introduced later. In a letter of 2 February 1891 the Netherlands agreed with this partition.

During the negotiations, the parties used various sketch-maps to illustrate their proposals and opinions. The Court considers that it is impossible to deduce anything at all from the length of the lines on these sketch-maps.

The Court concludes that neither the *travaux préparatoires* of the Convention nor the circumstances of its conclusion can be regarded as supporting the position of Indonesia when it contends that the parties to the Convention agreed not only on the course of the land boundary but also on an allocation line beyond the east coast of Sebatik.

Subsequent practice
(paras. 59-80)

The Court observes that the relations between the Netherlands and the Sultanate of Bulungan were governed by a series of contracts entered into between them. The Contracts of 12 November 1850 and 2 June 1878 laid down the limits of the Sultanate. These limits extended to the north of the land boundary that was finally agreed in 1891 between the Netherlands and Great Britain. For this reason the Netherlands had consulted the Sultan before concluding the Convention with Great Britain and was moreover obliged in 1893 to amend the 1878 Contract in order to take into account the delimitation of 1891. The new text stipulated that the islands of Tarakan and Nanukan, and that portion of the island of Sebatik situated to the south of the boundary line, belonged to Bulungan, together with "the small islands belonging to the above islands, so far as they are situated to the south of the boundary-line". The Court observes that these three islands are surrounded by many smaller islands that could be said to "belong" to them geographically. The Court, however, considers that this cannot apply to Ligitan and Sipadan, which are situated more than 40 nautical miles away from the three islands in question.

The Court then recalls that the 1891 Convention included a clause providing that the parties would in the future be able to define the course of the boundary line more exactly. Thus, Article V of the Convention states: "The exact positions of the boundary-line, as described in the four preceding Articles, shall be determined hereafter by mutual agreement, at such times as the Netherlands and the British Governments may think fit."

The first such agreement was the one signed at London by Great Britain and the Netherlands on 28 September 1915 relating to "the boundary between the State of North Borneo and the Netherlands possessions in Borneo". By that Agreement, the two States approved and confirmed a joint report, incorporated into that Agreement, and the map annexed thereto, which had been drawn up by a mixed Commission. The Commissioners started their work on the east coast of Sebatik and, from east to west, undertook to "delimitate on the spot the frontier" agreed in 1891, as indicated in the preamble to the Agreement. In the Court's view, the Commissioners' assignment was not simply a demarcation exercise, the task of the parties being to clarify the course of a line which could only be imprecise in view

of the somewhat general wording of the 1891 Convention and the line's considerable length. The Court finds that the intention of the parties to clarify the 1891 delimitation and the complementary nature of the demarcation operations become very clear when the text of the Agreement is examined carefully. Thus the Agreement indicates that "[w]here physical features did not present natural boundaries conformable with the provisions of the Boundary Treaty of the 20th June, 1891, [the Commissioners] erected the following pillars". Moreover, the Court observes that the course of the boundary line finally adopted in the 1915 Agreement does not totally correspond to that of the 1891 Convention.

In view of the foregoing, the Court does not accept Indonesia's argument that the 1915 Agreement was purely a demarcation agreement; nor can it accept the conclusion drawn therefrom by Indonesia that the very nature of this Agreement shows that the parties were not required to concern themselves therein with the course of the line out to sea to the east of Sebatik Island.

After examining the title and preamble of the 1915 Agreement and the terms of the joint report of the Commission, the Court concludes that the 1915 Agreement covered a priori the entire boundary "between the Netherlands territory and the State of British North Borneo" and that the Commissioners performed their task beginning at the eastern end of Sebatik. In the opinion of the Court, if the boundary had continued in any way to the east of Sebatik, at the very least some mention of that could have been expected in the Agreement. The Court, in addition, considers that an examination of the map annexed to the 1915 Agreement reinforces its interpretation of that Agreement.

The Court is further of the view that a debate, referred to by Indonesia, that took place within the Dutch Government between 1922 and 1926 over whether the issue of the delimitation of the territorial waters off the east coast of the island of Sebatik should be raised with the British Government, suggests that, in the 1920s, the best informed Dutch authorities did not consider that there had been agreement in 1891 on the extension out to sea of the line drawn on land along the 4°10′ north parallel.

The Court finally is of the opinion that it cannot draw any conclusion for purposes of interpreting Article IV of the 1891 Convention from the practice of the Parties in awarding oil concessions.

In view of all the foregoing, the Court considers that an examination of the subsequent practice of the parties to the 1891 Convention confirms the conclusions at which the Court has arrived in paragraph 52 above as to the interpretation of Article IV of that Convention.

- *Maps*
  (paras. 81-91)

The Court observes that no map reflecting the agreed views of the parties was appended to the 1891 Convention, which would have officially expressed the will of Great Britain and the Netherlands as to the prolongation of the boundary line, as an allocation line, out to sea to the east of Sebatik Island.

It notes that in the course of the proceedings, the Parties made particular reference to two maps: the map annexed to the Explanatory Memorandum appended by the Netherlands Government to the draft Law submitted to the States-General for the ratification of the 1891 Convention, and the map annexed to the 1915 Agreement. The Court has already set out its findings as to the legal value of these maps (see paras. 47, 48 and 72 above).

Having examined the other maps produced by the Parties, the Court finds that, in sum, with the exception of the map annexed to the 1915 Agreement (see above), the cartographic material submitted by the Parties is inconclusive in respect of the interpretation of Article IV of the 1891 Convention.

*

The Court ultimately comes to the conclusion that Article IV, interpreted in its context and in the light of the object and purpose of the Convention, determines the boundary between the two Parties up to the eastern extremity of Sebatik Island and does not establish any allocation line further eastwards. That conclusion is confirmed both by the *travaux préparatoires* and by the subsequent conduct of the parties to the 1891 Convention.

Title by succession
(paras. 93-125)

The Court then turns to the question whether Indonesia or Malaysia obtained title to Ligitan and Sipadan by succession. The Court recalls that Indonesia contended during the second round of the oral proceedings that, if the Court were to dismiss its claim to the islands in dispute on the basis of the 1891 Convention, it would nevertheless have title as successor to the Netherlands, which in turn acquired its title through contracts with the Sultan of Bulungan, the original title-holder. Malaysia contends that Ligitan and Sipadan never belonged to the possessions of the Sultan of Bulungan.

The Court observes that it has already dealt with the various contracts of vassalage concluded between the Netherlands and the Sultan of Bulungan when it considered the 1891 Convention. It recalls that in the 1878 Contract the island possessions of the Sultan were described as "Terekkan [Tarakan], Nanoekan [Nanukan] and Sebittikh [Sebatik], with the islets belonging thereto". As amended in 1893, this list refers to the three islands and surrounding islets in similar terms while taking into account the division of Sebatik on the basis of the 1891 Convention. The Court further recalls that it stated above that the words "the islets belonging thereto" can only be interpreted as referring to the small islands lying in the immediate vicinity of the three islands which are mentioned by name, and not to islands which are located at a distance of more than 40 nautical miles. The Court therefore cannot accept Indonesia's

contention that it inherited title to the disputed islands from the Netherlands through these contracts, which stated that the Sultanate of Bulungan as described in the contracts formed part of the Netherlands Indies.

The Court then recalls that for its part, Malaysia maintains that it acquired sovereignty over the islands of Ligitan and Sipadan further to a series of alleged transfers of the title originally held by the former sovereign, the Sultan of Sulu, that title having allegedly passed in turn to Spain, the United States, Great Britain on behalf of the State of North Borneo, the United Kingdom of Great Britain and Northern Ireland and finally to Malaysia. It is this "chain of title" which, according to Malaysia, provides it with a treaty-based title to Ligitan and Sipadan.

The Court notes at the outset that the islands in dispute are not mentioned by name in any of the international legal instruments presented by Malaysia to prove the alleged consecutive transfers of title. It further notes that the two islands were not included in the grant by which the Sultan of Sulu ceded all his rights and powers over his possessions in Borneo, including the islands within a limit of 3 marine leagues, to Alfred Dent and Baron von Overbeck on 22 January 1878, a fact not contested by the Parties. Finally, the Court observes that, while the Parties both maintain that the islands of Ligitan and Sipadan were not *terrae nullius* during the period in question in the present case, they do so on the basis of diametrically opposed reasoning, each of them claiming to hold title to those islands.

The Court first deals with the question whether Ligitan and Sipadan were part of the possessions of the Sultan of Sulu. In all relevant documents, the Sultanate is invariably described as "the Archipelago of Sulu and the dependencies thereof" or "the Island of Sooloo with all its dependencies". These documents, however, provide no answer to the question whether Ligitan and Sipadan, which are located at a considerable distance from the main island of Sulu, were part of the Sultanate's dependencies. The Court further refers to Malaysia's allegation of the existence of ties of allegiance between the Sultan of Sulu and the Bajau Laut who inhabited the islands off the coast of North Borneo and who from time to time may have made use of the two uninhabited islands. The Court is of the opinion that such ties may well have existed but that they are in themselves not sufficient to provide evidence that the Sultan of Sulu claimed territorial title to these two small islands or considered them part of his possessions. Nor is there any evidence that the Sultan actually exercised authority over Ligitan and Sipadan.

Turning to the alleged transfer of title over Ligitan and Sipadan to Spain, the Court notes that in the Protocol between Spain and Sulu Confirming the Bases of Peace and Capitulation of 22 July 1878 the Sultan of Sulu definitively ceded the "Archipelago of Sulu and the dependencies thereof" to Spain. But the Court concludes that there is no evidence that Spain considered Ligitan and Sipadan as covered by that Protocol. The Court observes, however, that it cannot be disputed, that the Sultan of Sulu relinquished the sovereign rights over all his possessions in favour of Spain, thus losing any title he may have had over islands located beyond the 3-marine-league limit from the coast of North Borneo. The Court, therefore, is of the opinion that Spain was the only State which could have laid claim to Ligitan and Sipadan by virtue of the relevant instruments but that there is no evidence that it actually did so. It further observes that at the time neither Great Britain, on behalf of the State of North Borneo, nor the Netherlands explicitly or implicitly laid claim to Ligitan and Sipadan.

The next link in the chain of transfers of title is the Treaty of 7 November 1900 between the United States and Spain, by which Spain "relinquish[ed] to the United States all title and claim of title ... to any and all islands belonging to the Philippine Archipelago" which had not been covered by the Treaty of Peace of 10 December 1898. The Court first notes that, although it is undisputed that Ligitan and Sipadan were not within the scope of the 1898 Treaty of Peace, the 1900 Treaty does not specify islands, apart from Cagayan Sulu and Sibutu and their dependencies, that Spain ceded to the United States. Spain nevertheless relinquished by that Treaty any claim it may have had to Ligitan and Sipadan or other islands beyond the 3-marine-league limit from the coast of North Borneo. Subsequent events show that the United States itself was uncertain to which islands it had acquired title under the 1900 Treaty. A temporary arrangement between Great Britain and the United States was made in 1907 by an Exchange of Notes.

This Exchange of Notes, which did not involve a transfer of territorial sovereignty, provided for a continuation of the administration by the BNBC of the islands situated more than 3 marine leagues from the coast of North Borneo but left unresolved the issue to which of the parties these islands belonged.

This temporary arrangement lasted until 2 January 1930, when a Convention was concluded between Great Britain and the United States in which a line was drawn separating the islands belonging to the Philippine Archipelago on the one hand and the islands belonging to the State of North Borneo on the other hand. Article III of that Convention stated that all islands to the south and west of the line should belong to the State of North Borneo. From a point well to the north-east of Ligitan and Sipadan, the line extended to the north and to the east. The Convention did not mention any island by name apart from the Turtle and Mangsee Islands, which were declared to be under United States sovereignty. By concluding the 1930 Convention, the United States relinquished any claim it might have had to Ligitan and Sipadan and to the neighbouring islands. But the Court cannot conclude either from the 1907 Exchange of Notes or from the 1930 Convention or from any document emanating from the United States Administration in the intervening period that the United States did claim sovereignty over these islands. It can, therefore, not be said with any degree of certainty that by the 1930 Convention the United States transferred title to Ligitan and Sipadan to Great Britain, as Malaysia asserts. On the other hand, the Court cannot let go unnoticed that Great Britain was of the opinion that as a result of the 1930 Convention it acquired,

on behalf of the BNBC, title to all the islands beyond the 3-marine-league zone which had been administered by the Company, with the exception of the Turtle and the Mangsee Islands. To none of the islands lying beyond the 3-marine-league zone had it ever before laid a formal claim. Whether such title in the case of Ligitan and Sipadan and the neighbouring islands was indeed acquired as a result of the 1930 Convention is less relevant than the fact that Great Britain's position on the effect of this Convention was not contested by any other State.

The State of North Borneo was transformed into a colony in 1946. Subsequently, by virtue of Article IV of the Agreement of 9 July 1963, the Government of the United Kingdom agreed to take "such steps as [might] be appropriate and available to them to secure the enactment by the Parliament of the United Kingdom of an Act providing for the relinquishment ... of Her Britannic Majesty's sovereignty and jurisdiction in respect of North Borneo, Sarawak and Singapore" in favour of Malaysia.

In 1969 Indonesia challenged Malaysia's title to Ligitan and Sipadan and claimed to have title to the two islands on the basis of the 1891 Convention.

In view of the foregoing, the Court concludes that it cannot accept Malaysia's contention that there is an uninterrupted series of transfers of title from the alleged original title-holder, the Sultan of Sulu, to Malaysia as the present one. It has not been established with certainty that Ligitan and Sipadan belonged to the possessions of the Sultan of Sulu nor that any of the alleged subsequent title-holders had a treaty-based title to these two islands. The Court can therefore not find that Malaysia has inherited a treaty-based title from its predecessor, the United Kingdom of Great Britain and Northern Ireland.

"Effectivités"
(paras. 126-149)

The Court then considers whether evidence furnished by the Parties with respect to "*effectivités*" relied upon by them provides the basis for a decision — as requested in the Special Agreement — on the question to whom sovereignty over Ligitan and Sipadan belongs.

The Court observes that both Parties claim that the *effectivités* on which they rely merely confirm a treaty-based title. On an alternative basis, Malaysia claims that it acquired title to Ligitan and Sipadan by virtue of continuous peaceful possession and administration, without objection from Indonesia or its predecessors in title.

The Court indicates that, having found that neither of the Parties has a treaty-based title to Ligitan and Sipadan, it will consider these *effectivités* as an independent and separate issue.

It notes that, in support of its arguments relating to *effectivités*, Indonesia cites patrols in the area by vessels of the Dutch Royal Navy, activities of the Indonesian Navy, as well as activities of Indonesian fishermen. It notes further that, in regard to its Act No. 4 concerning Indonesian Waters, promulgated on 18 February 1960, in which its archipelagic baselines are defined, Indonesia recognizes that it did not at that time include Ligitan or Sipadan as base points for the purpose of drawing baselines and defining its archipelagic waters and territorial sea, although it argues that this cannot be interpreted as demonstrating that Indonesia regarded the islands as not belonging to its territory.

As regards its *effectivités* on the islands of Ligitan and Sipadan, Malaysia mentions control over the taking of turtles and the collection of turtle eggs, allegedly the most important economic activity on Sipadan for many years. Malaysia also relies on the establishment in 1933 of a bird sanctuary on Sipadan. Malaysia further points out that the British North Borneo colonial authorities constructed lighthouses on Ligitan and Sipadan Islands in the early 1960s and that these exist to this day and are maintained by the Malaysian authorities.

The Court first recalls the statement by the Permanent Court of International Justice in the *Legal Status of Eastern Greenland (Denmark* v. *Norway)* case:

> "a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority.
>
> Another circumstance which must be taken into account by any tribunal which has to adjudicate upon a claim to sovereignty over a particular territory, is the extent to which the sovereignty is also claimed by some other Power."

The Permanent Court continued:

> "It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries." (*P.C.I.J., Series A/B, No. 53*, pp. 45-46)

The Court points out that in particular in the case of very small islands which are uninhabited or not permanently inhabited — like Ligitan and Sipadan, which have been of little economic importance (at least until recently) — *effectivités* will indeed generally be scarce.

The Court further observes that it cannot take into consideration acts having taken place after the date on which the dispute between the Parties crystallized unless such acts are a normal continuation of prior acts and are not undertaken for the purpose of improving the legal position of the Party which relies on them. The Court therefore, primarily, analyses the *effectivités* which date from the period before 1969, the year in which the Parties asserted conflicting claims to Ligitan and Sipadan.

The Court finally observes that it can only consider those acts as constituting a relevant display of authority

which leave no doubt as to their specific reference to the islands in dispute as such. Regulations or administrative acts of a general nature can therefore be taken as *effectivités* with regard to Ligitan and Sipadan only if it is clear from their terms or their effects that they pertained to these two islands.

Turning then to the *effectivités* relied on by Indonesia, the Court begins by pointing out that none of them is of a legislative or regulatory character. It finds, moreover, that it cannot ignore the fact that Indonesian Act No. 4 of 8 February 1960, which draws Indonesia's archipelagic baselines, and its accompanying map do not mention or indicate Ligitan and Sipadan as relevant base points or turning points.

With regard to a continuous presence of the Dutch and Indonesian navies in the waters around Ligitan and Sipadan, as cited by Indonesia, it cannot, in the opinion of the Court, be deduced either from the report of the commanding officer of the Dutch destroyer *Lynx* — which patrolled the area in 1921 — or from any other document presented by Indonesia in connection with Dutch or Indonesian naval surveillance and patrol activities that the naval authorities concerned considered Ligitan and Sipadan and the surrounding waters to be under the sovereignty of the Netherlands or Indonesia.

The Court finally observes that activities by private persons such as Indonesian fishermen, cannot be seen as *effectivités* if they do not take place on the basis of official regulations or under governmental authority. The Court concludes that the activities relied upon by Indonesia do not constitute acts *à titre de souverain* reflecting the intention and will to act in that capacity.

With regard to the *effectivités* relied upon by Malaysia, the Court first observes that pursuant to the 1930 Convention, the United States relinquished any claim it might have had to Ligitan and Sipadan and that no other State asserted its sovereignty over those islands at that time or objected to their continued administration by the State of North Borneo. The Court further observes that those activities which took place before the conclusion of that Convention cannot be seen as acts "*à titre de souverain*", as Great Britain did not at that time claim sovereignty on behalf of the State of North Borneo over the islands beyond the 3-marine-league limit. Since it, however, took the position that the BNBC was entitled to administer the islands, a position which after 1907 was formally recognized by the United States, these administrative activities cannot be ignored either.

Both the measures taken to regulate and control the collecting of turtle eggs and the establishment of a bird reserve, as cited by Malaysia as evidence of such effective administration over the islands, must, in the view of the Court, be seen as regulatory and administrative assertions of authority over territory which is specified by name.

The Court observes that the construction and operation of lighthouses and navigational aids are not normally considered manifestations of State authority. It recalls, however, that in its Judgment in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain*) it stated as follows:

> "Certain types of activities invoked by Bahrain such as the drilling of artesian wells would, taken by themselves, be considered controversial as acts performed *à titre de souverain*. The construction of navigational aids, on the other hand, can be legally relevant in the case of very small islands. In the present case, taking into account the size of Qit'at Jaradah, the activities carried out by Bahrain on that island must be considered sufficient to support Bahrain's claim that it has sovereignty over it." (*Judgment, Merits, I.C.J. Reports 2001*, para. 197)

The Court is of the view that the same considerations apply in the present case.

The Court notes that the activities relied upon by Malaysia, both in its own name and as successor State of Great Britain, are modest in number but that they are diverse in character and include legislative, administrative and quasi-judicial acts. They cover a considerable period of time and show a pattern revealing an intention to exercise State functions in respect of the two islands in the context of the administration of a wider range of islands.

The Court moreover cannot disregard the fact that at the time when these activities were carried out, neither Indonesia nor its predecessor, the Netherlands, ever expressed its disagreement or protest. In this regard, the Court notes that in 1962 and 1963 the Indonesian authorities did not even remind the authorities of the colony of North Borneo, or Malaysia after its independence, that the construction of the lighthouses at those times had taken place on territory which they considered Indonesian; even if they regarded these lighthouses as merely destined for safe navigation in an area which was of particular importance for navigation in the waters off North Borneo, such behaviour is unusual. Given the circumstances of the case, and in particular in view of the evidence furnished by the Parties, the Court concludes that Malaysia has title to Ligitan and Sipadan on the basis of the *effectivités* referred to above.

Declaration of Judge Oda

Judge Oda considers the present case a "weak" one in that neither Party made a strong showing in support of its claim to title to the islands on any basis. Judge Oda notes that the Court was requested to choose between the two Parties in adjudging sovereignty, and he considers that given that choice, the Court reached a reasonable decision.

In Judge Oda's view, a full understanding of the present case requires an awareness of the underlying facts and circumstances. He notes that the existence of the islands of Ligitan and Sipadan has been known since the nineteenth century, but that neither Indonesia nor Malaysia claimed sovereignty over them until the late 1960s. Prior to that time, there was no dispute between the two States concerning sovereignty over the islands. Any dispute that may have arisen at that time concerned only the delimitation of the continental shelf between the two States, which had

become of interest because of submarine oil reserves, but *not* sovereignty over the islands.

In the mid-1960s agreements between neighbouring States to delimit the continental shelf were entered into in all parts of the world. Indonesia and Malaysia succeeded in concluding an agreement on the delimitation of the continental shelf in the Malacca Straits and the South China Sea. However, negotiations on the area to the east of Borneo became deadlocked in September 1969 and the Parties agreed to suspend them. The Parties considered this date to be the "critical date" in respect of their dispute concerning sovereignty. Prior to these negotiations, Indonesia and Malaysia had also granted Japanese oil companies oil exploration and exploitation concessions in this area. The concession zones did not overlap and neither Indonesia nor Malaysia claimed that its zone had been violated by the other Party.

Judge Oda finds that, contrary to the assertion in the Special Agreement, the only dispute which existed in or around 1969 was one concerning the delimitation of the continental shelf and that such delimitation dispute would have been referred more properly to the Court by joint agreement. Judge Oda further notes that the Application by the Philippines in 2001 for permission to intervene did *not* concern either Party's title to the two islands but the delimitation of the continental shelf between the Parties.

In the 1960s, the prevailing rule concerning the delimitation of the continental shelf was the one set out in Article 6, paragraph 1, of the 1958 Convention on the Continental Shelf. This provision is extremely ambiguous because it neither makes clear the baselines from which the median line should be measured nor does it explain the "special circumstances" which justify departing from a median line in connection with certain islands. Judge Oda suspects that the main concern of both Parties in their negotiations on the delimitation of their respective continental shelves related to the definition of the baselines and the role in terms of the "special circumstances" test to be played by the two islands. In fact, the Parties (particularly Indonesia) might have concluded that sovereignty over the islands would entitle them to a much wider continental shelf. In Judge Oda's view, the issue of sovereignty arose only as a result of the Parties' manoeuvring for better bargaining positions in the continental shelf delimitation. This resulted from a misconception on the part of the Parties, who failed to understand that, in accordance with the "special circumstances" rule, a delimitation line could have also been drawn disregarding these two islands.

Though Malaysia has now been awarded sovereignty over the islands, the impact of the Court's Judgment on the delimitation of the continental shelf should be considered from a different angle. The rule concerning the delimitation of the continental shelf is set out in Article 83 of the 1982 United Nations Convention on the Law of the Sea calling for "an equitable solution". The question remains how "equitable" considerations apply to these islands. Judge Oda concludes that the present Judgment does not necessarily have a direct bearing on the delimitation of the continental shelf.

Dissenting opinion of Judge Franck

Judge Franck agrees with the Court's finding and reasoning in rejecting Malaysia's contention that it has inherited sovereignty over Pulau Ligitan and Pulau Sipadan by virtue of a "chain of title" that stretches from the Sultan of Sulu to Spain to the United States to Britain to Malaysia.

As for the *effectivités*, acts undertaken by the Parties in their sovereign capacity with regard to the two islands, these are so inconsequential that, weighing them against each other resembles trying to guess the respective weight of a handful of cut grass and a handful of feathers. Malaysia set up navigational lights which, in other cases, this Court has considered not to be acts demonstrating a claim to sovereignty. The establishment by Malaysia of a deep-sea diving resort occurred after the critical date on which the Parties agreed to a "stand-still" that excludes evidence of this sort of subsequent activity. The Dutch, by their efforts by sea and air to control piracy in the area demonstrated an active interest of at least equal vigour to that of the British. The assessment of these and other such lightweight activities cannot but lead to inconclusive results.

Moreover, the Court should not even have embarked on this unsatisfying task because such *effectivités* are irrelevant when title to territory has been established by treaty. In this instance, Judge Franck maintains, the Anglo-Dutch Convention of 1891, in delimiting the entire frontier between the colonial predecessors on Borneo of Malaysia and Indonesia, has established a line intended to resolve potentially conflicting territorial claims of the two empires. The object and purpose was to bring peace to a vast area of overlapping ambitions and, in accordance with the Vienna Convention on Treaties, that objective should have been honoured by this Court.

In particular, Article IV of the 1891 Convention, in establishing the 4°10' line to allocate territory beyond Borneo's east coast and "across the Island of Sebittik" should have been presumed to extend so far as necessary to allocate the two islands — which clearly lie south of the line — and thereby to resolve any future source of disputation. It ought to have been presumed that a treaty intended to resolve all outstanding issues in the area could not have intended to leave the disposition of Ligitan and Sipadan up to turtle egg collection and piracy patrolling.

Indeed there is ample evidence to validate this logical, if rebuttable but unrebutted, presumption. The Dutch Government's map accompanying the Explanatory Memorandum by which the ratification of the 1891 Convention was urged upon the States-General shows the 4°10' line extending out to sea eastward of Sebatik. This map was well known to the British Government, which had been alerted to it by its Minister in The Hague. There was no objection from London. In more recent times, Indonesian and Malaysian oil exploration concessions were also careful to respect the extension of this line well east of Sebatik.

These facts duly support the inference that the 4°10' line was not intended to end on the east coast of Sebatik.

Moreover, the legal presumption — recognized in this Court's jurisprudence — that treaties establishing borders, boundaries and lines of allocation between States are intended to effect closure has an important role to play in establishing the legal régime that underpins world peace. Such treaties should be interpreted broadly, not narrowly as if they were contracts for the sale of barley. In this light, the 4°10' line in the 1891 Convention should have been recognized as dispositive in this dispute.

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9 789211 335415

Litho in United Nations, New York
39749—December 2003—2,555
ISBN 92-1-133541-8

United Nations publication
Sales No. E.03.V.12
ST/LEG/SER.F/1/Add.2