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FOREWORD

This publication contains summaries of the judgments, advisory opinions and orders of a substantive nature issued by the International Court of Justice, the principal judicial organ of the United Nations, from 1 January 2013 to 31 December 2017. It is the continuation of five earlier volumes on the same subject (ST/LEG/SER.F/1 and Addenda 1, 2, 3 and 5), which covered the periods 1948–1991, 1992–1996, 1997–2002, 2003–2007 and 2008–2012, respectively.[1]

During the period covered by this publication, the Court issued twenty-eight judgments, advisory opinions and orders of a substantive nature. It should be noted that the materials contained herein are summaries prepared by the Registry of the Court, which 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.

[1] The summaries of judgments, advisory opinions and orders of the Permanent Court of International Justice are published under ST/LEG/SER.F/1/Add. 4.

196. WHALING IN THE ANTARCTIC (AUSTRALIA *v.* JAPAN) [DECLARATION OF INTERVENTION OF NEW ZEALAND]

Order of 6 February 2013

On 6 February 2013, the Court issued an Order in the case concerning *Whaling in the Antarctic (Australia* v. *Japan)*, whereby it decided that the Declaration of Intervention filed by New Zealand, pursuant to Article 63, paragraph 2, of the Statute, was admissible.

The Court was composed as follows: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Gaja, Sebutinde, Bhandari; Judge *ad hoc* Charlesworth; *Registrar* Couvreur.

*

* *

The operative paragraph (para. 23) of the Judgment reads as follows:

"…

The Court,

(1) Unanimously,

Decides that the Declaration of Intervention filed by New Zealand, pursuant to Article 63, paragraph 2, of the Statute, is admissible;

(2) Unanimously,

Fixes 4 April 2013 as the time-limit for the filing by New Zealand of the written observations referred to in Article 86, paragraph 1, of the Rules of Court;

(3) Unanimously,

Authorizes the filing by Australia and Japan of written observations on these written observations of New Zealand and *fixes* 31 May 2013 as the time-limit for such filing.

Reserves the subsequent procedure for further decision."

*

* *

Judge Owada appended a declaration to the Order of the Court; Judge Cançado Trindade appended a separate opinion to the Order of the Court; Judge Gaja appended a declaration to the Order of the Court.

*

* *

Object of the intervention

In its Order, the Court recalls that, on 20 November 2012, the Government of New Zealand, referring to Article 63, paragraph 2, of the Statute of the Court, filed in the Registry of the Court a Declaration of Intervention in the case concerning *Whaling in the Antarctic (Australia* v. *Japan)*.

New Zealand's intervention relates to the points of interpretation which are in issue in the proceedings, in particular with respect to paragraph 1 of Article VIII of the International Convention for the Regulation of Whaling (hereinafter the "Convention"). It is recalled that the construction of this Convention is at the heart of the case between Australia and Japan. Article VIII, paragraph 1, of the Convention provides, *inter alia*, that "any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take, and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit" (a summary of the statement of the construction which New Zealand gives to that Article appears in paragraph14 of the Court's Order).

Reasoning of the Court

In its reasoning, the Court first states that intervention based on Article 63 of the Statute is an incidental proceeding that constitutes the exercise of a right. The Court then explains that the fact that intervention under Article 63 of the Statute is of right is not sufficient for the submission of a "declaration" to that end to confer *ipso facto* on the declarant State the status of intervener, and that such right to intervene exists only when the declaration concerned falls within the provisions of Article 63. The Court notes that it must therefore ensure that such is the case before accepting a declaration of intervention as admissible. It adds that it also has to verify that the conditions set forth in Article 82 of the Rules of Court are met.

The Court observes that, while Japan does not object, in its written observations, to the admissibility of New Zealand's Declaration of Intervention, it draws the Court's attention to "certain serious anomalies that would arise from the admission of New Zealand as an intervenor" (a summary of the argument of the Japanese Government on this point can be found in paragraph 17 of the Court's Order). Japan stresses in particular the need to ensure the equality of the Parties before the Court, expressing its concern that Australia and New Zealand could "avoid some of the safeguards" of procedural equality provided for by the Statute and the Rules of Court. It cites, *inter alia*, Article 31, paragraph 5, of the Statute and Article 36, paragraph 1, of the Rules of Court, which exclude the possibility of appointing a judge *ad hoc* when two or more parties are in the same interest and there is a Member of the Court of the nationality of any one of those parties. It is recalled that the Court includes on the Bench a judge of New Zealand nationality, and that Australia has chosen a judge *ad hoc* to sit in the case.

The Court observes that the concerns expressed by Japan relate to certain procedural issues regarding the equality of the Parties to the dispute, rather than to the conditions for admissibility of the Declaration of Intervention, as set out in Article 63 of the Statute and Article 82 of the Rules of Court. It recalls that intervention under Article 63 of the Statute is limited to submitting observations on the construction of the convention in question and does not allow the intervener, which does not become a party to the proceedings, to deal

with any other aspect of the case before the Court. It therefore considers that such an intervention cannot affect the equality of the parties to the dispute.

Having noted that New Zealand has met the requirements set out in Article 82 of the Rules of Court, that its Declaration of Intervention falls within the provisions of Article 63 of the Statute and, moreover, that the Parties raised no objection to the admissibility of the Declaration, the Court concludes that New Zealand's Declaration of Intervention is admissible.

In its Order, the Court lastly observes that the question of the participation in the case of the judge *ad hoc* chosen by Australia was referred to by the Respondent in the context of the latter's discussion of the equality of the Parties before the Court. The Court considers that it must make clear that, since the intervention of New Zealand does not confer upon it the status of party to the proceedings, Australia and New Zealand cannot be regarded as being "parties in the same interest" within the meaning of Article 31, paragraph 5, of the Statute, and that, consequently, the presence on the Bench of a judge of the nationality of the intervening State has no effect on the right of the judge *ad hoc* chosen by the Applicant to sit in the case pursuant to Article 31, paragraph 2, of the Statute.

*

* *

Declaration of Judge Owada

In his declaration, Judge Owada states that when considering the admissibility of a request for intervention, whether it is filed pursuant to Article 62 or Article 63 of the Statute of the Court, the Court, should it find it necessary under the particular circumstances of the case, is in a position to examine and determine *proprio motu* whether such intervention would be in keeping with the principles of ensuring the fair administration of justice, including, *inter alia*, the equality of the Parties in the proceedings before the Court. Judge Owada submits that the Court's authority to examine these matters is inherent in the judicial function of the Court as a court of justice.

Judge Owada notes that the Court has exercised this inherent power with respect to a State's request to intervene pursuant to Article 62 of the Statute, though the concrete context was quite different. In the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case, the Court denied Italy's application for permission to intervene despite the possibility that Italy might have had "an interest of a legal nature which may be affected by the decision in the case" within the meaning of Article 62 of the Statute. Judge Owada points out that, in that case, the Court held that the procedure of intervention cannot constitute an exception to the fundamental principles underlying the Court's jurisdiction, including the principle of equality of States. According to Judge Owada, the Court's Judgment in *Libya/Malta* demonstrates that the Court has the power to deny a request for intervention when such a request would impinge on fundamental legal principles, including the principle of equality of States, even if the State requesting intervention may have fulfilled the express conditions for intervention set forth in the relevant articles of the Statute.

In Judge Owada's view, the language used in paragraph 18 of the Order is an oversimplified and overly categorical approach to the issue of intervention. Judge Owada states that the reasoning of the Order is based on a highly questionable proposition, as a general statement of the law, that simply because the scope of intervention under Article 63 is "limited to submitting observations on the construction of the convention in question" it therefore follows that such intervention "cannot affect the equality of the parties to the dispute". This, in Judge Owada's view, is a *non sequitur.*

Judge Owada adds that the Order does not sufficiently examine, in the concrete context of the situation of this case, the serious issues raised by Japan regarding the intervention by New Zealand. Judge Owada notes that, although Japan does not raise a formal objection to the intervention, it seems evident that it is deeply concerned that New Zealand's intervention could have consequences that would affect the equality of the Parties to the dispute and thus the fair administration of justice.

Judge Owada further writes that it is regrettable that a State Party to a case before the Court and a State seeking to intervene in that case pursuant to Article 63 of the Statute should engage in what could be perceived as active collaboration in litigation strategy to use the Court's Statute and the Rules of Court for the purpose of promoting their common interest, as is candidly admitted in their Joint Media Release of 15 December 2010.

Judge Owada states that he has voted in favour of the Order, as he believes that Japan has not substantiated, sufficiently to the satisfaction of the Court, its claim that the admission of New Zealand as a third-party intervenor under Article 63 could create a situation in which the principle of the fair administration of justice, including the equality of the Parties, would most likely be compromised. He wishes, however, to place on record his serious reservation about the formalistic approach in which the Court has handled this issue without giving sufficient reflection on an important aspect of the principle of equality of the Parties, which forms an essential cornerstone of the fair administration of justice.

Separate opinion of Judge Cançado Trindade

1. In his Separate opinion, composed of 10 parts, Judge Cançado Trindade begins by explaining that, although he has concurred with his vote to the adoption of the present Order in the case concerning *Whaling in the Antarctic* (Australia *versus* Japan), which declared admissible the Declaration of Intervention of New Zealand,—yet he feels bound, and cares, to leave on the records the foundations of his own personal position on the matter dealt with, in all its interrelated aspects. His reflections, developed in the present Separate opinion, pertain—as he indicates in part I—to considerations at factual, conceptual and epistemological levels, on distinct points in relation to which he does not find the reasoning of the Court entirely sufficient or satisfactory.

2. He wished greater attention were devoted to these considerations, and finds that a proper understanding of intervention in legal proceedings under Article 63 of the Statute of the Court

can contribute to further development of international legal procedure in our days. Even more so,—he adds,—if one bears in mind that intervention under Article 63 and under Article 62 of the Court's Statute "rest on two quite distinct grounds, disclosing various interrelated aspects which have not been sufficiently or satisfactorily studied to date" (para. 2).

3. He begins his analysis by reviewing in detail all the documents conforming the *dossier* of the present case, relating to the proceedings before the Court concerning intervention, namely, the Declaration of Intervention of New Zealand (part II), the Written Observations of Australia and Japan on New Zealand's Declaration of Intervention (part III), and the Comments of New Zealand on Japan's Written Observations (part IV). Recalling that, in the present case, there has been no *formal* objection to New Zealand's Application for permission to intervene, he then makes the point that State consent does not play a role in the proceedings conducive to the Court's decision whether or not to grant intervention. This is so, he adds, in respect of interventions under Article 62 as well as Article 63 of the Court's Statute (part V).

4. He further recalls that, likewise, there was no *formal* objection to Greece's recent Application for permission to intervene in the case concerning the *Jurisdictional Immunities of the State* (Germany *versus* Italy), wherein the ICJ granted Greece permission to intervene as a non-party in the case (Order of 4 July 2011). He had already made this point in his Separate opinion appended to that previous Court's Order, as well as in his earlier Dissenting Opinion in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia *versus* Russian Federation, Judgment of 1 April 2011). Even if there were any such objection, it would, in his view, have been immaterial for the purpose of the Court's assessment of the request or declaration of intervention; the ICJ is not always restrained by State consent, nor is it an arbitral tribunal (para. 23).

5. Judge Cançado Trindade proceeds by turning attention to the typology of interventions under the ICJ Statute (part VI): he addresses the conceptual distinction between *discretionary intervention* (under Article 62) and *intervention as of right* (under Article 63). Although in its origins the historical antecedents of the institute of intervention in legal proceedings can be found in the old practice of international arbitrations, such antecedents show that arbitral practice pursued its essentially bilateralized outlook, and maintained its focus on the consent of the contending parties; it was thus necessary, he adds, to wait for "the systematization of the whole chapter of peaceful settlement of international disputes, encompassing the *judicial solution* as well (as distinguished from the arbitral solution), for the express provision on intervention to come to the fore and to see the light of the day" (para. 25).

6. That systematization took place in the course of the two Hague Peace Conferences, in 1899 and 1907, respectively. The institute of intervention was in fact provided for by the 1899 Convention for the Pacific Settlement of International Disputes (Article 56) and the 1907 Convention for the Pacific Settlement of International Disputes (Article 84). What the draftsmen of this provision had in mind was intervention as of right, of the kind of the one which, some years later, found its place in Article 63 of the Statute of the Permanent Court of International Justice (PCIJ), and subsequently of the International Court of Justice (ICJ).

7. By the end of the two Hague Peace Conferences, Judge Cançado Trindade ponders,

> "the universal juridical conscience seemed to have captured the idea that international law had to conform a true international *system* (…). After all, State voluntarism remained an obstacle to respect for international law and an undue limitation of the rule of law in international litigation. [There were] fears that, in the absence of international justice, States would keep on doing whatever they wished, and the increase in armaments (naval and military) would keep on going on. There was a premonitory reaction, on the part of the lucid jurists of those threatening times, against that state of affairs, and against State voluntarism" (paras. 28–29).

8. In fact, he proceeds, the discussions, throughout the work of the two Hague Peace Conferences (of 1899 and 1907), on the future creation of international courts, contained, already at that time, references to: *a*) the juridical conscience of peoples; *b*) the need of obligatory arbitration; *c*) the needed establishment or constitution of permanent tribunals; *d*) the determination of fundamental rules of procedure; *e*) the access of individuals to international justice; *f*) the development of an international jurisprudence; and *g*) the progressive development of international law. This, in his perception, showed "the awareness, of the importance of such issues, already present in the minds of jurists of that time" (such as, e.g., T.M.C. Asser, Ruy Barbosa, L. Bourgeois, J.H. Choate, F. de Martens, C.E. Descamps, F. Hagerup, F.W. Holls, among others para. 30).

9. The following historical moment to address was that of the drafting, in mid-1920, by the Advisory Committee of Jurists (appointed by the League of Nations), of the Statute of the old PCIJ, followed, years later (in 1945), by the Statute of the ICJ. By then, with the advent of the *judicial* settlement of disputes at world level, the concept of intervention fully bloomed. Two kinds of intervention were envisaged, and enshrined into Articles 62 and 63, respectively, of the Statute of the Hague Court (PCIJ and ICJ). As Judge Cançado Trindade observes, "[i]ntervention, under the two provisions, was to seek to overcome the bilateralization of the controversy at stake, thus widening dispute-settlement, when it could be of direct interest or concern to other States" (para. 34).

10. Although the use of intervention (as a non-party), under Article 63 (2) of the Statute, of the kind sought by New Zealand in the *cas d'espèce*,—has been rather infrequent, this does not mean, he adds, that it would or should remain so, as all States Parties to multilateral treaties are committed to contribute to their proper interpretation. If such interventions increased, uncertainties could diminish, "as the ICJ could have more occasions to clarify the application and scope of Article 63" (para. 40). There is here a case for a "teleological interpretation" of certain multilateral treaties, so as to enable the Parties to defend the rights that such treaties purport to protect. In any case, Judge Cançado Trindade adds, Article 63 widens the Court's jurisdiction, in contemplating *intervention as of right* in certain circumstances (cf. *infra*).

11. As to *discretionary intervention*, set out in Article 62 of the Statute, it has had distinct antecedents and meanings, as the State seeking to intervene ought to disclose "an interest of a legal nature which may be affected by the decision in the case", and the Court has the discretion to decide upon this request. The scope of Article 62 is thus stricter than that of Article 63, in that the permission for intervention will depend on the exercise by the Court of its discretion, its decision being taken in the light of the particular circumstances of each case. This kind of discretionary intervention, he proceeds, "is drawn from that provided for in the domestic legal system of several States, i.e., in comparative domestic law" (para. 37).

12. After clarifying this conceptual distinction, Judge Cançado Trindade reviews the precedents on intervention in the case-law developed along the history of the Hague Court (PCIJ and ICJ paras. 41–52), and singles out the significance of the upholding of intervention in legal proceedings in the Order of the Court in the present case of *Whaling in the Antarctic*, as well as in the Court's Order of 4 July 2011, in the case concerning the *Jurisdictional Immunities of the State* , on the basis of Article 63 and 62, respectively. He then moves on to the following line of his considerations, pertaining to the *nature* of the multilateral treaties at issue (part VII).

13. In drawing attention to the fact that certain multilateral treaties embody matters of a general or "collective interest" and are endowed with mechanisms of "collective guarantee", Judge Cançado Trindade sustains that intervention in legal proceedings in respect of such treaties is even more compelling, for the sake of the due observance of, or compliance with, the obligations contracted by the States Parties (para.53). This is—he adds—in accordance with the general rule of interpretation of treaties, set forth in Article 31 of the two Vienna Conventions on the Law of Treaties (of 1969 and 1986), underlying which is the principle *ut res magis valeat quam pereat*, widely supported in case-law, and which corresponds to the so-called *effet utile* (principle of effectiveness), whereby one is to secure to the conventional provisions their *proper effects* (para. 54).

14. Judge Cançado Trindade then ponders that

> "(…) When it comes to *protection* (of the human person, of the environment, or of matters of general interest), the principle of *effet utile* assumes particular importance in the determination of the (enlarged) scope of the conventional obligations of protection.
>
> The corresponding obligations of the States Parties assume an essentially *objective character*: they are implemented collectively, singling out the predominance of considerations of general interest (or even *ordre public*), transcending the individual interests of States Parties. The nature of treaties addressing matters of general or common interest and counting on *collective guarantee* (by States Parties) for their implementation has an incidence on their process of interpretation. And it could not be otherwise.
>
> There is no space, under treaties of the kind, for unilateral State action, or even for bilateral reciprocal concessions: States Parties to such treaties are bound by the contracted obligations to seek jointly the realization or fulfillment of the object and purpose of the treaties at issue. State Parties are bound by *positive obligations* enshrined therein" (paras. 55–57).

15. He then recalls that the 1946 International Convention for the Regulation of Whaling (ICRW), provides for the proper conservation of the whale stocks and the orderly development of the whaling industry; it is, in his view, clear that the former stands higher, as without the proper *conservation* of whale stocks there can be no *orderly* development of the whaling industry. The basic foundation of the ICRW is thus the *conservation* of all whale species at issue. The principle of *effet utile* points in this direction, discarding the mere profitability of the whaling industry (para. 58).

16. There is here a concern for *orderly* development in the ICRW, which uses the expression "common interest" (fourth preambular paragraph), and, moreover, identifies its beneficiaries, in expressly recognizing, in its first preambular paragraph,

> "the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks".

The general policy objectives under the ICRW thus remain the protection of all whale species from overfishing, to the benefit of *future generations in all nations* (as stated in its preamble), and the orderly development of whaling industry, abiding by that. The objectives of the ICRW disclose the *nature* of the treaty, to be implemented well beyond the scope of bilateral relations between States Parties. The *nature* of the ICRW is, in his understanding, to be kept in mind, in the present decision of the Court concerning intervention for the purposes of interpretation of Article VIII of the Convention (paras. 59–60).

17. Judge Cançado Trindade next draws attention to the ICRW's *preventive* dimension, calling upon States Parties to act with due care, so as to avoid a harm which may project itself in time. The long-term temporal dimension and the notion of inter-generational equity are present herein, a point to which he devoted his reflections in his Separate opinion (paras. 114–131) in the case concerning *Pulp Mills on the River Uruguay* (Argentina *versus* Uruguay, Judgment of 20 April 2010). The uncertainties still surrounding the institute of intervention in legal proceedings are, in his view, proper to the persisting and new challenges faced by international justice in our times, in the enlargement of its scope both *ratione materiae* and *ratione personae.* In any case, "international tribunals are to face such uncertainties, approaching the institute of intervention with due attention to the contemporary evolution of international legal procedure at conceptual level, and to the nature of the multilateral treaties at stake" (para. 62).

18. His following line of thinking in the present Separate opinion concerns the *resurrectio* of intervention in contemporary judicial proceedings before the ICJ (part IX). This is a point which he had already made in his Separate opinion in the Court's previous Order of 4 July 2011 permitting Greece's intervention in the case concerning the *Jurisdictional Immunities of the State* (Germany *versus* Italy), and which he reiterates herein. In a rather short lapse of time, the Court has thus taken its position on granting intervention, on the basis of both Article 62 (in 2011) and Article 63 (the present Order) of its Statute. He recalls that, twice before, in two

cases concerning land and maritime boundaries in the nineties (case concerning the *Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras, Nicaragua's intervention, Judgment of 13 September 1990; and case concerning the *Land and Maritime Boundary* between Cameroon and Nigeria, Equatorial Guinea's intervention, Order of 21 October 1999), the ICJ had also authorized two other applications to intervene.

19. In the two more recent aforementioned cases (concerning the *Jurisdictional Immunities of the State*, and *Whaling in the Antarctic*, *supra*), the Court has adopted two Orders granting the requested interventions "in two domains of great importance in and for the development of contemporary international law, namely, that of the tension between the right of access to justice and the invocation of State immunities, and that of marine life and resources and international protection of the environment" (para. 66). In granting intervention in the aforementioned last two cases, in such relevant contexts, the ICJ has so decided at the height of its responsibilities as the main judicial organ of the United Nations (Article 92 of the United Nations Charter). Judge Cançado Trindade adds that,

> "[u]nlike land and maritime delimitation cases, or other cases concerning predominantly bilateralized issues, these last two cases concern third States as well, other than the respective contending parties before the Court.
>
> The subject-matters at issue in those two cases (*supra*) are, in my perception, closely and decisively related to the evolution of contemporary international law as a truly *universal* international law, being thus of relevance ultimately to all States. The *resurgere* of intervention is thus most welcome, propitiating the sound administration of justice (*la bonne administration de la justice*), attentive to the needs not only of all States concerned but of the international community as a whole, in the conceptual universe of the *jus gentium* of our times" (paras. 67–68).

20. The way is then paved for the presentation of Judge Cançado Trindade's concluding observations (part X). In his perception, in the present case a proper expression to the principle of the sound administration of justice (*la bonne administration de la justice*) can be found precisely in the declaration of admissibility by the ICJ of the Declaration of Intervention by New Zealand in the *cas d'espèce*. He had made precisely this point, one and a half years ago, in his Separate opinion (para. 59) appended to the Court's Order of 04 July 2011, in the case concerning the *Jurisdictional Immunities of the State* (Germany *versus* Italy). This is a point which, in his view, should not pass unnoticed herein.

21. It so happens that, in the present Order, the Court considered the principle of the sound administration of justice (*la bonne administration de la justice*) in relation to other arguments put to it (paras. 17–19 of the Order), which he regards as "rather tangential" to the institute of intervention (under Article 63) itself, and without a direct bearing on its essence. A Declaration of Intervention falling within the provisions of Article 63 of the Statute and the requirements of Article 82 of the Rules of Court, cannot—does not—affect the procedural equality of the contending parties, and is thus admissible, irrespective of whether the contending parties object or not to it (para. 70). And Judge Cançado Trindade adds that:

> "In circumstances like those of the *cas d'espèce*, it is necessary to surmount the old bilateralist bias that permeates dispute-settlement under the procedure before this Court. It so happens that such bias has for a long time impregnated expert writing on the subject as well. It is about time to overcome such dogmatisms of the past, with their characteristic immobilization, remnant of the old arbitral practice. The present case concerning *Whaling in the Antarctic*, unlike land and maritime delimitation cases, or other cases concerning predominantly bilateralized issues, concerns third States as well, Parties to the 1946 Convention for the International Regulation of Whaling, other than the respective contending parties before the Court. The Convention concerns a matter of general or common interest, and is to be implemented collectively by States Parties, thus contributing to the public order of the oceans" (para. 71).

22. Judge Cançado Trindade notes that, in the present Order, the Court has limited itself to address the points raised by the three States concerned, "in the terms in which they were raised". The insufficient clarification provided so far has been attributed to the rather infrequent use of intervention as of right under Article 63. But even in the cases wherein intervention under Article 63 has been put to the Court, like the present one, "this latter has not provided sufficient or entirely satisfactory clarification, though it has fortunately reached the right decision in today's Order" (paras. 72–73),—as it also did one and a half years ago (Order of 4 July 2011), in granting permission for Greece's intervention, under Article 62 of its Statute, in the case concerning the *Jurisdictional Immunities of the State.*

23. The aforementioned last two grants of intervention by this Court, under Articles 62 and 63 of its Statute (Orders of 4 July 2011 and 06 February 2013, respectively), in his view contribute to the progressive development of international law and the realization of justice at international level, in so far as the subject-matter at stake is concerned. He concludes that the "gradual *resurrectio* of intervention" in contemporary judicial proceedings before the ICJ, can render "a valuable service towards a more cohesive international legal order in our days. After all, intervention in legal proceedings, by providing additional elements to the Court for its consideration and reasoning, can contribute to the progressive development of international law itself, especially when matters of collective or common interest and collective guarantee are at stake" (para. 76).

Declaration of Judge Gaja

The Court should have specifically considered, among the conditions for the admissibility of New Zealand's intervention under Article 63 of the Statute, the relevance of the suggested construction of the International Convention for the Regulation of Whaling to the decision of the case.

The Court states that the construction of the Convention will be binding on the intervening States. The Court should have added that, with regard to that construction, the Parties will also be bound towards New Zealand under paragraph 2 of Article 63.

197. FRONTIER DISPUTE (BURKINA FASO/NIGER)

Judgment of 16 April 2013

On 16 April 2013, the International Court of Justice rendered its Judgment in the case concerning the *Frontier Dispute (Burkina Faso/Niger)*.

The Court was composed as follows: President Tomka; *Vice-President* Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari; Judges *ad hoc* Mahiou, Daudet; *Registrar* Couvreur.

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The operative paragraph (para. 114) of the Judgment reads as follows:

"…

The Court,

(1) Unanimously,

Finds that it cannot uphold the requests made in points 1 and 3 of the final submissions of Burkina Faso;

(2) Unanimously,

Decides that, from the Tong-Tong astronomic marker, situated at the point with geographic co-ordinates 14° 24' 53.2" N; 00° 12' 51.7" E, to the Tao astronomic marker, the precise co-ordinates of which remain to be determined by the Parties as specified in paragraph 72 of the present Judgment, the course of the frontier between Burkina Faso and the Republic of Niger takes the form of a straight line;

(3) Unanimously,

Decides that, from the Tao astronomic marker, the course of the frontier follows the line that appears on the 1:200,000-scale map of the *Institut géographique national (IGN) de France*, 1960 edition, (hereinafter the "IGN line") until its intersection with the median line of the River Sirba at the point with geographic co-ordinates 13° 21' 15.9" N; 01° 17' 07.2" E;

(4) Unanimously,

Decides that, from this latter point, the course of the frontier follows the median line of the River Sirba upstream until its intersection with the IGN line, at the point with geographic co-ordinates 13° 20' 01.8" N; 01°07' 29.3" E; from that point, the course of the frontier follows the IGN line, turning up towards the north-west, until the point, with geographic co-ordinates 13° 22' 28.9" N; 00° 59' 34.8" E, where the IGN line turns south. At that point, the course of the frontier leaves the IGN line and continues due west in a straight line until the point, with geographic co-ordinates 13° 22' 28.9" N; 00° 59' 30.9" E, where it reaches the meridian which passes through the intersection of the Say parallel with the right bank of the River Sirba; it then runs southwards along that meridian until the said intersection, at the point with geographic co-ordinates 13° 06' 12.08" N; 00° 59' 30.9" E;

(5) Unanimously,

Decides that, from this last point to the point situated at the beginning of the Botou bend, with geographic co-ordinates 12° 36' 19.2" N; 01° 52' 06.9" E, the course of the frontier takes the form of a straight line;

(6) Unanimously,

Decides that it will nominate at a later date, by means of an Order, three experts in accordance with Article 7, paragraph 4, of the Special Agreement of 24 February 2009."

*

* *

Judge Bennouna appended a declaration to the Judgment of the Court; Judges Cançado Trindade and Yusuf appended separate opinions to the Judgment of the Court; Judges *ad hoc* Mahiou and Daudet appended separate opinions to the Judgment of the Court.

*

* *

I. Procedural and factual background of the case (para. 1–34)

The Court recalls that, by a joint letter of notification dated 12 May 2010, Burkina Faso and the Republic of Niger transmitted to the Registrar a Special Agreement which was signed at Niamey on 24 February 2009 and entered into force on 20 November 2009, whereby they agreed to submit to the Court the frontier dispute between them over a section of their common boundary. Attached to this letter were the Protocol of Exchange of the Instruments of Ratification of the said Special Agreement and an exchange of Notes, dated 29 October and 2 November 2009, placing on record the agreement ("*entente*") between the two States on the results of the work of the Joint Technical Commission on Demarcation concerning the demarcated sectors of the frontier running, in the north, from the heights of N'Gouma to the astronomic marker of Tong-Tong and, in the south, from the beginning of the Botou bend to the River Mekrou. The Court further recalls that it was requested, in Article 2 of the said Special Agreement, to determine the course of the boundary between Burkina Faso and Niger in the sector from the astronomic marker of Tong-Tong to the beginning of the Botou bend and to place on record the Parties' agreement ["*leur entente*"] on the results of the work of the Joint Technical Commission on Demarcation of the boundary. It then sets out the historical and factual background of the dispute between these two former colonies, which were part of French West Africa until they gained independence in 1960.

Before examining the dispute between the Parties regarding the course of their common frontier between the astronomic marker of Tong-Tong and the beginning of the Botou bend, the Court deals with the request submitted by Burkina Faso concerning the two demarcated sectors of the frontier.

II. The request concerning the two sectors running, in the north, from the heights of N'Gouma to the Tong-Tong astronomic marker and, in the south, from the beginning of the Botou bend to the River Mekrou (para. 35–39)

The Court notes that in points 1 and 3 of its final submissions, Burkina Faso requests it to adjudge and declare that its frontier with Niger follows, in the two demarcated sectors, a course which consists of lines linking points whose co-ordinates it provides, which correspond to those recorded in 2009 by the joint mission tasked with conducting surveys based on the work of the Joint Technical Commission. It further notes that Burkina Faso asks the Court to include that course in the operative part of its Judgment, so that the Parties will be bound by it, in the same way that they will be bound with regard to the frontier line in the sector that remains in dispute. The Court observes that, in its final submissions, Niger only requests the Court to draw the frontier between the two States in the section in dispute, which runs from the Tong-Tong astronomic marker to the beginning of the Botou bend. Taking the view that there already exists an agreement between the Parties regarding the two demarcated sectors, Niger is of the opinion that there is no need to include a reference to those sectors in the operative part of the Judgment. However, it does consider that the said agreement should be noted by the Court in the reasoning of its Judgment.

The Court indicates that, when it is seised on the basis of a special agreement, any request made by a party in its final submissions can fall within the jurisdiction of the Court only if it remains within the limits defined by the provisions of that special agreement. However, it considers that the request made by Burkina Faso in its final submissions does not exactly correspond to the terms of the Special Agreement, since that State does not request the Court to "place on record the Parties' agreement" ("*leur entente*") regarding the delimitation of the frontier in the two demarcated sectors, but rather to delimit the frontier according to a line that corresponds to the conclusions of the Joint Technical Commission. According to the Court, however, it is one thing to note the existence of an agreement between the Parties and to place it on record for them; it is quite a different matter to appropriate the content of that agreement in order to make it the substance of a decision of the Court itself. The Court considers that, taken literally, Burkina Faso's request could therefore be rejected as exceeding the limits of the Court's jurisdiction as defined by the Special Agreement. It recognizes, however, that it has the power to interpret the final submissions of the Parties in such a way as to maintain them, so far as possible, within the limits of its jurisdiction under the Special Agreement and, consequently, to interpret the final submissions of Burkina Faso as seeking that the Court place on record the agreement of the Parties.

Nevertheless, the Court takes the view that that would not be sufficient to entertain such a request, since it would still have to be verified that the object of that request falls within the Court's judicial function as defined by its Statute, which is "to decide in accordance with international law such disputes as are submitted to it". The Court notes that, in the present case, neither of the Parties has ever claimed that a dispute continued to exist between them concerning the delimitation of the frontier in the two sectors in question on the date when the proceedings were instituted—nor that such a dispute has subsequently arisen. It observes that, if the Parties have appeared to argue differently, it is on the question of whether the "*entente*" referred to in the Special Agreement has already resulted in an agreement which is legally binding for the two Parties under international law. In its opinion, however, the decisive question is whether a dispute existed between the Parties concerning these two sectors on the date when the proceedings were instituted; it matters little, from the point of view of the judicial function of the Court, whether or not the "*entente*" reached by the Parties has already been incorporated into a legally binding instrument. Accordingly, the Court considers that Burkina Faso's request exceeds the limits of its judicial function.

III. The course of the section of the frontier remaining in dispute (para. 60–112)

A. Applicable law (paras. 60–69)

The Court notes that Article 6 of the Special Agreement, entitled "Applicable law", stipulates that "[t]he rules and principles of international law applicable to the dispute are those referred to in Article 38, paragraph 1, of the Statute of the International Court of Justice, including the principle of the intangibility of boundaries inherited from colonization and the Agreement of 28 March 1987". It observes that, amongst the rules of international law applicable to the dispute, the above-mentioned provision highlights "the principle of the intangibility of boundaries inherited from colonization and the Agreement of 28 March 1987". It states that the Special Agreement provides specific indications as to the way in which the above-mentioned principle must be applied. Article 6 of that instrument requires the application of the 1987 Agreement, which binds the Parties and the objective of which is, according to its title, "the demarcation of the frontier between the two countries". The Court observes that, although the aim of the 1987 Agreement is the "demarcation of the frontier between the two countries" through the installation of markers, it lays down first of all the criteria that must be applied to determine the "course" of the frontier.

The Court notes that the first two articles of that Agreement specify the acts and documents of the French colonial administration which must be used to determine the delimitation line that existed when the two countries gained independence. It observes in this connection that it follows from that Agreement that the *Arrêté* of 31 August 1927 adopted by the Governor-General *ad interim* of French West Africa with a view to "fixing the boundaries of the colonies of Upper Volta and Niger", as clarified by its Erratum of 5 October 1927, is the instrument to be applied for the delimitation of the boundary. The Court states that it must be interpreted in its context, taking into account the circumstances of its enactment and implementation by the colonial authorities. As to the relationship between the *Arrêté* and its Erratum, the Court notes that, since the purpose of the Erratum is to correct the text of the *Arrêté* retroactively, it forms an integral part of the latter. For that reason, whenever reference is made to the "*Arrêté*", that will signify, unless otherwise indicated,

the wording of the *Arrêté* as amended by the Erratum. The Court further observes that Article 2 of the 1987 Agreement provides for the possibility of "the *Arrêté* and Erratum not suffic[ing]" and establishes that, in that event, "the course shall be that shown on the 1:200,000-scale map of the *Institut géographique national de France*, 1960 edition" or resulting from "any other relevant document accepted by joint agreement of the Parties". It points out, however, that the Parties do not consider that they have accepted any relevant document other than the 1960 IGN map.

B. The course of the frontier (paras. 70–112)

1. The course of the frontier between the Tong-Tong and Tao astronomic markers (paras. 72–79)

The Court observes that the Parties agree that, in accordance with the *Arrêté,* their common frontier connects the two points at which the Tong-Tong and Tao astronomic markers are respectively situated. It points out that the Parties do not disagree on the identification or the location of these markers, but on how to connect the two points at which they are situated. It notes that Burkina Faso wants the Court to connect these two points with a straight line, whereas Niger argues in favour of two straight-line segments, one running from the Tong-Tong marker to the Vibourié marker, the other running from the Vibourié marker to the Tao marker. The Court is of the opinion that the colonial administration officials interpreted the *Arrêté* as drawing, in the sector in question, a straight line between the Tong-Tong and Tao astronomic markers. Accordingly, a straight line connecting the two markers should be regarded as constituting the frontier between Burkina Faso and Niger in the sector in question.

2. The course of the frontier between the Tao astronomic marker and the River Sirba at Bossébangou (paras. 80–99)

The Court notes that it is not possible to determine from the *Arrêté* how to connect the Tao astronomic marker to "the River Sirba at Bossébangou"; the *Arrêté* merely states that the "line … turns ['*s'infléchit*'] towards the south-east, cutting the Téra-Dori motor road at the Tao astronomic marker …, and reaching the River Sirba at Bossébangou". The Court observes that, in Burkina Faso's opinion, this lack of detail should be interpreted as meaning that the two above-mentioned points must be connected by a straight line. It notes that, in Niger's view, this lack of detail demonstrates, on the other hand, that "the *Arrêté* and *Erratum* [do] not suffice", within the meaning of the 1987 Agreement, making it necessary in principle to follow the line as drawn on the 1960 IGN map for the section of the frontier in question, with, however, a slight deviation to the west in two segments corresponding to the Petelkolé frontier post and to the Oussaltane encampment, so as to leave those two localities in Niger's territory, whereas the said line locates them on the Upper Volta side of the inter-colonial boundary. The Court observes that, according to Niger, this is to give precedence to the *effectivités* as observed at the critical dates of independence. It notes that, in addition, Niger considers that it is also necessary to deviate from the 1960 IGN map in order to define the endpoint of the frontier line in the sector in question, since the line should not end at Bossébangou, but descend only as far as a point situated some 30 km to the north-west of that village, and, from that point, turn towards the south-west, thereby leaving an extensive area around Bossébangou entirely in Niger's territory.

The Court begins by examining the question of the endpoint of the frontier line in the sector in question. It notes that the *Arrêté* provides *expressis verbis* that the inter-colonial boundary continues as far as the River Sirba. In conclusion, the Court can only find that the frontier line necessarily reaches the River Sirba at Bossébangou.

The Court then turns to the question of how the "Tao astronomic marker" is to be connected to "the River Sirba at Bossébangou" in order to draw the frontier. It begins by stating that the Decree of the President of the French Republic of 28 December 1926 "transferring the administrative centre of the Colony of Niger and providing for territorial changes in French West Africa", on the basis of which the *Arrêté* was adopted, constitutes an important element of the context within which that *Arrêté* was issued. It observes that the object of the said Decree was twofold: to transfer certain *cercles* and *cantons* from the Colony of Upper Volta to the Colony of Niger and to empower the Governor-General of French West Africa to draw the new inter-colonial boundary between Niger and Upper Volta. It notes that, to this end, the Governor-General sought to identify the pre-existing boundaries of the *cercles* and *cantons*, but that there was nothing to indicate that they followed a straight line in the sector in question. It observes that, in such a case, it would have been easy to plot this line on a map. The Court then observes that, with respect to the village of Bangaré, there are sufficient documents subsequent to the *Arrêté* to establish that, during the relevant colonial period and until the critical date of independence, this village was administered by the authorities of the Colony of Niger, as the latter claims. According to the Court, this consideration supports the conclusion that the *Arrêté* should not be interpreted, and in fact was not interpreted in the colonial period, as drawing a straight line between Tao and Bossébangou.

The Court concludes from the foregoing considerations that the *Arrêté* must be regarded as "not suffic[ient]", within the meaning of the 1987 Agreement, in respect of the sector running from the Tao astronomic marker to the River Sirba at Bossébangou. Recourse must therefore be had to the line appearing on the 1960 IGN map. Moreover, it declares that it cannot uphold Niger's requests that the said line be shifted slightly at the level of the localities of Petelkolé and Oussaltane, on the ground that these were purportedly administered by Niger during the colonial period. The Court considers that, once it has been concluded that the *Arrêté* is insufficient, and in so far as it is insufficient, the *effectivités* can no longer play a role in the present case. In conclusion, the Court finds that, in the sector of the frontier that runs from the Tao astronomic marker to "the River Sirba at Bossébangou", the line shown on the 1960 IGN map should be adopted.

3. The course of the frontier in the area of Bossébangou (paras. 100–107)

The Court considers that, in order to complete the determination of the frontier line coming from the Tao astronomic marker, it is necessary to specify its endpoint where it reaches "the River Sirba at Bossébangou". It states that, according to Burkina Faso, this point is located where the straight-line segment which runs from Tao to Bossébangou intersects with the right bank of the Sirba close to that village. It notes that, for its part, Niger does not take a view on the matter, on account of its argument that the frontier line from Tao does not continue as far as the River Sirba, but turns towards the south-west at the tripoint between the *cercles* of Dori, Say and Tillabéry, some 30 km before it reaches that river.

According to the description in the *Arrêté*, it is clear, in the opinion of the Court, that the frontier line ends at the River Sirba and not at the village of Bossébangou. The endpoint of the frontier in this section must therefore be situated in the Sirba or on one of its banks. However, the use of the term "reach" ("*atteindre*") in the *Arrêté* does not suggest that the frontier line crosses the Sirba completely, meeting its right bank. Moreover, the Court considers that there is no evidence before it that the River Sirba in the area of Bossébangou was attributed entirely to one of the two colonies. It notes in this regard that the requirement concerning access to water resources of all the people living in the riparian villages is better met by a frontier situated in the river than on one bank or the other. Accordingly, the Court concludes that, on the basis of the *Arrêté*, the endpoint of the frontier line in the area of Bossébangou is located in the River Sirba. This endpoint is more specifically situated on the median line because, in a non-navigable river with the characteristics of the Sirba, that line best meets the requirements of legal security inherent in the determination of a boundary.

The Court notes that, in its original wording, the *Arrêté* situated the meeting-point of the frontier line from Tao with the River Sirba further downstream and stated that this line "then joins the River Sirba". It was clear, according to that wording, that the frontier was supposed to follow that river upstream for a certain distance. The Court contends that, while the language of the Erratum is less clear, it nevertheless specifies that, after reaching the Sirba, the frontier line "almost immediately turns back up towards the north-west". It can be concluded, therefore, that the Erratum did not seek to amend the *Arrêté* entirely on this point and that it implies that the line must follow the Sirba for a short distance. For the reasons given above, the Court considers that the frontier follows the median line of the Sirba.

The Court observes that the corrected wording of the *Arrêté,* according to which the frontier line "almost immediately turns back up towards the north-west", does not establish the precise point at which that line leaves the River Sirba in order to "[turn] back up". There is no indication in the text in that regard except for the fact that the point is located close to Bossébangou. Similarly, once the frontier leaves the Sirba, its course is indicated in the *Arrêté* in a manner that makes it impossible to establish the line accurately. According to the Court, it can therefore only be concluded that the *Arrêté* does not suffice to determine the frontier line in this section and that it is thus necessary to refer to the 1960 IGN map in order to define precisely the point where the frontier line leaves the River Sirba and "turns back up towards the north-west" and the course that it must follow after that point.

The Court indicates that, according to the *Arrêté,* the frontier line, after turning up towards the north-west, "turn[s] back to the south, … [and] again cuts the Sirba at the level of the Say parallel". It considers that, once that place has been determined, the meridian passing through it can be followed northwards until the parallel running through the point where the line drawn on the 1960 IGN map turns back to the south. The Court observes that, whereas, in its original wording, the *Arrêté* referred to "a line starting approximately from the Sirba at the level of the Say parallel", the text of the Erratum is much more categorical in this respect and thus cannot be regarded as insufficient. It refers to the intersection between the parallel passing through Say and the River Sirba. According to the Court, it can even be deduced that this point, called point I on sketch-maps 3 and 4, is located on the right bank of the Sirba (at the point with geographic co-ordinates 13º 06' 12.08" N; 00º 59' 30.9" E), since, according to the Erratum, the frontier line coming from the north cuts the river here before continuing towards the south-east. In the view of the Court, the frontier thus drawn from the area of Bossébangou to the point where the Say parallel cuts the River Sirba forms what might be termed a "salient", in accordance with the description contained in the *Arrêté*. Niger acknowledges that, in contrast, the frontier line which it proposes does not, for its part, "create a salient in this area".

The Court concludes that the frontier line, after reaching the median line of the River Sirba while heading towards Bossébangou, at the point with geographic co-ordinates 13° 21' 15.9" N; 01° 17' 07.2" E, called point SB on sketch-maps 1, 2, 3 and 4, follows that line upstream until its intersection with the IGN line, at the point with geographic co-ordinates 13° 20' 1.8" N; 01° 07' 29.3" E, called point A on sketch-maps 3 and 4. From that point, the frontier line follows the IGN line, turning up towards the north-west until the point, with geographic co-ordinates 13° 22' 28.9" N; 00° 59' 34.8" E, called point B on sketch-map 3, where the IGN line markedly changes direction, turning due south in a straight line. As this turning point B is situated some 200 m to the east of the meridian which passes through the intersection of the Say parallel with the River Sirba, the IGN line does not cut the River Sirba at the Say parallel. However—the Court notes—the *Arrêté* expressly requires that the boundary line cut the River Sirba at that parallel. The frontier line must therefore depart from the IGN line as from point B and, instead of turning there, continue due west in a straight line until the point, with geographic co-ordinates 13° 22' 28.9" N; 00° 59' 30.9" E, called point C on sketch-maps 3 and 4, where it reaches the meridian which passes through the intersection of the Say parallel with the right bank of the River Sirba. The frontier line then runs southwards along that meridian until the said intersection, at the point with geographic co-ordinates 13° 06' 12.08" N; 00° 59' 30.9" E, called point I on sketch-maps 3 and 4.

4. The course of the southern part of the frontier (paras. 108–112)

The Court observes that the intersection of the River Sirba with the Say parallel is the starting-point of another section of the frontier. According to the *Arrêté*, "[f]rom that point the frontier, following an east-south-east direction, continues in a straight line up to a point located 1,200 m to the west of the village of Tchenguiliba". It notes that this latter point has been identified in a consistent manner by the Parties, since it marks the start of the southern section of the already demarcated portion of the frontier. The Court recalls that the *Arrêté* specifies that, in this section, the frontier "continues in a straight line". It considers that it is precise in that it establishes that the frontier line is a straight-line segment between the intersection of the Say parallel with the Sirba and the point located 1,200 m to the west of the village of Tchenguiliba. According to the Court, it cannot therefore be said that the *Arrêté* does not suffice with respect to this section of the frontier.

The Court concludes that, in this section of the frontier, the line consists of a straight-line segment between the intersection of the Say parallel with the right bank of the River Sirba and the beginning of the Botou bend.

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Having determined the course of the frontier between the two countries, the Court expresses its wish that each Party, in exercising its authority over the portion of the territory under its sovereignty, should have due regard to the needs of the populations concerned, in particular those of the nomadic or semi-nomadic populations, and to the necessity to overcome difficulties that may arise for them because of the frontier. The Court notes the co-operation that has already been established on a regional and bilateral basis between the Parties in this regard, in particular under Chapter III of the 1987 Protocol of Agreement, and encourages them to develop it further.

IV. Nomination of experts (para. 113)

The Court observes that, in Article 7, paragraph 4, of the Special Agreement, the Parties requested the Court to nominate, in its Judgment, three experts to assist them as necessary in the demarcation of their frontier in the area in dispute. It notes that both Parties reiterated this request in the final submissions presented at the hearings. The Court is ready to accept the task which the Parties have thus entrusted to it. However, having regard to the circumstances of the present case, the Court is of the opinion that it is inappropriate at this juncture to make the nominations requested by the Parties. It will do so later by means of an Order, after ascertaining the views of the Parties, particularly as regards the practical aspects of the exercise by the experts of their functions.

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Declaration of Judge Bennouna

While supporting the Court's decision, Judge Bennouna recalls that, according to the jurisprudence of the Court, colonial law is not taken into account as such, but only as a factual element or as evidence of the colonial heritage.

For Judge Bennouna, this distinction has proved difficult to apply in this case inasmuch as the Special Agreement requested the Court to rely on a relatively succinct *arrêté* of the Governor-General of French West Africa of 1927, whose sole concern was to separate entities depending on the same colonial power in order to improve territorial administration.

Separate opinion of Judge Cançado Trindade

1. In his Separate opinion, composed of 12 parts, Judge Cançado Trindade begins by explaining that, although he has concurred with his vote to the adoption of the present Judgment in the case concerning the *Frontier Dispute* between Burkina Faso and Niger, where the ICJ has, at the request of the Parties, determined the course of their frontier, there are certain points, to which he attributes much importance, which are not properly reflected in the reasoning of its Judgment, or which have not been sufficiently stressed therein. He thus feels bound, and cares, to leave on the records the foundations of his own personal position thereon, particularly in respect of the relationship between the territory at issue and the local (nomadic and semi-nomadic) populations.

2. His reflections, on the basis of the documentation conforming the *dossier* of the present case (not wholly reflected in the present Judgment), pertain,—as he indicates in part I,—to: *a*) provisions of treaties (after independence in 1960) expressing concern with the local populations; *b*) concern of the Parties with the local populations in the written phase of proceedings; *c*) *communiqués* (after independence in 1960) expressing concern with the local populations; *d*) views of the Parties concerning villages; *e*) concern of the Parties with the local populations in the oral phase of proceedings (first and second rounds of oral arguments); *f*) concern of the Parties with the local populations in the responses of the Parties to questions from the bench; and *g*) the tracing of the frontier line in the IGN map.

3. He observes that there is a wealth of materials, in the *dossier* of the present case, in the responses provided by the Parties to questions from the bench, not fully or sufficiently reflected in the present Judgment of the Court. He then focuses on: *a*) the human factor and frontiers; *b*) admission by the Parties that they are bound by their pledge to co-operation in respect of local populations (in multilateral African *fora*, and in bilateral agreements, conforming the régime of transhumance); and *c*) population and territory together, conforming a "system of solidarity" (encompassing transhumance and the "system of solidarity"; people and territory together; and solidarity in the *jus gentium*). He then presents his concluding observations.

4. He recalls that, in the present Judgment in the case of the *Frontier Dispute* between Burkina Faso and Niger, the ICJ begins by pointing out that the dispute at issue is set within an historical context marked by the *accession to independence*

of the two contending Parties (Burkina Faso and Niger), which were formerly part of French West Africa (para. 12). Judge Cançado Trindade ascribes particular importance to the documents *after* their independence in 1960. He finds it commendable that the contending Parties, Burkina Faso and Niger, deemed it fit to insert, into treaties they concluded after their independence in 1960, provisions expressing their concern with the local populations (part II).

5. Likewise, he singles out the concern expressed by the contending Parties with the local populations in the written phase of proceedings, and examines each of the arguments they advanced to that effect (part III). The same concern is found in *communiqués* between Burkina Faso and Niger (after independence in 1960), concerning freedom of movement of local populations (free circulation of persons and goods; trade, transportation and customs) (part IV). He then examines the views advanced by the Parties concerning villages in the frontier region (part V).

6. Judge Cançado Trindade then reviews the concern expressed by the contending Parties with the local populations in the course of the oral phase of proceedings (first and second rounds of oral arguments—part VI). To the questions he put to the contending Parties at the end of the public sittings before the Court, on 17 October 2012, both Burkina Faso and Niger, in three rounds of responses, have provided the Court with considerable additional information (a file of 140 pages), containing relevant details for the consideration of the present case (part VII).

7. He considers certain passages of their responses to be particularly enlightening,—in particular those pertaining to nomadic populations. Transhumance movements were dictated by nature and natural resources, without taking into account border lines between States; they were based on solidarity. The free circulation of local populations and goods between the two States was said to be guaranteed by the bilateral and multilateral agreements concerning the liberty of movement and access to natural resources, to which Niger and Burkina Faso are Parties; they have been able to keep their *modus vivendi* in this regard.

8. The Parties' responses have submitted that: *a*) there are nomads and semi-nomads located in the border area and in the region; *b*) the nomadic populations move across the areas where any of the frontiers claimed by the Parties would be located; *c*) the Parties are willing and are bound (by their membership in regional organizations and by their bilateral engagements) to continue to guarantee free movement to the nomadic populations (para. 46). In this light, Judge Cançado Trindade ponders that "any frontier to be determined does not seem likely to have an impact on the population, as long as both States continue to guarantee the free movement to the nomads and semi-nomads, and their living conditions do not change as a consequence of the fixing of the frontier (by the Court)" (para. 47).

9. Judge Cançado Trindade then observes (part VIII) that, in the area between the Tao astronomic marker and Bossébangou, the IGN line appears, "from the perspective of the relations between people and territory, as the appropriate one" (para. 61). All evidence available in the *dossier* of the present case, as well as in the archives of this Court, points to the fact that the IGN line was drawn taking into account the consultations undertaken *in loco* by IGN cartographers with village chiefs and local people. Judge Cançado Trindade then states that

> "People and territory stand together; it is clear, in contemporary *jus gentium*, that territorial or frontier disputes cannot be settled making abstraction of the local populations concerned. (…) [T]he IGN line, and indeed the course of the frontier determined by the Court in the *cas d'espèce* in the area between the Tao astronomic marker and Bossébangou, cuts across the width of the areas of population movements today in a balanced way, equitably within the orbit of their present-day movements' areas" (para. 62).

10. In the next part, on the human factor and frontiers (part IX), Judge Cançado Trindade refers to studies by historians and anthropologists in support of his view that, in cases like the present one, concerning frontiers with nomadic and semi-nomadic populations, "people and territory go together" (para. 63). In his perception, "in the determination of frontiers in regions inhabited by human groups of such dense cultural features, one should not simply draw entirely and admittedly 'artificial' lines, overlooking the human element"; the centrality, in his view, is of human beings (para. 69).

11. In the present Judgment on the *Frontier Dispute* case between Burkina Faso and Niger, the Court has expressed "its wish" that each Party has due regard to the needs of the population concerned, in particular those of the nomadic or semi-nomadic populations (para. 112). Judge Cançado Trindade finds this "very reassuring", as, in effect, the contending Parties themselves have, in response to his questions, indicated that they regard themselves bound to do so, by virtue of their acknowledgment of their duty of co-operation in respect of local populations (in particular nomadic and semi-nomadic ones), as manifested in multilateral African *fora*, as well as in bilateral agreements, conforming the régime of transhumance (with freedom of movement of those local populations across their borders—part X).

12. The contending Parties indicated that the living conditions of the local populations will not be affected by the tracing of the frontier line between them. They confirmed their understanding of the conformation of a régime of transhumance as a true "system of solidarity" (para. 87) (part XI). Judge Cançado Trindade observes that the ICJ now sees that people and territory go together:

> "the latter cannot make abstraction of the former, in particular in cases of such a cultural density as the present one. After all, since the time of its 'founding fathers', the law of nations (*jus gentium*) has born witness of the presence of solidarity in its *corpus juris*" (para. 87).

13. Judge Cançado Trindade points out that, "even a classic subject as territory", is seen today—even by the ICJ—as going together with the population: thus, in its Order on Provisional Measures of Protection (of 18 July 2011) in the case of the *Temple of Preah Vihear* (request for interpretation, Cambodia *versus* Thailand), the ICJ approached territory together with the (affected) population, and ordered,—in an unprecedented way in its case-law,—the creation

of a demilitarized zone in the surroundings of the aforementioned Temple (near the borderline between the two countries—para. 89).

14. Underlying this jurisprudential construction,—he added,—"is the *principle of humanity*, orienting the search for the improvement of the conditions of living of the *societas gentium* and the attainment and realization of the common good (…), in the framework of the new *jus gentium* of our times" (para. 90). The ICJ's 2011 decision in the case of the *Temple of Preah Vihear* is not the only example to this effect. Reference could further be made to a couple of other recent ICJ decisions acknowledging likewise the need to take into account people and territory together.

15. For example, earlier on, in its Judgment (of 13 July 2009) on the *Dispute relating to Navigational and Related Rights (Costa Rica* v. *Nicaragua)*, the ICJ upheld the customary right of fishing for subsistence (paras. 143–144) of the inhabitants of both margins of the River San Juan. Such fishing for subsistence was never objected to (by the respondent State); and, ultimately, those who fish for subsistence are not the States, but rather the "human beings affected by poverty" (para. 92). Shortly afterwards, in its Judgment (of 20 April 2010) in the case concerning the *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, the ICJ, in examining the arguments and evidence produced by the Parties (on the environmental protection in the River Uruguay), took into account aspects pertaining to the affected local populations, and the consultation to these latter (para. 93).

16. Judge Cançado Trindade then evokes the treatment of the "natural precept" of solidarity in the writings of one of the founding fathers on the law of nations, Francisco Suárez (para. 97), in his masterful *De Legibus, Ac Deo Legislatore* (1612), preceded by the *recta ratio* in the writings of Cicero (*De Legibus*, 52–43 b.c.): "solidarity and mutual interdependence are always present in the regulation of the relations among the members of the universal *societas*" (para. 98). And he ponders that "solidarity has always had a place in the *jus gentium*, in the law of nations. And the circumstances of the *cas d'espèce* before the ICJ between Burkina Faso and Niger bear witness of that today, in so far as their nomadic and semi-nomadic (local) populations are concerned" (para. 98).

17. Judge Cançado Trindade then concludes (part XII) that the basic lesson to be extracted from the present case of the *Frontier Dispute* between Burkina Faso and Niger is that "it is perfectly warranted and viable to determine a frontier line keeping in mind the needs of the local populations" (para. 99). Law "cannot be applied mechanically" (para. 104), and the law of nations cannot be adequately approached from an exclusive inter-State paradigm. "After all, in historical or temporal perspective, nomadic and semi-nomadic, as well as sedentary, populations have largely antedated the emergence of States in classic *jus gentium*" (para. 104).

18. States,—he adds,—historically "took shape, in order to take care of human beings under their respective jurisdictions, and to strive towards the common good. States have human ends. Well beyond State sovereignty, the basic lesson to be extracted from the present case is, in my perception, focused on human solidarity, *pari passu* with the needed juridical security of frontiers. This is in line with sociability, emanating from the *recta ratio* in the foundation of *jus gentium*. *Recta ratio* marked presence in the thinking of the "founding fathers" of the law of nations, and keeps on echoing in human conscience in our days" (para. 105).

Separate opinion of Judge Yusuf

1. Judge Yusuf appends a separate opinion to the judgment to take up "certain issues, which the Court did not adequately address in the reasoning of the Judgment, particularly as regards the applicable principles invoked by the Parties in their pleadings before the Court (see paragraph 63 of the Judgment)".

2. Judge Yusuf states that *uti possidetis* juris and the OAU/AU principle on respect of borders should not be treated as identical or equivalent. The two principles must be distinguished in light of their different origins, purposes, legal scope and nature. The Court should have cleared up this confusion in the present Judgment. It should have also addressed the issue whether or not both principles have an effective role to play in the present case.

3. The assumption that the two principles are equivalent originates from a statement of a Chamber of the Court in *Frontier Dispute ((Burkina Faso/Republic of Mali) Judgment, I.C.J. Reports 1986*, pp. 565–566, para. 22) which held that the OAU Charter made "indirect reference" to *uti possidetis* and that the 1964 Cairo Resolution of the OAU "deliberately defined and stressed the principle". This statement was unchallenged in subsequent judgments concerning African boundary disputes.

4. Judge Yusuf notes that none of the official documents of the OAU or of its successor organization, the AU, relating to African conflicts, territorial or boundary disputes, refers to the principle of *uti possidetis juris* or mentions it in any manner. The diversity of the boundary régimes which existed on the African continent at the time of independence, and the aversion of the newly-independent African States to the legitimization of colonial law in inter-African relations, led the OAU, and later the AU, to craft its own principle, the legal scope and nature of which is different from *uti possidetis juris.* Thus, the lack of reference to *uti possidetis* was not due to a lack of awareness by the OAU/AU member States of the existence of *uti possidetis juris* as a principle or of its use by the Spanish-American Republics following their own decolonization a century earlier. Rather, different situations, and historical circumstances, dictated the adoption of different legal rules and principles.

5. The principle of respect for boundaries enshrined in the Cairo Resolution of 1964 and in Article 4 *(b)* of the Constitutive Act of the AU places the boundaries existing at the time of independence in a "holding pattern", particularly to avoid armed conflict over territorial claims, until a satisfactory and peaceful solution is found by the Parties to a territorial dispute in conformity with international law, or until such time as closer integration and unity is achieved among all (or some) African States in keeping with the Pan-African vision. As such, the principle implies a prohibition of the use of force

in the settlement of boundary disputes and an obligation to refrain from acts of seizure of a portion of the territory of another African State. It does not, however, establish a particular method for the delimitation of boundaries, nor does it constitute a criterion for the ascertainment of the pedigree of boundary lines.

6. Judge Yusuf also notes that title to territory is a central aspect of the *uti possidetis juris* principle, which relies on a clear dichotomy between legal title and *effectivités*, whereby the title, if it exists, will trump the *effectivités* or the effective possession of the territory. In Latin America, the relevant title was the Spanish legislation of the time, which served to convert formerly internal boundaries into international ones. The OAU/AU principle of respect for boundaries, on the other hand, is a broader principle which calls for the respect of the post-independence frontiers of African States, pending the resolution of any bilateral disputes, in order to safeguard peace and stability in the continent. It does not rely on, or refer to, the distinction between title and *effectivités,* nor does it confer preference on one over the other.

7. The relationship between title and *effectivités* in the determination of the boundary to be respected was never spelled out or even mentioned in OAU or AU documents. In view of the diversity and complexity of the process of independence of African States, the varied legal régimes under which the delimitation of their boundaries was carried out before independence (e.g., international treaties, administrative boundaries, trusteeship agreements), and the sharply divided opinions among African States at the time of independence, both the OAU and the AU deliberately refrained from engaging in a detailed consideration of such legal issues as whether title to territory, or *effectivités* should prevail. Similarly, these organizations declined to lay down, as part of the public law of Africa, a specific peaceful method applicable to the settlement of all potential boundary disputes among all African States, or to the determination of the course of such boundaries.

8. For Judge Yusuf, there is no doubt that the principle of *uti possidetis juris* has served many advantageous functions in Latin America over the years, and continues to play a useful role in the settlement of boundary disputes in other parts of the world. It cannot, however, be considered as a synonym of the principle endorsed by the OAU in 1964, and later inscribed in the Constitutive Act of the AU, a principle which bars the alteration of existing boundaries by force pending the peaceful settlement of disputes between African States.

9. Judge Yusuf then addresses the relationship between *uti posidetis juris* and territorial integrity. In the judge's view, the Chamber of the Court in *Frontier Dispute (Burkina Faso/ Republic of Mali)* erred by interpreting the reference to territorial integrity in the OAU Charter as an "indirect" reference to *uti possidetis*. These distinct principles of international law must not be confused. The reference in the Cairo Resolution to Article III, paragraph 3, of the OAU Charter, may be construed as a reference to the inviolability of boundaries which is implicit in the principle of territorial integrity, but cannot be taken to have "deliberately defined and stressed the principle of *uti possidetis juris* contained only in an implicit sense in the Charter of their organization", as stated by the Chamber of the Court. Inviolability does not, however, signify the invariability or intangibility of frontiers; rather, it means that territorial adjustments must be effected by mutual consent.

10. Finally, Judge Yusuf notes that the present case differs from the earlier cases in so far as the Parties to it concluded an agreement in 1987 delimiting their common boundary. The Court is required only to interpret and apply this agreement. It is not required to determine what constituted for each of the Parties the colonial heritage to which the *uti possidetis* was to apply. The Parties had already specified that in their own delimitation agreement. The principle of *uti possidetis juris* has therefore no role to play in the present case.

Separate opinion of Judge *ad hoc* Mahiou

While subscribing to the Court's overall approach and to most of the findings reached by it in the present case, Judge *ad hoc* Mahiou makes a few observations on certain points regarding which the Court's position calls for further refinements and clarifications. These points relate, on the one hand, to the status of the various documents invoked in the course of the proceedings and, on the other, to the status of the *effectivités* or, more precisely, their place and role in determining the different sections of the frontier.

The delimitation of the frontier is based on the application and interpretation of the provisions of the Decree of 28 December 1926, the *Arrêté* of 31 August 1927 and the Erratum of 5 October 1927, the 1960 IGN map and the *effectivités* on the ground. These texts, documents and *effectivités* show that the course of the frontier is a combination of straight lines and sinuosities that takes account of the inter-colonial boundaries and the *effectivités* at the date of the independence of Niger and of Burkina Faso. It is a matter of regret that the Court fails to give due place to those *effectivités.*

Separate opinion of Judge *ad hoc* Daudet

The separate opinion of Judge *ad hoc* Daudet focuses on points 3 and 4 of the operative clause of the Judgment.

With respect to point 3, concerning the course of the frontier between the Tao astronomic marker and the River Sirba at Bossébangou, Judge *ad hoc* Daudet believes that the Court was right to have recourse to the 1960 IGN map in order for the boundary to be determined. In his view, however, a straight-line course nevertheless remains plausible and the arguments put forward by the Court in favour of recourse to the map and its sinuous line give rise to a number of questions on his part.

The Court took the view that, if the 1927 *Arrêté* had opted for a straight line here, it would have said so specifically, as it had for other sections, and since this was not the case, it is difficult to accept that the line is straight here. Judge *ad hoc* Daudet acknowledges that this *a contrario* argument is sound. However, he puts forward several grounds which, in his view, weaken that argument, starting with the inherent limits of any *a contrario* reasoning. Account should also be taken of the characteristics of the sections in question: the section running from Tao to the River Sirba at Bossébangou

comes immediately after a straight line, whose course it continues and which it does in accordance with normal colonial practice, whereas, elsewhere, the lines expressly described as straight by the *Arrêté* are preceded by meandering portions (like the course of the Sirba) or by significant changes of direction. Judge *ad hoc* Daudet also observes that, while it is true that the "consensual line" has ceased to be applicable between the Parties, that line, which was deemed pertinent by the Parties at one time, was straight.

He then disagrees with the Court's analysis of the terms of the 1926 Decree of the President of the French Republic, the basis of the 1927 *Arrêté*, and its analysis of the nature of the powers accorded to the Governor-General. In contrast to the Court, Judge *ad hoc* Daudet believes that the Decree gives the Governor-General broad powers to try to fix the boundaries between the two colonies and implies that the *Arrêté* itself has a constitutive character.

Finally, unlike the Court, Judge *ad hoc* Daudet does not consider that, in the case of the village of Bangaré, account should be taken, as it is by the Court, "of the practice followed by the colonial authorities concerning the implementation of the *Arrêté*". To his mind, the reasoning in the case of Bangaré should not be different to that applied in the Judgment to Oussaltane and Petelkolé, for which recourse to the *effectivités* is rejected.

However, and irrespective of his disagreements with the Court's reasoning, Judge *ad hoc* Daudet believes that while, on the basis of the *Arrêté*—in so far as its laconic character allows for its interpretation—a straight line is plausible, this cannot be established with any certainty, and he admits that other interpretations are just as conceivable. This proves that the *Arrêté* does "not suffice" to determine one line or another and, under the terms of the Special Agreement, calls for recourse to the 1960 IGN map.

With respect to point 4 of the operative clause, Judge *ad hoc* Daudet does not share the Court's interpretation regarding the endpoint of the line at the River Sirba at Bossébangou. This point then determines the course of the line as it turns back up the Sirba, up to the point where it must leave the river in order to leave to Niger the "salient which includes four villages". In order to be able to decide that the frontier follows the median line of the river, the Court interprets the *Arrêté* in such a way that the term "reach" ("atteindre") (the Sirba at Bossébangou) "does not suggest that the frontier line crosses the Sirba completely, meeting its right bank", meaning that the endpoint may be situated in the middle of the river, "better me[eting]" the "requirement concerning access to water resources of all the people living in the riparian villages". The Court's choice is fully justified from the point of view of equity. However, the Court is not called upon to draw an equitable frontier, but a frontier based on the 1927 *Arrêté* or, should the latter not suffice, on the 1960 IGN map. Consequently, without completely dismissing such considerations of equity, the Court has tried, although not entirely successfully, to keep its reasoning within the framework of the *Arrêté*.

Judge *ad hoc* Daudet therefore has some reservations, first and foremost with respect to the content of the Court's interpretation of the *Arrêté*, since he sees no justification, in this context, for the meaning attributed by the Court to the verb "reach" and, in fact, considers that, since the *Arrêté* states that the line "reach[es] the River Sirba at Bossébangou", it must therefore continue as far as the right bank of the river, where that village is located. In order to reach that location, the line must thus have crossed (and will cross again later) the river completely. It is from that point that the line must continue, thus along the right bank, as it turns back up the river. This view, moreover, is confirmed by the line shown on the 1960 IGN map, where crosses cut across the entire width of the River Sirba at Bossébangou and run along the right bank of the river, before cutting it again, in order to create the salient comprising the four villages. According to Judge *ad hoc* Daudet, by deciding otherwise, the Court has in fact ruled on the basis of equity, while trying to keep its reasoning within the framework prescribed by the Special Agreement, i.e., by applying the *Arrêté* according to its interpretation thereof. He wonders, however, whether the Court could have opted for delimitation along the bank, which he believes is more consistent with the terms of the *Arrêté*, and encouraged the States to put in place co-operation mechanisms (in the spirit of paragraph 112 of the Judgment), mitigating the inequitable character of that line and encouraging the shared use of water resources. In spite of these reservations, Judge *ad hoc* Daudet nevertheless voted in favour of point 4 of the operative clause; he did so because he accepts that such a literal interpretation of the *Arrêté*, although correct in his view, leads to an unduly formalistic result, highlighting the fact that, nowadays, the application of *uti possidetis* is not always in keeping with present-day situations: the challenges posed by an internal administrative boundary along a river between two colonies governed by the same colonial power bear little or no relationship with those posed when that same line constitutes the international frontier between two sovereign States.

Judge *ad hoc* Daudet also explains that he voted in favour of point 4 because that point also covers other portions of the line, in respect of which he agrees with the Court.

Annex

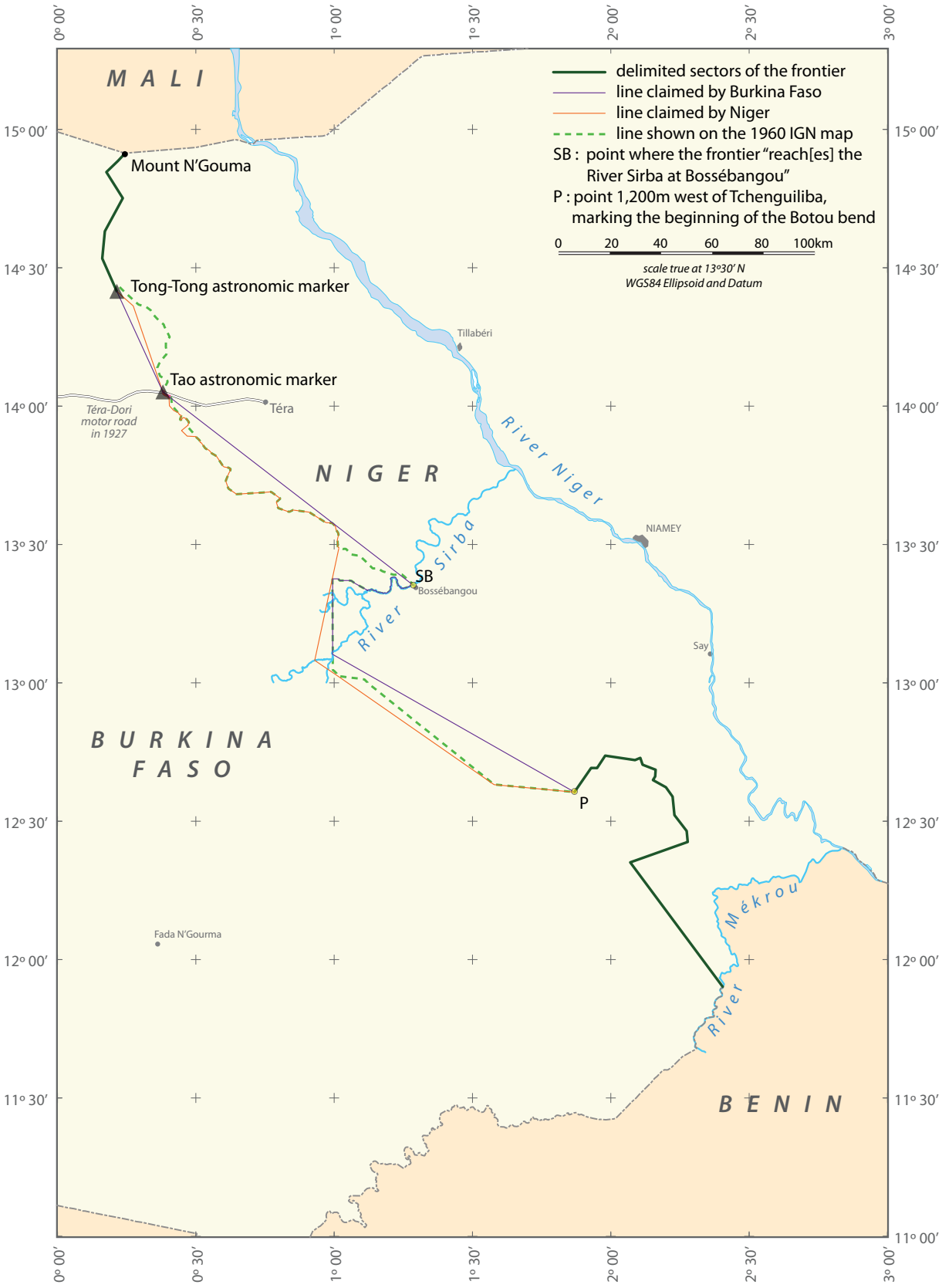
— Sketch map No. 1: Parties' claims and line depicted on the 1960 IGN map;

— Sketch map No. 2: Course of the frontier from the Tao astronomic marker to the point where it "reach[es] the River Sirba at Bossébangou";

— Sketch map No. 3: Course of the frontier from the point where it "reach[es] the River Sirba at Bossébangou" to the intersection of the River Sirba with the Say parallel;

— Sketch map No. 4: Course of the frontier as decided by the Court.

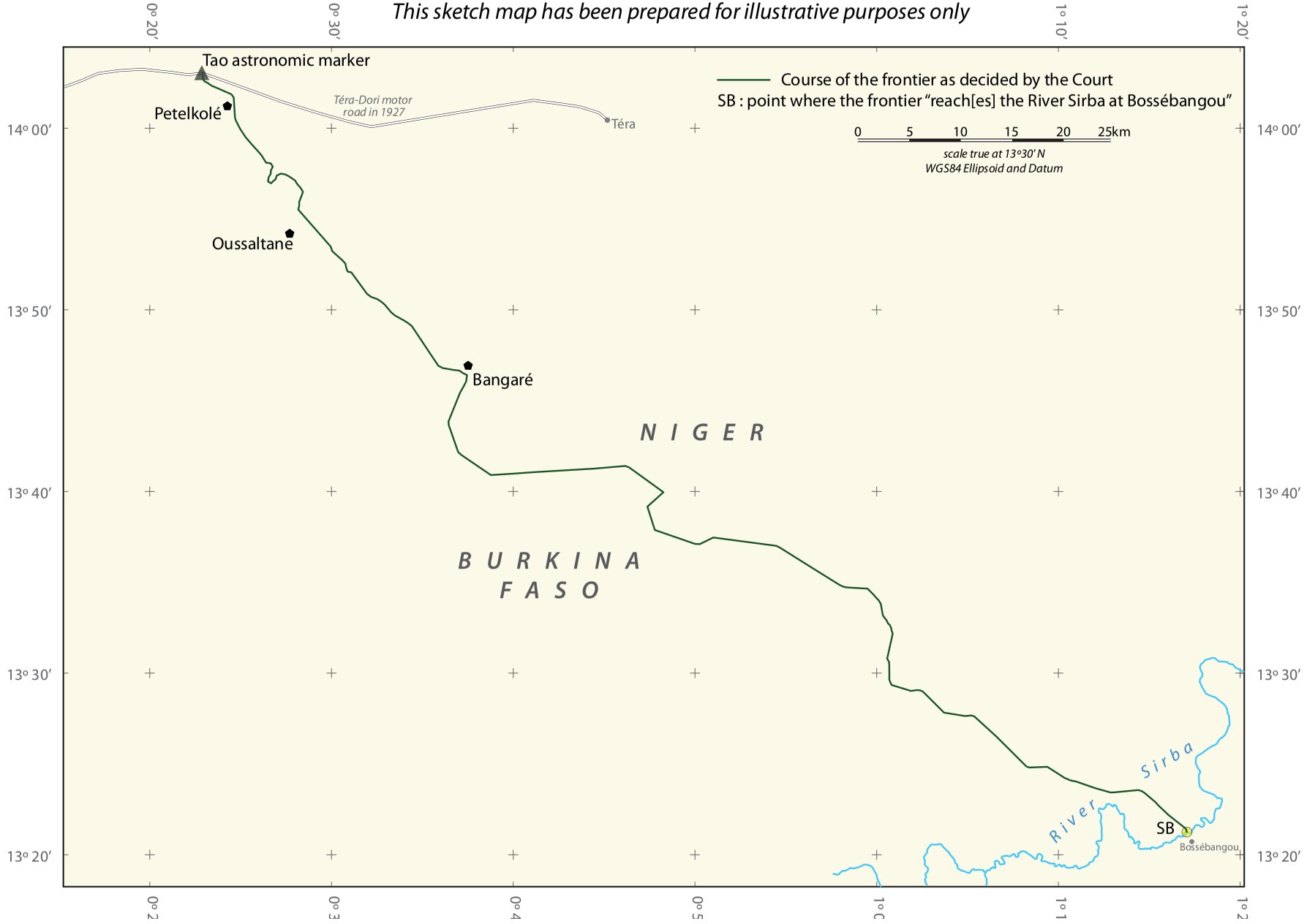
Sketch Map 1:
PARTIES' CLAIMS AND LINE DEPICTED ON THE 1960 IGN MAP
This sketch map has been prepared for illustrative purposes only



Sketch Map 2:

COURSE OF THE FRONTIER FROM THE TAO ASTRONOMIC MARKER TO THE POINT WHERE IT "REACH[ES] THE RIVER SIRBA AT BOSSÉBANGOU"

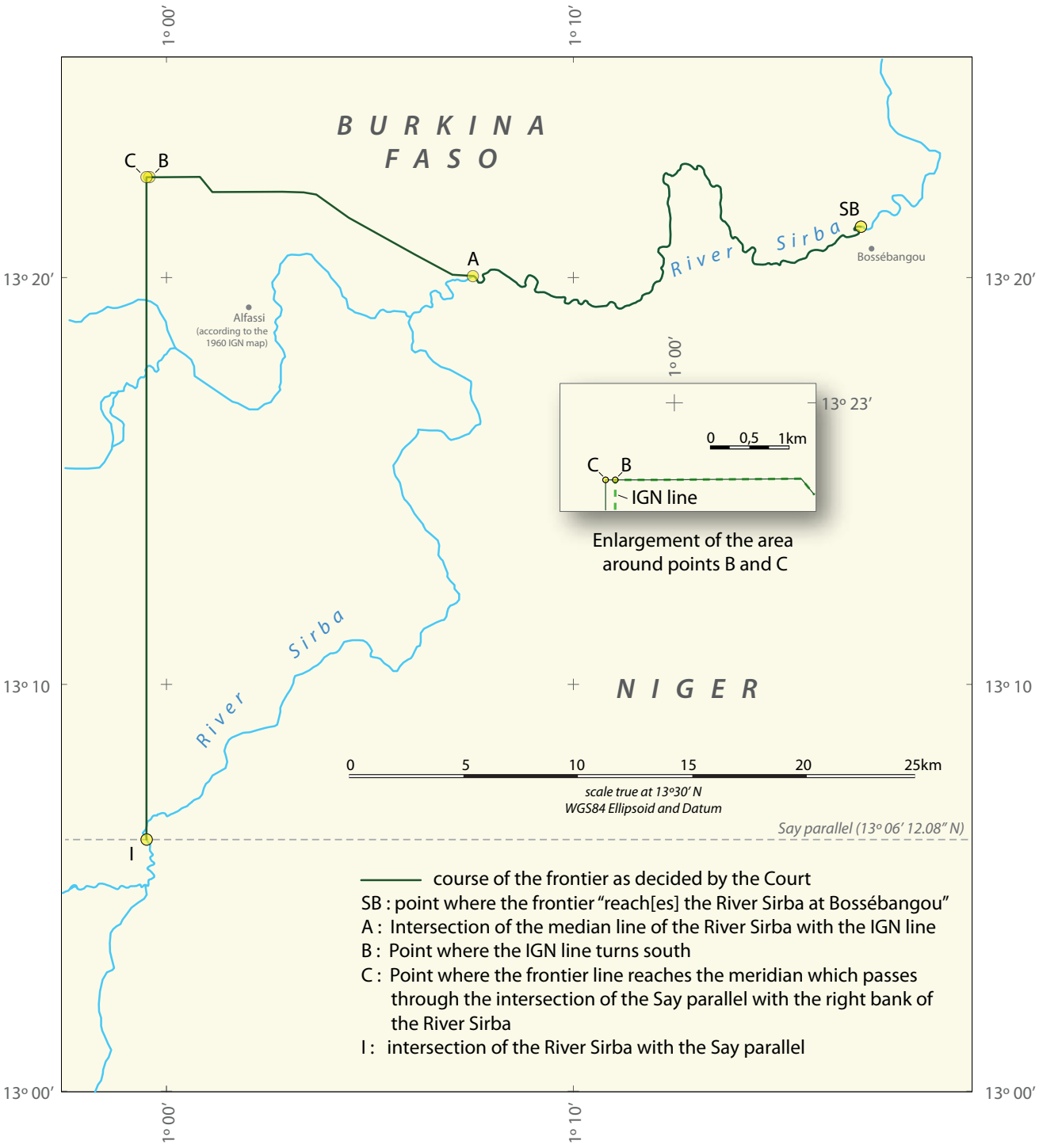
This sketch map has been prepared for illustrative purposes only



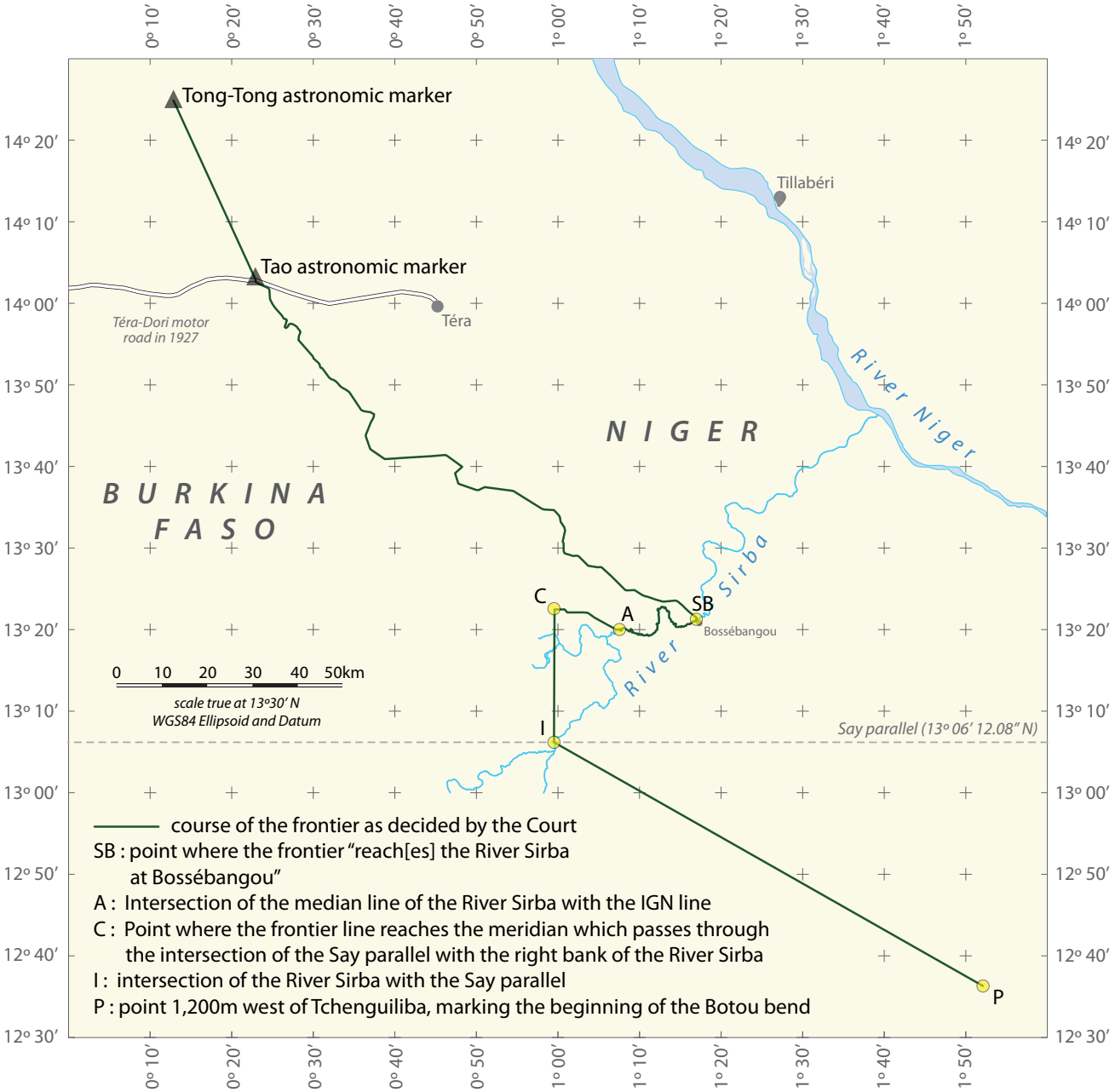
Sketch Map 3:

COURSE OF THE FRONTIER FROM THE POINT WHERE IT "REACH[ES] THE RIVER SIRBA AT BOSSÉBANGOU" TO THE INTERSECTION OF THE RIVER SIRBA WITH THE SAY PARALLEL

This sketch map has been prepared for illustrative purposes only



Sketch Map 4:
COURSE OF THE FRONTIER AS DECIDED BY THE COURT
This sketch map has been prepared for illustrative purposes only



198. CERTAIN ACTIVITIES CARRIED OUT BY NICARAGUA IN THE BORDER AREA (COSTA RICA *v.* NICARAGUA) [JOINDER OF PROCEEDINGS]

Order of 17 April 2013

On 17 April 2013, the International Court of Justice delivered an Order in the case concerning *Certain Activities carried out by Nicaragua in the Border Area* (*Costa Rica* v. *Nicaragua*), whereby it decided to join the proceedings in this case with those in the case concerning *Construction of a Road in Costa Rica along the San Juan River* (*Nicaragua* v. *Costa Rica*).

The Court was composed as follows: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari; Judges *ad hoc* Guillaume, Dugard; Registrar Couvreur.

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The text of the Order reads as follows:

"The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Article 48 of the Statute of the Court and to Article 47 of the Rules of Court,

Makes the following Order:

Whereas:

1. By an Application filed in the Registry of the Court on 18 November 2010, the Government of the Republic of Costa Rica (hereinafter "Costa Rica") instituted proceedings against the Government of the Republic of Nicaragua (hereinafter "Nicaragua") in the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* (hereinafter referred to as the Costa Rica v. *Nicaragua* case) for "the incursion into, occupation of and use by Nicaragua's army of Costa Rican territory", contending, in particular, that Nicaragua had "in two separate incidents, occupied the territory of Costa Rica in connection with the construction of a canal across Costa Rican territory … and certain related works of dredging on the San Juan River". Costa Rica alleged breaches by Nicaragua of its obligations towards Costa Rica under a number of treaty instruments and other applicable rules of international law, as well as under certain arbitral and judicial decisions. In this regard, Costa Rica refers to the Charter of the United Nations and the Charter of the Organization of American States; the Treaty of Territorial Limits between Costa Rica and Nicaragua of 15 April 1858 (hereinafter the "1858 Treaty of Limits"), namely, Articles I, II, V and IX; the arbitral award issued by the President of the United States of America, Grover Cleveland, on 22 March 1888 (hereinafter the "Cleveland Award"); the first and second arbitral awards rendered by Edward Porter Alexander dated respectively 30 September 1897 and 20 December 1897 (hereinafter the "Alexander Awards"); the 1971 Convention on Wetlands of International Importance (hereinafter the "Ramsar Convention"); and the Judgment of the Court of 13 July 2009 in the case concerning the *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua).*

2. In its Application, Costa Rica invokes, as a basis for the jurisdiction of the Court, Article XXXI of the American Treaty on Pacific Settlement signed at Bogotá on 30 April 1948 (hereinafter the "Pact of Bogotá"). In addition, Costa Rica seeks to found the jurisdiction of the Court on the declaration it made on 20 February 1973 under Article 36, paragraph 2, of the Statute, as well as on the declaration which Nicaragua made on 24 September 1929 (and amended on 23 October 2001) under Article 36 of the Statute of the Permanent Court of International Justice and which is deemed, pursuant to Article 36, paragraph 5, of the Statute of the present Court, for the period which it still has to run, to be acceptance of the compulsory jurisdiction of this Court.

3. On 18 November 2010, having filed its Application, Costa Rica also submitted a Request for the indication of provisional measures, pursuant to Article 41 of the Statute of the Court and Articles 73 to 75 of the Rules of Court.

4. In accordance with Article 40, paragraph 2, of the Statute, the Registrar communicated a signed copy of the Application forthwith to the Government of Nicaragua; and, under paragraph 3 of that Article, all States entitled to appear before the Court were notified of the filing of the Application.

5. Pursuant to the instructions of the Court under Article 43 of the Rules of Court, the Registrar addressed to States parties to the Pact of Bogotá and to the Ramsar Convention the notifications provided for in Article 63, paragraph 1, of the Statute. In accordance with the provisions of Article 69, paragraph 3, of the Rules of Court, the Registrar moreover addressed to the Organization of American States the notification provided for in Article 34, paragraph 3, of the Statute. The Organization of American States indicated that it did not intend to submit any observations in writing under Article 69, paragraph 3, of the Rules of Court.

6. Since the Court includes no judge of the nationality of the Parties upon the Bench, each of them, in exercise of the right conferred by Article 31, paragraph 3, of the Statute, chose a judge *ad hoc* in the case. Costa Rica chose Mr. John Dugard, and Nicaragua chose Mr. Gilbert Guillaume.

7. By an Order of 8 March 2011, the Court indicated certain provisional measures to both Parties.

8. By an Order of 5 April 2011 the Court fixed 5 December 2011 and 6 August 2012 as the respective time-limits for the filing of a Memorial by Costa Rica and a Counter-Memorial by Nicaragua. Costa Rica's Memorial was duly filed within the time-limit so prescribed.

9. On 22 December 2011, Nicaragua instituted proceedings against Costa Rica in the case concerning *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)* (hereinafter referred to as the *Nicaragua* v. *Costa Rica* case). In its Application,

Nicaragua stated that the case relates to "violations of Nicaraguan sovereignty and major environmental damages on its territory", contending, in particular, that Costa Rica was carrying out major works along most of the border area between the two countries along the San Juan River, namely the construction of a road, with grave environmental consequences. Nicaragua also reserved the right to request that the proceedings in the *Nicaragua* v. *Costa Rica* case and the *Costa Rica* v. *Nicaragua* case be joined.

10. Nicaragua filed its Counter-Memorial in the present case on 6 August 2012, within the time-limit fixed for that purpose in the Court's Order of 5 April 2011. That pleading included four counter-claims. Nicaragua stated in the Counter-Memorial that, "with the filing of its Counter-Claims … including its claim based on the harm caused to the San Juan de Nicaragua River caused by the construction of this road and particularly, on its navigability, a discussion of the joinder of the cases [became] more opportune".

11. At a meeting held by the President with representatives of the Parties on 19 September 2012, the Parties agreed not to request the Court's authorization to file a reply and a rejoinder in the present case. At the same meeting the Co-Agent of Costa Rica raised certain objections to the admissibility of the first three counter-claims contained in the Counter-Memorial of Nicaragua. These objections were confirmed in a letter from the Co-Agent of Costa Rica dated 19 September 2012.

12. By letters dated 28 September 2012, the Registrar informed the Parties that the Court had decided that the Government of Costa Rica should specify in writing, by 30 November 2012 at the latest, the legal grounds on which it relied in maintaining that the Respondent's first three counter-claims were inadmissible, and that the Government of Nicaragua should then present its own views on the question in writing, by 30 January 2013 at the latest.

13. The Written Observations of the Republic of Costa Rica were duly filed within the time-limit so prescribed. In these Written Observations, Costa Rica argued that Nicaragua was "effectively seeking the joinder of the two different cases" pending between both Parties before the Court and that such joinder would be neither timely nor equitable. In particular, Costa Rica contended that the present case concerned the exercise of territorial sovereignty and that, in the absence of the Court's ruling thereon, "Costa Rica [was] prevented from exercising sovereignty over part of its territory", while the *Nicaragua* v. *Costa Rica* case had a different subject-matter. Costa Rica underlined that, as each of the two cases has its own procedural timetable, the joinder of proceedings would lead to a delay in the resolution of the dispute over territorial sovereignty and would thus constitute a serious prejudice to Costa Rica. Finally, Costa Rica noted that the composition of the Court is different in the two cases.

14. In a letter dated 19 December 2012, accompanying its Memorial in the *Nicaragua* v. *Costa Rica* case, Nicaragua again asked the Court to consider the need to join the proceedings in the above-mentioned case and the present case, and requested the Court to decide on this matter in the interests of the administration of justice.

15. By a letter dated 15 January 2013, the Registrar, on the instructions of the President, asked the Government of Costa Rica to inform the Court, by 18 February 2013, of its views on Nicaragua's position regarding the proposed joinder of the proceedings in the *Nicaragua* v. *Costa Rica* case and the *Costa Rica* v. *Nicaragua* case.

16. The Written Observations of the Republic of Nicaragua containing its views on the admissibility of the first three counter-claims made in its Counter-Memorial in the present case were duly filed on 30 January 2013, within the time-limit prescribed in the Registrar's letter dated 28 September 2012. Nicaragua stated that the *Nicaragua* v. *Costa Rica* case and the present case "involve the same Parties and are tightly connected both in law and in fact" and that there was "therefore no reason why they could not be joined". It requested the Court to "decide the joinder of the proceedings" in the two cases in accordance with Article 47 of the Rules of Court.

17. By a letter dated 7 February 2013, Costa Rica, with regard to the question of the proposed joinder, stated that the proceedings in the two cases should not be joined for the reasons previously indicated in its Written Observations on the Admissibility of Nicaragua's Counter-Claims, filed in the *Costa Rica* v. *Nicaragua* case on 30 November 2012. In the same letter, Costa Rica reiterated its position that it would be neither timely nor equitable to join the proceedings in the two cases. Costa Rica contended that there was no close connection between the two cases such as might justify a joinder. In particular, according to Costa Rica, the *Costa Rica* v. *Nicaragua* case concerns an area which is geographically distant from the road the construction of which is the subject of the *Nicaragua* v. *Costa Rica* case. Costa Rica argued that "[i]t [was] not sufficient that both cases [were] related—although in very different respects—to the San Juan River, which is more than 205 km in length".

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18. Under Article 47 of its Rules, "[t]he Court may at any time direct that the proceedings in two or more cases be joined". That provision leaves the Court a broad margin of discretion. Where the Court, or its predecessor, has exercised its power to join proceedings, it has done so in circumstances where joinder was consonant not only with the principle of the sound administration of justice but also with the need for judicial economy (see, e.g., *Legal Status of the South-Eastern Territory of Greenland, Order of* 2 *August 1932, P.C.I.J., Series* A/B, *No. 48*, p. 268; *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Order of* 26 *April 1968, I.C.J. Reports 1968*, p. 9). Any decision to that effect will have to be taken in the light of the specific circumstances of each case.

19. The two cases here concerned involve the same Parties and relate to the area where the common border between them runs along the right bank of the San Juan River.

20. Both cases are based on facts relating to works being carried out in, along, or in close proximity to the San Juan River, namely the dredging of the river by Nicaragua and the construction of a road along its right bank by Costa Rica. Both sets of proceedings are about the effect of

the aforementioned works on the local environment and on the free navigation on, and access to, the San Juan River. In this regard, both Parties refer to the risk of sedimentation of the San Juan River.

21. In the present case and in the *Nicaragua* v. *Costa Rica* case, the Parties make reference, in addition, to the harmful environmental effect of the works in and along the San Juan River on the fragile fluvial ecosystem (including protected nature preserves in and along the river).

22. In both cases, the Parties refer to violations of the 1858 Treaty of Limits, the Cleveland Award, the Alexander Awards and the Ramsar Convention.

23. A decision to join the proceedings will allow the Court to address simultaneously the totality of the various interrelated and contested issues raised by the Parties, including any questions of fact or law that are common to the disputes presented. In the view of the Court, hearing and deciding the two cases together will have significant advantages. The Court does not expect any undue delay in rendering its Judgment in the two cases.

24. In view of the above, the Court, in conformity with the principle of the sound administration of justice and with the need for judicial economy, considers it appropriate to join the proceedings in the present case and in the *Nicaragua* v. *Costa Rica* case.

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25. For these reasons,

The Court,

Unanimously,

Decides to join the proceedings in the present case with those in the case concerning *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)*;

Reserves the subsequent procedure for further decision."

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Judge Cançado Trindade appended a separate opinion to the Order.

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Separate opinion of Judge Cançado Trindade

In his Separate opinion (in 7 parts) in the Court's Orders of joinders in the cases concerning *Certain Activities Carried out by Nicaragua in the Border Area* and concerning the *Construction of a Road in Costa Rica along the San Juan River*, Judge Cançado Trindade examines the foundations of the matter, addressing at first the issue of "implied" and "inherent powers", and providing some precisions in respect of the exercise of the international judicial function. Secondly, he dwells upon the issue of the *Kompetenz Kompetenz / la compétence de la compétence*, inherent to the exercise of the international judicial function. Thirdly, he reviews the sound administration of justice, and focuses attention on joinders effected by the Hague Court (PCIJ and ICJ) *avant la lettre*. Fourthly, Judge Cançado Trindade considers what he perceives as the idea of justice guiding the sound administration of justice (*la bonne administration de la justice*). And fifthly, he examines the sound administration of justice (*la bonne administration de la justice*) and the *procedural equality* of the parties. His final considerations stress the relevance of general principles of law in the handling of international procedural issues.

199. CONSTRUCTION OF A ROAD IN COSTA RICA ALONG THE SAN JUAN RIVER (NICARAGUA *v.* COSTA RICA) [JOINDER OF PROCEEDINGS]

Order of 17 April 2013

On 17 April 2013, the International Court of Justice delivered an Order in the case concerning *Construction of a Road in Costa Rica along the San Juan River* (*Nicaragua* v. *Costa Rica*), whereby it decided to join the proceedings in this case with those in the case concerning *Certain Activities carried out by Nicaragua in the Border Area* (*Costa Rica* v. *Nicaragua*).

The Court was composed as follows: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari; Judges *ad hoc* Guillaume, Simma; Registrar Couvreur.

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The text of the Order reads as follows:

"The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Article 48 of the Statute of the Court and to Article 47 of the Rules of Court,

Makes the following Order:

Whereas:

1. By an Application filed in the Registry of the Court on 22 December 2011, the Government of the Republic of Nicaragua (hereinafter "Nicaragua") instituted proceedings against the Government of the Republic of Costa Rica (hereinafter "Costa Rica") in the case concerning *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)* (hereinafter referred to as the *Nicaragua* v. *Costa Rica case*) for "violations of Nicaraguan sovereignty and major environmental damages on its territory", contending, in particular, that Costa Rica was carrying out major works along most of the border area between the two countries along the San Juan River, namely the construction of a road, with grave environmental consequences.

2. In its Application, Nicaragua reserved the right to request the joinder of the proceedings in the present case and the proceedings in the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* instituted by Costa Rica against Nicaragua by an Application dated 18 November 2010 (hereinafter referred to as the *Costa Rica* v. *Nicaragua* case).

3. In its Application in the *Costa Rica* v. *Nicaragua* case, Costa Rica stated that the case related to "the incursion into, occupation of and use by Nicaragua's army of Costa Rican territory", contending, in particular, that Nicaragua had "in two separate incidents, occupied the territory of Costa Rica in connection with the construction of a canal across Costa Rican territory … and certain related works of dredging on the San Juan River". Costa Rica alleged breaches by Nicaragua of its obligations towards Costa Rica under a number of treaty instruments and other applicable rules of international law, as well as under certain arbitral and judicial decisions. In this regard, Costa Rica refers to the Charter of the United Nations and the Charter of the Organization of American States; the Treaty of Territorial Limits between Costa Rica and Nicaragua of 15 April 1858 (hereinafter the "1858 Treaty of Limits"), namely, Articles I, II, V and IX; the arbitral award issued by the President of the United States of America, Grover Cleveland, on 22 March 1888 (hereinafter the "Cleveland Award"); the first and second arbitral awards rendered by Edward Porter Alexander dated respectively 30 September 1897 and 20 December 1897 (hereinafter the "Alexander Awards"); the 1971 Convention on Wetlands of International Importance (hereinafter the "Ramsar Convention"); and the Judgment of the Court of 13 July 2009 in the case concerning the *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua).*

4. In its Application in the present case, Nicaragua invokes, as a basis for the jurisdiction of the Court, Article XXXI of the American Treaty on Pacific Settlement signed at Bogotá on 30 April 1948 (hereinafter the "Pact of Bogotá"). In addition, Nicaragua seeks to found the jurisdiction of the Court on the declaration it made on 24 September 1929 (and amended on 23 October 2001) under Article 36 of the Statute of the Permanent Court of International Justice and which is deemed, pursuant to Article 36, paragraph 5, of the Statute of the present Court, for the period which it still has to run, to be acceptance of the compulsory jurisdiction of this Court, as well as on the declaration which Costa Rica made on 20 February 1973 under Article 36, paragraph 2, of the Statute.

5. In accordance with Article 40, paragraph 2, of the Statute, the Registrar communicated a signed copy of the Application forthwith to the Government of Costa Rica; and, under paragraph 3 of that Article, all States entitled to appear before the Court were notified of the filing of the Application.

6. Since the Court includes no judge of the nationality of the Parties upon the Bench, each of them, in exercise of the right conferred by Article 31, paragraph 3, of the Statute, chose a judge *ad hoc* in the case. Nicaragua chose Mr. Gilbert Guillaume and Costa Rica chose Mr. Bruno Simma.

7. By an Order of 23 January 2012, taking account of the agreement of the Parties, the Court fixed 19 December 2012 and 19 December 2013 as the respective time-limits for the filing of a Memorial by Nicaragua and a Counter-Memorial by Costa Rica. Nicaragua's Memorial was filed within the time-limit so prescribed. In a letter dated 19 December 2012, accompanying its Memorial, Nicaragua asked the Court to consider the need to join the proceedings in the present case and the *Costa Rica* v. *Nicaragua* case, and requested the Court to decide on this matter in the interests of the administration of justice.

8. By a letter dated 15 January 2013, the Registrar, on the instructions of the President, asked the Government of Costa Rica to inform the Court, by 18 February 2013, of

its views on Nicaragua's position regarding the proposed joinder of the proceedings in the *Nicaragua* v. *Costa Rica* case and the *Costa Rica* v. *Nicaragua* case.

9. By a letter dated 7 February 2013, Costa Rica, with regard to the question of the proposed joinder, stated that the proceedings in the two cases should not be joined for the reasons previously indicated in its Written Observations on the Admissibility of Nicaragua's Counter-Claims, filed in the *Costa Rica* v. *Nicaragua* case on 30 November 2012. It is recalled that in those Written Observations, Costa Rica argued that Nicaragua was "effectively seeking the joinder of the two different cases" pending between both Parties before the Court and that it would be neither timely nor equitable to join the proceedings in the two cases. In particular, Costa Rica contended that the *Costa Rica* v. *Nicaragua* case concerned the exercise of territorial sovereignty and that, in the absence of the Court's ruling thereon, "Costa Rica [was] prevented from exercising sovereignty over part of its territory", while the present case had a different subject-matter. Costa Rica underlined that, as each of the two cases has its own procedural timetable, the joinder of proceedings would lead to a delay in the resolution of the dispute over territorial sovereignty and would thus constitute a serious prejudice to Costa Rica. Finally, Costa Rica noted that the composition of the Court is different in the two cases.

10. It is further recalled that in its Written Observations on the Admissibility of its Counter-Claims, which were filed in the context of the *Costa Rica* v. *Nicaragua* case on 30 January 2013, Nicaragua stated that the *Costa Rica* v. *Nicaragua* case and the present case "involve the same Parties and are tightly connected both in law and in fact" and that there was "therefore no reason why they could not be joined". Nicaragua therefore again requested the Court to "decide the joinder of the proceedings" in the two cases in accordance with Article 47 of the Rules of Court.

11. In the above-mentioned letter dated 7 February 2013, Costa Rica reiterated its position that it would be neither timely nor equitable to join the proceedings in the two cases. Costa Rica contended that there was no close connection between the two cases such as might justify a joinder. In particular, according to Costa Rica, the *Costa Rica* v. *Nicaragua* case concerns an area which is geographically distant from the road the construction of which is the subject of the present case. Costa Rica argued that "[i]t [was] not sufficient that both cases [were] related—although in very different respects—to the San Juan River, which is more than 205 km in length".

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12. Under Article 47 of its Rules, "[t]he Court may at any time direct that the proceedings in two or more cases be joined". That provision leaves the Court a broad margin of discretion. Where the Court, or its predecessor, has exercised its power to join proceedings, it has done so in circumstances where joinder was consonant not only with the principle of the sound administration of justice, but also with the need for judicial economy (see, e.g., *Legal Status of the South-Eastern Territory of Greenland, Order of* 2 *August 1932, P.C.I.J., Series* A/B, *No. 48*, p. 268; *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Order of* 26 *April 1968, I.C.J. Reports 1968*, p. 9). Any decision to that effect will have to be taken in the light of the specific circumstances of each case.

13. The two cases here concerned involve the same Parties and relate to the area where the common border between them runs along the right bank of the San Juan River.

14. Both cases are based on facts relating to works being carried out in, along, or in close proximity to the San Juan River, namely the dredging of the river by Nicaragua and the construction of a road along its right bank by Costa Rica. Both sets of proceedings are about the effect of the aforementioned works on the local environment and on the free navigation on, and access to, the San Juan River. In this regard, both Parties refer to the risk of sedimentation of the San Juan River.

15. In the present case and in the *Costa Rica* v. *Nicaragua* case, the Parties make reference, in addition, to the harmful environmental effect of the works in and along the San Juan River on the fragile fluvial ecosystem (including protected nature preserves in and along the river).

16. In both cases, the Parties refer to violations of the 1858 Treaty of Limits, the Cleveland Award, the Alexander Awards and the Ramsar Convention.

17. A decision to join the proceedings will allow the Court to address simultaneously the totality of the various interrelated and contested issues raised by the Parties, including any questions of fact or law that are common to the disputes presented. In the view of the Court, hearing and deciding the two cases together will have significant advantages. The Court does not expect any undue delay in rendering its Judgment in the two cases.

18. In view of the above, the Court, in conformity with the principle of the sound administration of justice and with the need for judicial economy, considers it appropriate to join the proceedings in the present case and in the *Costa Rica* v. *Nicaragua* case.

19. The Court adds that the time-limit fixed in its Order of 23 January 2012 for the filing of the Counter-Memorial of Costa Rica in the present case, namely 19 December 2013, remains unaffected by its decision in the current Order.

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20. For these reasons,

The Court,

By sixteen votes to one,

Decides to join the proceedings in the present case with those in the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)*;

In favour: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari; Judge *ad hoc* Guillaume;

Against: Judge *ad hoc* Simma;

Reserves the subsequent procedure for further decision."

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Judge Cançado Trindade appended a separate opinion to the Order.

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Separate opinion of Judge Cançado Trindade

In his Separate opinion (in 7 parts) in the Court's Orders of joinders in the cases concerning *Certain Activities Carried out by Nicaragua in the Border Area* and concerning the *Construction of a Road in Costa Rica along the San Juan River*, Judge Cançado Trindade examines the foundations of the matter, addressing at first the issue of "implied" and "inherent powers", and providing some precisions in respect of the exercise of the international judicial function. Secondly, he dwells upon the issue of the *Kompetenz Kompetenz / la compétence de la compétence*, inherent to the exercise of the international judicial function. Thirdly, he reviews the sound administration of justice, and focuses attention on joinders effected by the Hague Court (PCIJ and ICJ) *avant la lettre*. Fourthly, Judge Cançado Trindade considers what he perceives as the idea of justice guiding the sound administration of justice (*la bonne administration de la justice*). And fifthly, he examines the sound administration of justice (*la bonne administration de la justice*) and the *procedural equality* of the parties. His final considerations stress the relevance of general principles of law in the handling of international procedural issues.

200. CERTAIN ACTIVITIES CARRIED OUT BY NICARAGUA IN THE BORDER AREA (COSTA RICA *v.* NICARAGUA); CONSTRUCTION OF A ROAD IN COSTA RICA ALONG THE SAN JUAN RIVER (NICARAGUA *v.* COSTA RICA) [COUNTER-CLAIMS]

Order of 18 April 2013

On 18 April 2013, the International Court of Justice issued its Order concerning the four counter-claims submitted by Nicaragua in its Counter-Memorial filed in the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua).*

The Court was composed as follows: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari; Judges *ad hoc* Guillaume, Dugard; Registrar Couvreur.

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The operative paragraph (para. 41) of the Order reads as follows:

"…

The Court,

(A) Unanimously,

Finds that there is no need for the Court to adjudicate on the admissibility of Nicaragua's first counter-claim as such;

(B) Unanimously,

Finds that Nicaragua's second counter-claim is inadmissible as such and does not form part of the current proceedings;

(C) Unanimously,

Finds that Nicaragua's third counter-claim is inadmissible as such and does not form part of the current proceedings;

(D) Unanimously,

Finds that there is no need for the Court to entertain Nicaragua's fourth counter-claim as such, and that the Parties may take up any question relating to the implementation of the provisional measures indicated by the Court in its Order of 8 March 2011 in the further course of the proceedings;

Reserves the subsequent procedure for further decision."

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Judge *ad hoc* Guillaume appended a declaration to the Order.

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In its Order, the Court finds, unanimously, that there is no need for it to adjudicate on the admissibility of Nicaragua's first counter-claim as such, since that claim has become without object by reason of the fact that the proceedings in the *Costa Rica* v. *Nicaragua* and *Nicaragua* v. *Costa Rica* cases were joined by an Order of the Court dated 17 April 2013. That claim will therefore be examined as a principal claim within the context of the joined proceedings.

In its first counter-claim, Nicaragua requested the Court to declare that "Costa Rica bears responsibility to Nicaragua" for the impairment of navigation on the San Juan River and for the damage to the environment caused by the construction of a road next to its right bank by Costa Rica in violation of its obligations stemming from the 1858 Treaty of Limits and various treaty or customary rules relating to the protection of the environment and good neighbourliness.

In its Order, the Court also unanimously finds that the second and third counter-claims are inadmissible as such and do not form part of the current proceedings, since there is no direct connection, either in fact or in law, between those claims and the principal claims of Costa Rica.

In its second counter-claim, Nicaragua asked the Court to declare that it "has become the sole sovereign over the area formerly occupied by the Bay of San Juan del Norte". In its third counter-claim, it requested the Court to find that "Nicaragua has a right to free navigation on the Colorado Branch of the San Juan de Nicaragua River until the conditions of navigability existing at the time the 1858 Treaty was concluded are re-established".

In its Order, the Court lastly finds, unanimously, that there is no need for it to entertain the fourth counter-claim as such, since the question of compliance by both Parties with provisional measures may be considered in the principal proceedings, irrespective of whether or not the respondent State raised that issue by way of a counter-claim. Consequently, the Parties may take up any question relating to the implementation of the provisional measures indicated by the Court in its Order of 8 March 2011 in the further course of the proceedings.

In its fourth counter-claim, Nicaragua alleged that Costa Rica did not implement the said provisional measures. It is recalled that, in the above-mentioned Order, the Court: (1) requested the Parties to refrain from sending to, or maintaining in the disputed territory any personnel, whether civilian, police or security; (2) authorized Costa Rica to dispatch civilian personnel charged with the protection of the environment to the said territory, but only in so far as it is necessary to avoid irreparable prejudice being caused; (3) called on the Parties to refrain from any action which might aggravate or extend the dispute; and (4) asked each of the Parties to inform it as to its compliance with the said provisional measures.

The subsequent procedure was reserved for further decision.

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Declaration of Judge *ad hoc* Guillaume

Judge *ad hoc* Guillaume observes that the principal claims of Costa Rica and the second and third counter-claims of Nicaragua relate to a single fluvial basin, that of the San Juan and the Colorado, presenting shared problems of alluviation, dredging, navigability and protection of the environment. Consequently, in his view, the Court could have found that a direct connection existed between the principal claims and the second and third counter-claims. While he endorsed the solution adopted by the Court, Judge *ad hoc* Guillaume nonetheless deemed it necessary to point out that a different solution could have been envisaged.

201. CERTAIN ACTIVITIES CARRIED OUT BY NICARAGUA IN THE BORDER AREA (COSTA RICA *v.* NICARAGUA); CONSTRUCTION OF A ROAD IN COSTA RICA ALONG THE SAN JUAN RIVER (NICARAGUA *v.* COSTA RICA) [PROVISIONAL MEASURES]

Order of 16 July 2013

On 16 July 2013, the International Court of Justice delivered its Order concerning the requests submitted by Costa Rica and Nicaragua, respectively, for the modification of the provisional measures indicated by the Court in the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)*.

The Court was composed as follows: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari; Judges *ad hoc* Guillaume, Dugard; Registrar Couvreur.

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The operative paragraph (para. 40) of the Order reads as follows:

"…

The Court,

(1) 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 to modify the measures indicated in the Order of 8 March 2011;

In favour: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari; Judge *ad hoc* Guillaume;

Against: Judge Cançado Trindade; Judge *ad hoc* Dugard;

(2) Unanimously,

Reaffirms the provisional measures indicated in its Order of 8 March 2011, in particular the requirement that the Parties 'shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve'."

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Judge Cançado Trindade appended a dissenting opinion to the Order of the Court; Judge *ad hoc* Dugard appended a dissenting opinion to the Order of the Court.

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The Court first recalls that, by its Order of 8 March 2011 made in the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* (hereinafter "the *Costa Rica* v. *Nicaragua* case"), it had indicated, amongst other things, that "[e]ach Party shall refrain from sending to, or maintaining in the disputed territory, including the *caño*, any personnel, whether civilian, police or security" and that "Costa Rica may dispatch civilian personnel charged with the protection of the environment to the disputed territory, including the *caño*, but only in so far as it is necessary to avoid irreparable prejudice being caused to the part of the wetland where that territory is situated" (para. 3).

In its Order of 16 July 2013, the Court sets out the modifications requested by Costa Rica and by Nicaragua, and notes that each of the Parties asked it to reject the other's request (paras. 12–15).

The Court further recalls that, in order to rule on those requests, it must determine whether the conditions set forth in Article 76, paragraph 1, of the Rules of Court have been fulfilled. That paragraph reads as follows: "At the request of a party the Court may, at any time before the final judgment in the case, revoke or modify any decision concerning provisional measures if, in its opinion, some change in the situation justifies such revocation or modification." (para. 16.)

Costa Rica's request

In the first place, Costa Rica complains of "Nicaragua's sending to the disputed area … and maintaining thereon large numbers of persons" and, secondly, of the "activities undertaken by those persons affecting that territory and its ecology". In Costa Rica's view, these actions, which have occurred since the Court decided to indicate provisional measures, create a new situation necessitating the modification of the Order of 8 March 2011, in the form of further provisional measures, in particular so as to prevent the presence of any individual in the disputed territory other than civilian personnel sent by Costa Rica and charged with the protection of the environment (para. 19).

Nicaragua maintains that the persons referred to by Costa Rica are not part of the Government of Nicaragua, but young people, members of a private movement (the *Guardabarranco Environmental Movement*), who are present in the said territory in order to undertake environmental conservation activities (para. 24).

Decision of the Court on Costa Rica's request

In its Order of 16 July 2013, the Court regards it as having been established that, since the rendering of its Order of 8 March 2011, organized groups of persons, whose presence was not contemplated when it made its decision to indicate provisional measures, are regularly staying in the disputed territory. It considers that this fact does indeed constitute, in the present case, a change in the situation within the meaning of Article 76 of the Rules of Court (para. 25).

The Court then examines whether that change in the situation is such as to justify the modification of the Order of 2011. It states that such a modification is subject to the same general conditions as those governing the indication of provisional measures (Article 41 of the Statute of the Court). The Court recalls in this respect that it may only indicate provisional measures if irreparable prejudice may be caused to

rights which are the subject of dispute in judicial proceedings and that that power must be exercised only if there is urgency, in the sense that there is a real and imminent risk that such prejudice may be caused before the Court has given its final decision (para. 30).

After setting out the arguments of the Parties concerning these various points, the Court considers "that, as matters stand, it has not been demonstrated sufficiently that there is a risk of irreparable prejudice to the rights claimed by Costa Rica". It states that "[t]he facts put forward by Costa Rica, whether the presence of Nicaraguan nationals or the activities which they are carrying out in the disputed territory, do not appear, in the present circumstances as they are known to the Court, to be such as to cause irreparable harm to 'its right to sovereignty, to territorial integrity, and to non-interference with its lands'". Nor, the Court continues, "does the evidence included in the case file establish the existence of a proven risk of irreparable damage to the environment". Moreover, the Court "does not see, in the facts as they have been reported to it, the evidence of urgency that would justify the indication of further provisional measures" (paras. 32–35).

Consequently, the Court considers that, "despite the change that has occurred in the situation, the conditions have not been fulfilled for it to modify the measures that it indicated in its Order of 8 March 2011" (para. 36).

Nicaragua's request

Considering that Costa Rica's request is "unsustainable", Nicaragua submits its own request for the modification or adaptation of the Order of 8 March 2011. It considers that there has been a change in the factual and legal situations in question as a result of, first, the construction of a 160-km long road along the right bank of the San Juan River and, second, the joinder, by the Court, of the proceedings in the two cases. Consequently, Nicaragua asks the Court to modify its Order of 8 March 2011, in particular to allow both Parties (and not only Costa Rica) to dispatch civilian personnel charged with the protection of the environment to the disputed territory (para. 21).

For its part, Costa Rica asserts that no part of the road in question is in the disputed area and considers that the joinder of the proceedings in the case concerning the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)*, introduced by Nicaragua on 21 December 2011 (hereinafter "the *Nicaragua* v. *Costa Rica* case"), "does not mean that there is now one proceeding which should be the subject of joint orders". Consequently, it asks the Court to reject Nicaragua's request (para. 22).

Decision of the Court on Nicaragua's request

After examining Nicaragua's first argument, the Court first recalls that, in the *Nicaragua* v. *Costa Rica* case, on 19 December 2012, Nicaragua had asked the Court to examine *proprio motu* whether the circumstances of the case required the indication of provisional measures, and that the Court was of the view that, in March 2013, this was not the case. In addition, the Court finds that the construction of the road, which is at the centre of the *Nicaragua* v. *Costa Rica* case, does not have any bearing on the situation addressed in the Order made on 8 March 2011 in the *Costa Rica* v. *Nicaragua* case (paras. 26–27).

With regard to Nicaragua's second argument, the Court considers that the joinder of proceedings in the two cases has also not brought about a change in the situation. It explains that that joinder is a procedural step which does not have the effect of rendering applicable *ipso facto*, to the facts underlying the *Nicaragua* v. *Costa Rica* case, the measures prescribed with respect to a specific and separate situation in the first case (para. 28).

The Court therefore considers that Nicaragua may not rely upon a change in the situation within the meaning of Article 76 of the Rules of Court in order to found its request for the modification of the Order of 8 March 2011 (para. 29).

Conclusion of the Order

After examining the requests of the Parties and finding that it could not accede to them, the Court notes nevertheless that "the presence of organized groups of Nicaraguan nationals in the disputed area carries the risk of incidents which might aggravate the present dispute". It adds that that situation is "exacerbated by the limited size of the area and the numbers of Nicaraguan nationals who are regularly present there", and wishes to express "its concerns in this regard" (para. 37).

The Court thus considers it necessary to reaffirm the measures that it indicated in its Order of 8 March 2011, in particular the requirement that the Parties "shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve". It notes that "the actions thus referred to may consist of either acts or omissions". It reminds the Parties once again that "these measures have binding effect … and therefore create international legal obligations which each [of them] is required to comply with" (para. 38).

Finally, the Court underlines that its Order of 16 July 2013 is without prejudice as to any finding on the merits concerning the Parties' compliance with its Order of 8 March 2011 (para. 39).

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Dissenting opinion of Judge Cançado Trindade

1. In his Dissenting Opinion, composed of 12 parts, Judge Cançado Trindade states that he cannot concur with the decision taken by the majority of the Court (first resolutory point) not to indicate *new* provisional measures in the *cas d'espèce*, as, in his perception, the Court majority's reasoning and decision "suffer from an ineluctable incongruence": having admitted that there is a change in the situation, it extracts no consequence therefrom, as in its view "the conditions" had "not been fulfilled" for it to modify the measures it indicated in its previous Order of 8 March 2011. In limiting itself to simply reaffirming its previous provisional measures, yet it expresses its "concerns" at the new situation created in the disputed area, with the presence therein no

longer of *personnel* (whether civilian, police or security), but rather of "organized groups" of individuals, or any "private individuals".

2. Judge Cançado Trindade´s position is, *a contrario sensu*, that the changing circumstances surrounding the present cases (joined), opposing Costa Rica to Nicaragua and vice-versa, concerning, respectively, *Certain Activities Carried out by Nicaragua in the Border Area*, and the *Construction of a Road in Costa Rica along the San Juan River*, require from the ICJ, in the light of the relevant provisions of its *interna corporis* (Article 41 of the Statute and Article 76(1) of the Rules of Court), the exercise of its powers to indicate *new* provisional measures in order to face the new situation, which is one of urgency and of probability of irreparable harm, in the form of bodily injury or death of the persons staying in the disputed area.

3. He thus feels bound, and cares, to leave on the records the foundations of his own personal position thereon. His reflections, developed in the present Dissenting Opinion, pertain as he indicates in part I to considerations as to the facts and as to the law. He reviews the concomitant new requests of additional provisional measures of protection on the part of Costa Rica as well as Nicaragua, and the position taken by them, in their respective requests, as to the purported expansion of provisional measures of protection (part II). After reviewing the three technical missions *in loco* pursuant to the 1971 Ramsar Convention (part III), Judge Cançado Trindade considers the requisites of urgency, and risk or probability of harm (in the form of bodily injury or death, of the persons staying in the disputed area part V), before proceeding to a general assessment of the requests of Costa Rica (part IV) and of Nicaragua (part VI).

4. The joinder of proceedings in the two aforementioned cases of *Certain Activities Carried out by Nicaragua in the Border Area*, and of the *Construction of a Road in Costa Rica along the San Juan River* does not amount to a change of the situation, for the purposes of provisional measures; be that as it may, the relevant questions raised by Nicaragua are bound to be dealt with by the ICJ in the merits phase of the latter case (para. 37). There is, however, he proceeds, a change in the situation (part VII) in respect of the Court's Order of 8 March 2011, in that provisional measures at that time were keeping in mind the presence in the disputed area of "personnel" (whether civilian, security of police), whereas now the presence therein is of "organized groups" of individuals (Nicaraguan nationals). This amounts to a new situation, endowed with urgency, in face of the probability of incidents causing "irremediable harm in the form of bodily injury or death" (paras. 30–31), to recall the language of paragraph 75 of the Court's Order of 8 March 2011. The Court, thus, should, in his understanding, have ordered new provisional measures of protection (para. 33).

5. Judge Cançado Trindade then turns his attention to the aspects of the matter as to the law, namely: *a*) the effects of provisional measures of protection beyond the strict territorialist outlook; *b*) the beneficiaries of provisional measures of protection, beyond the traditional inter-State dimension; and *c*) the effects of provisional measures of protection beyond the traditional inter-State dimension. As to the first of these three points (the *effects* of provisional measures of protection beyond the strict territorialist outlook), he ponders that the factual context before the ICJ "takes us beyond the traditional outlook of State territorial sovereignty" (part VIII). He adds that the concerns expressed before the ICJ encompass

> "living conditions of people in their natural habitat, and the required environmental protection. International case-law on the matter (of distinct international tribunals) has so far sought to clarify the *juridical nature* of provisional measures, stressing its essentially preventive character. (…) Whenever ordered provisional measures protect rights of individuals, they appear endowed with a character, more than precautionary, truly *tutelary*, besides preserving the parties' (States') rights at stake" (para. 38).

6. Judge Cançado Trindade recalls that the circumstances of certain cases before the ICJ have led this latter, in its decisions on provisional measures, to shift its attention on to the *protection of people* in territory (e.g., the case of the *Frontier Dispute*, Burkina Faso *versus* Mali, 1986; the case of the *Land and Maritime Boundary*, Cameroon *versus* Nigeria, 1996; the case of *Armed Activities on the Territory of the Congo*, Democratic Republic of the Congo *versus* Uganda, 2000; the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, Georgia *versus* Russian Federation, 2008 cf. *infra*). In those decisions, among others, he stresses, the ICJ became attentive *also* to the fate of *persons*, thus moving beyond the strict territorialist outlook (paras. 39–40).

7. He further recalls that, lately, the ICJ has again moved its reasoning beyond the strict territorialist approach in its recent Order of the Court of provisional measures of protection (of 18 July 2011) in the case of the *Temple of Preah Vihear* (Cambodia *versus* Thailand). International law he continues "in a way endeavours to be *anticipatory* in the regulation of social facts, so as to avoid disorder and chaos, as well as irreparable harm"; we are here before the *raison d'être* of provisional measures of protection, *i.e.*, to prevent and avoid irreparable harm in situations of gravity and urgency. Endowed with a notorious preventive character, they are anticipatory in nature, looking forward in time; they thus disclose the preventive dimension of the safeguard of rights (para. 41).

8. Judge Cançado Trindade next recalls that, in his Separate opinion in the Court's recent Order in the case of the *Temple of Preah Vihear*, he has sustained that there is epistemologically no impossibility or inadequacy for provisional measures, of the kind of the ones indicated in that Order, to extend protection as they should also to human life, as well as to cultural and spiritual world heritage. In fact, the reassuring effects of the provisional measures indicated in that recent Order of the ICJ have been precisely that they have extended protection not only to the territorial zone at issue, but also to the life and personal integrity of human beings who live or happen to be in that zone or near it, as well as to the Temple of Preah Vihear itself, situated in the aforementioned zone, and all that the Temple represents (para. 42). That Court's Order has thus brought *people and territory together*, since, in the warning of Judge Cançado Trindade,

"[n]ot everything can be subsumed under territorial sovereignty. The fundamental human right to life is not at all subsumed under State sovereignty. […] The Court needs to adjust its conceptual framework and its language to the new needs of protection, when it decides to indicate or order the Provisional Measures requested from it." (para. 43).

9. Moving to the next point of his analysis (namely, the *beneficiaries* of provisional measures of protection, beyond the traditional inter-State dimension part IX), he observes that, although in the international litigation before the ICJ, only States, as contending parties, can request provisional measures, yet, in recent years, in successive cases, the ultimate beneficiaries were meant to be the individuals concerned, and to that end the requesting States advanced their arguments in order to obtain the Court's Orders of provisional measures of protection, in distinct contexts (para. 44).

10. He refers, as examples, to the Order of 15 December 1979, in the *Hostages* case (United States *versus* Iran); the Order of 10 May 1984, in the *Nicaragua* case; the Order of 10 January 1986 in the *Frontier Dispute* case (Burkina Faso *versus* Mali); the Order of 15 March 1996 in the case of the *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon *versus* Nigeria); the Order of 1 July 2000 in the case concerning *Armed Activities on the Territory of the Congo*; the Order of 8 April 1993 in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina *versus* Yugoslavia); the Order of 15 October 2008 in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia *versus* Russian Federation) (paras. 44–48).

11. Judge Cançado Trindade points out that, along the last three decades, the ICJ has gradually overcome the strictly inter-State outlook in the acknowledgement of the rights to be preserved by means of its Orders of provisional measures of protection. And he adds that

"Nostalgics of the past, clung to their own dogmatism, can hardly deny that, nowadays, States litigating before this Court, despite its inter-State contentious procedure, have conceded that they have no longer the monopoly of the rights to be preserved, and, much to their credit, they recognize so, in pleading before this Court on behalf also of individuals, their nationals and others, or even in a larger framework, its inhabitants.

Facts tend to come before the norms, requiring of these latter the aptitude to cover new situations they are meant to regulate, with due attention to superior values. Before this Court, States keep on holding the monopoly of *jus standi*, as well as *locus standi in judicio*, in so far as requests for provisional measures are concerned, but this has not proved incompatible with the preservation of the rights of the human person, together with those of States. The ultimate beneficiaries of the rights to be thereby preserved have been, not seldom and ultimately, human beings, alongside the States wherein they live. Provisional measures indicated in successive Orders of the ICJ have transcended the artificial inter-State dimension of the past, and have come to preserve also rights whose ultimate subjects (*titulaires*) are human beings" (paras. 49–50).

12. Turning to the remaining one of his three points (namely, the effects of provisional measures of protection beyond the traditional inter-State dimension), Judge Cançado Trindade recalls that, in the case concerning *Questions Relating to the Obligation to Prosecute or to Extradite* (Order of 28 May 2009), wherein the ICJ decided not to indicate provisional measures, he warned, in his extensive Dissenting Opinion, that the basic right at issue pertained to the *realization of justice*, which assumed a central place in the case, one of a paramount importance, deserving of particular attention. The crucial factor was, as he stressed in his Dissenting Opinion, the endurance by the victims of an ungrateful two-decade search for justice, in vain until now, for the reported atrocities of the Habré regime in Chad (para. 51).

13. The determination of urgency and the probability of irreparable damage are exercises which the ICJ is nowadays used to; yet, he proceeds, although the identification of the legal nature and the material content of the right(s) to be preserved seem not to raise great difficulties, the same cannot be said of the consideration of the *legal effects* and *consequences* of the right at issue, in particular when provisional measures are not indicated or ordered by the Court. We here move on to the effects of provisional measures of protection, beyond the traditional inter-State dimension. In this respect, "there seems to remain still a long way to go" (para. 53).

14. In the *cas d'espèce* before the Court, he adds, the new provisional measures are requested not only in respect of agents of the public power (*personnel*), but also in respect of individuals (*simples particuliers*), in order to avoid "harm in the form of bodily injury or death", well beyond the traditional inter-State dimension (para. 54). Judge Cançado Trindade then concludes on this point that

"States are bound to protect all persons under their respective jurisdictions. Provisional measures, with their preventive nature, appear as truly *tutelary*, rather than only precautionary, purporting to protect individuals also against harassment and threats, thus avoiding "harm in the form of bodily injury or death". After all, the beneficiaries of the compliance with, and due performance of, obligations under ordered provisional measures of protection, are not only States, but also human beings. A strictly inter-State outlook does not reflect this important point. The strictly inter-State dimension has long been surpassed, and seems insufficient, if not inadequate, to address obligations under provisional measures of protection" (para. 56).

15. Judge Cançado Trindade then focuses his reflections on the proper exercise of the international judicial function in the present domain, and moves on to his rebuttal of so-called "judicial self-restraint", or *l'art de ne rien faire* (part XI). He stresses that the present Order of the ICJ, on requests for provisional measures in the cases concerning *Certain Activities Carried out by Nicaragua in the Border Area* and the *Construction of a Road in Costa Rica along the San Juan River*, suffers from "a stark incongruence", as the Court concludes (in respect of Costa Rica's request) that a change in the situation has occurred, as "organized groups of persons", whose presence was not contemplated when it issued its previous decision to indicate provisional measures, are now

"regularly staying" in the disputed area, yet the Court extracts no consequence therefrom (para. 57).

16. The Court limits itself to say that, despite that change in the situation, in its view the conditions "have not been fulfilled" for it to modify the measures that it indicated in its previous Order of 8 March 2011. In Judge Cançado Trindade's perception, this conclusion simply begs the question. Worse still, as the Court's majority admits in paragraph 36 of the present Order that there indeed is a risk of incidents in the disputed area, and that this new situation "is exacerbated" by the "limited size" of the area and the presence therein of "numbers of Nicaraguan nationals". Thus, contrary to the Court's majority, he sustains that the new situation created in the disputed area clearly calls for new provisional measures, in order to prevent or avoid irreparable harm to the persons concerned and to the environment. The new provisional measures called for by Judge Cançado Trindade would make it clear that each Party should refrain from sending to, or maintaining in, the disputed area, including the *caño*, not only any personnel (whether civilian, police or security), but also "organized groups" of individuals, or any "private individuals".

17. As a matter of fact, he adds, this is not the first time that the Court discloses its unjustified "judicial self-restraint" in respect of provisional measures of protection, even when faced with the presence of the prerequisites of *urgency* and the *probability of irreparable harm*. Four years ago, it did so in its Order of 28 May 2009 in the case concerning *the Obligation to Prosecute or Extradite* (Belgium *versus* Senegal), wherein it refrained from ordering or indicating the requested provisional measures of protection. Judge Cançado Trindade recalls that, on the occasion, he appended an extensive Dissenting Opinion (paragraphs 1–105) to that Order, seeking to preserve the integrity of the *corpus juris* of the 1984 United Nations Convention against Torture. Shortly after the Court's Order of 28 May 2009 wherein the ICJ found that the circumstances of the case were, in its view, not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures, there followed a succession of uncertainties, amidst the "emptiness" of the Court's self-imposed "restraint", and "its apparent insensitiveness towards the underlying human values" (paras. 60–61).

18. On that occasion, contrary to the Court's majority, he sought to demonstrate that there was manifest urgency in the situation affecting surviving victims of torture, or their close relatives, in respect of their right to the realization of justice under the United Nations Convention against Torture. Yet the Court "preferred to rely comfortably on an unilateral act of promise (conceptualized in the traditional framework of inter-State relations) made by the respondent State in the course of the legal proceedings before itself". That pledge, in his view, "did not remove the prerequisites of urgency and probability of irreparable harm for the indication of provisional measures, nor did it efface the longstanding sufferings of the Habré regime, in their saga of more than two decades in search of the realization of justice" (para. 62).

19. Yet, the Court took a "passive posture", reduced to that of "a spectator of subsequent events". In effect, following the Court's Order of 28 May 2009, no initiative was taken in the respondent State towards the trial of Mr. Hissène Habré in Senegal; the return to Mr. H. Habré to Chad was announced, as well as his imminent expulsion from Senegal, which was then cancelled in the last minute under public pressure. In Judge Cançado Trindade's perception, the Court "was lucky" that Mr. H. Habré did not escape from his house *surveillance* in Dakar, and that he was not expelled from Senegal. Instead of "assuming its own control" over the situation, he added,

> "the self-restrained Court preferred to count on the imponderable, on *la fortuna*. The Court cannot keep on counting on the imponderable, as *la fortuna* may at any time turn against it. As Sophocles, in his perennial wisdom, warned, through the voices of the chorus of one of his tragedies: count no man happy till he passed the final threshold of his life secure from pain (bodily or spiritual harm)" (para. 63).

20. In today's present Order, the ICJ "has exercised self-restraint once again": this time, after finding that there has been a change in the situation, it has added that the circumstances presented to it, nevertheless, are not such as to require modification of its previous Order of 8 March 2011, which is simply reaffirmed. Moreover, it has seen no urgency in the new situation. The Court's reasoning, in his understanding, "rests on a *petitio principii*, adducing no persuasive argument to support its decision not to order new provisional measures in face of the new situation"; the ICJ limits itself to reasserting the previous provisional measures, even in addressing a new and distinct situation, which it admits has now changed (para. 64).

21. The Court "unduly establishes" a further test for the indication of provisional measures, rendering it more difficult or simply avoiding to order these latter, "at variance with its *interna corporis*". In his view, the ICJ "does not elaborate on its dictum, nor does it provide any demonstration whatsoever to corroborate its assertion". Its "ineluctable incongruence" lies in the fact that, once it finds that there is a change in the situation, it fails to modify or rather expand its previous Order, so as to face the new situation, endowed with the requisite elements of risk (in the form of bodily harm or death, and harm to the environment) and urgency.

22. Once again, the Court, from now on, will "only hope for the best", but not without expressing its "concerns" with regard to the new situation (as it did in paragraph 36 of the present Order), given the ostensible risk and the probability of harm posed by it. In Judge Cançado Trindade's understanding,

> "instead of remaining preoccupied, the ICJ should have ordered the new provisional measures required by the new situation created in the disputed area. Once again, the Court will nourish the hope that fate is on its side, oblivious of the extreme care with which someone so familiar with human suffering and tragedy like Cicero approached fate, in one of his fragmented reflections. Even so, despite all his awareness, Cicero did not cross over the final threshold of his life secure from pain: at the end of his path, he suffered bodily injuries and violent death …" (para. 66).

23. If the Court expressly recognizes such risk and the probability of irreparable harm, and expresses its "concerns" with this new situation (*supra*), it is then clear, he proceeds,

that the provisional measures already ordered should be modified, or expanded, so as to face this new situation. That the Court has not done so, "in face of the likelihood of bodily harm or death of the individuals staying in the disputed area", is a cause of concern to him, as "the rights at issue and the corresponding obligations are beyond the strictly inter-State dimension, and the Court seems not to have valued this as it should" (para. 68).

24. Last but not least, Judge Cançado Trindade presents, as his concluding reflections, his thesis towards an *autonomous legal regime* of provisional measures of protection (part XII). He insists on the point he has already made in other cases lodged with the ICJ, as well as in another international jurisdiction (cf. *El Ejercicio de la Función Judicial Internacional Memorias de la Corte Interamericana de Derechos Humanos*, 2nd. ed., Belo Horizonte/Brazil, Edit. Del Rey, 2013, chap. XXI: "The Preventive Dimension: The Binding Character and the Expansion of Provisional Measures of Protection", pp. 177–186), that "the strictly inter-State dimension has long been surpassed, and appears inappropriate to address obligations under provisional measures of protection" (para. 69). In his understanding, the institute of provisional measures of protection stands in need of a conceptual refinement, in all its aspects.

25. Provisional measures of protection indicated or ordered by the ICJ (or other international tribunals) generate *per se* obligations for the States concerned, which are distinct from the obligations which emanate from the Court's (subsequent) Judgments on the merits (and on reparations) of the respective cases. In this sense, in Judge Cançado Trindade's conception, "provisional measures have an autonomous legal regime of their own, disclosing the high relevance of their *preventive* dimension". Parallel to the Court's (subsequent) decisions on the merits, the international responsibility of a State may be engaged for non-compliance with, or breach of, a provisional measure of protection ordered by the Court (or other international tribunals) (para. 71).

26. His thesis, in sum, is that provisional measures, endowed with a conventional basis, such as those of the ICJ (under Article 41 of the Statute), are also endowed with autonomy, have a legal regime of their own, and non-compliance with them generates the responsibility of the State, entails legal consequences, without prejudice of the examination and resolution of the concrete cases as to the merits. This discloses their important preventive dimension, in their wide scope. The proper treatment of this subject-matter is, in his view, "the task before this Court, now and in the years to come" (para. 72).

27. The *juridical nature* of provisional measures, with their preventive dimension, he adds, has lately been clarified by a growing case-law on the matter, as those measures came to be increasingly indicated or ordered, in recent years, by contemporary international, as well as national, tribunals. Soon the recourse to provisional measures of protection, also at international level, had the effect of expanding the domain of international jurisdiction, with the consequent reduction of the so-called "reserved domain" of the State. In his outlook, this "grows in importance in respect of regimes of *protection*, such as those of the human person as well as of the environment". The clarification of the juridical nature of provisional measures is, however, still at the initial stage of the evolution of the matter, to be followed, in our days, in his understanding, by "the elaboration on the *legal consequences* of non-compliance with those measures", and the conceptual development of what he deems it fit to call "their *autonomous legal regime*" (para. 73).

28. He points out that what has led him to leave on the records, in the present Dissenting Opinion, his position on the matter, which he has been sustaining for years, "is not a lack of confidence in the contending parties complying with them (…) The two contending parties come both from a part of the world, Latin America, with a longstanding and strong tradition in international legal doctrine" (para. 74). Instead, what has led him to leave on the records his dissenting position, is "the Court's self-restraint, and the incongruence of its reasoning", in "a matter of such importance for the progressive development international law". He has thus cared "to take the time and work to leave on the records the present Dissenting Opinion, so as to render a service to our mission of imparting justice" (para. 74).

29. In Judge Cançado Trindade's perception, the notion of victim (or of *potential* victim), of injured party, can thus, in effect, "emerge also in the context proper to provisional measures of protection", parallel to the merits (and reparations) of the *cas d'espèce*. Provisional measures of protection generate obligations (of prevention) for the States concerned, which are distinct from the obligations which emanate from the Judgments of the Court as to the merits (and reparations) of the respective cases. This ensues from their autonomous legal regime, as he conceives it. There is, in his perception, "pressing need nowadays to refine and to develop conceptually this autonomous legal regime, focused, in particular, on the contemporary expansion of provisional measures, the means to secure due and prompt compliance with them, and the legal consequences of non-compliance, to the benefit of those protected thereunder" (para 75).

30. He has likewise advocated a pro-active posture of the ICJ in respect of provisional measures of protection, in his earlier Dissenting Opinion in the Court's Order of 28 May 2009 in the case of *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium *versus* Senegal), where he deemed it fit to recall that the Court is not restricted by the arguments of the Parties, as confirmed by Article 75 (1) and (2) of the Rules of Court, which expressly entitle the ICJ to indicate or order, *motu proprio*, provisional measures that it regards as necessary, even if they are wholly or in part distinct from those that are requested.

31. A decision of the ICJ indicating provisional measures in the present case, as he then sustained, "would have set up a remarkable precedent in the long search for justice in the theory and practice of international law", as this was "the first case lodged with the ICJ on the basis of the 1984 United Nations Convention against Torture", the first human rights treaty incorporating the principle of universal jurisdiction as an international obligation of all States Parties (para. 80 of his Dissenting Opinion in the Court's Order of 28 May 2009).

32. Judge Cançado Trindade concludes that, in this matter, "the worst possible posture would be that of passiveness, if not indifference, that of judicial inactivism" (para. 76). The matter before the ICJ "calls for a more pro-active posture on its part", so as not only to settle the controversies filed with it, but also to tell what the Law is (*juris dictio*), and thus "to contribute effectively to the avoidance or prevention of irreparable harm in situations of urgency, to the ultimate benefit of *all* subjects of international law, States as well as groups of individuals, and *simples particuliers*. After all, the human person (living in harmony in her natural habitat) occupies a central place in the new *jus gentium* of our times" (para. 76).

Dissenting opinion of Judge *ad hoc* Dugard

The Order of 2011 requiring Parties to refrain from sending personnel into the territory subject to dispute between Costa Rica and Nicaragua prohibits members of the Guardabarranco Environment Movement from entering this territory as they qualify as civilian personnel. Moreover, their presence in the disputed territory is contrary to the object and purpose of the 2011 Order. The access of members of the Guardabarranco Environment Movement to the disputed territory poses a real risk of irreparable prejudice to Costa Rica as the Movement is not an association of youthful environmentalists committed to the scientific study of the environment. It is rather a nationalistic youth movement with a dual purpose, the protection of the environment and the furtherance of Nicaragua's national interest.

202. AERIAL HERBICIDE SPRAYING (ECUADOR *v.* COLOMBIA) [DISCONTINUANCE]

Order of 13 September 2013

On 13 September 2013, the President of the International Court of Justice delivered an Order in the case concerning *Aerial herbicide spraying (Ecuador* v. *Colombia)*, recording the discontinuance of the proceedings and directing the removal of the case from the Court's list.

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The Order of the President of the Court 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 31 March 2008, whereby the Republic of Ecuador instituted proceedings against the Republic of Colombia in respect of a dispute concerning "Colombia's aerial spraying of toxic herbicides at locations near, at and across its border with Ecuador" which "has already caused serious damage to people, to crops, to animals, and to the natural environment on the Ecuadorian side of the frontier, and poses a grave risk of further damage over time",

Having regard to the Order of 30 May 2008, by which the Court fixed 29 April 2009 and 29 March 2010 as the time-limits for the filing, respectively, of the Memorial of Ecuador and the Counter-Memorial of Colombia,

Having regard to the Memorial and the Counter-Memorial duly filed by the Parties within the time-limits thus fixed,

Having regard to the Order of 25 June 2010, whereby the Court fixed 31 January 2011 and 1 December 2011 as the time-limits for the filing, respectively, of the Reply of Ecuador and the Rejoinder of Colombia,

Having regard to the Reply duly filed by Ecuador within the time-limit thus fixed,

Having regard to the Order of 19 October 2011, whereby the President of the Court extended to 1 February 2012 the time-limit for the filing of the Rejoinder of Colombia,

Having regard to the Rejoinder duly filed by Colombia within the time-limit thus extended;

Whereas, by a letter dated 12 September 2013 and received in the Registry on the same day, the Agent of Ecuador, referring to Article 89 of the Rules of Court and to an Agreement between the Parties dated 9 September 2013 "that fully and finally resolves all of Ecuador's claims against Colombia" in the case, notified the Court that his Government wished to discontinue the proceedings in the case;

Whereas a copy of that letter was immediately communicated to the Government of Colombia, which was asked, pursuant to Article 89, paragraph 2, of the Rules of Court, to inform the Court, by a letter to be transmitted at the meeting which the President had called with the Agents of the Parties for 12 September 2013, if Colombia objected to the discontinuance;

Whereas, by a letter dated 12 September 2013, handed in at the above—mentioned meeting, the Agent of Colombia informed the Court that his Government made no objection to the discontinuance of the case as requested by Ecuador;

Whereas, according to the letters received from the Parties, the Agreement of 9 September 2013 establishes, *inter alia*, an exclusion zone, in which Colombia will not conduct aerial spraying operations, creates a Joint Commission to ensure that spraying operations outside that zone have not caused herbicides to drift into Ecuador and, so long as they have not, provides a mechanism for the gradual reduction in the width of the said zone; and whereas, according to the letters, the Agreement sets out operational parameters for Colombia's spraying programme, records the agreement of the two Governments to ongoing exchanges of information in that regard, and establishes a dispute settlement mechanism,

Places on record the discontinuance by the Republic of Ecuador of the proceedings instituted by its Application filed on 31 March 2008; and

Directs that the case be removed from the List."

203. REQUEST FOR INTERPRETATION OF THE JUDGMENT OF 15 JUNE 1962 IN THE CASE CONCERNING THE *TEMPLE OF PREAH VIHEAR* (*CAMBODIA* v. *THAILAND*) (CAMBODIA *v.* THAILAND)

Judgment of 11 November 2013

On 11 November 2013, the International Court of Justice delivered its Judgment in the case concerning the *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cambodia *v.* Thailand) (*Cambodia* v. *Thailand).*

The Court was composed as follows: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari; Judges *ad hoc* Guillaume, Cot; Registrar Couvreur.

*

* *

The operative paragraph (para. 108) of the Judgment reads as follows:

"…

The Court,

(1) Unanimously,

Finds that it has jurisdiction under Article 60 of the Statute to entertain the Request for interpretation of the 1962 Judgment presented by Cambodia, and that this Request is admissible;

(2) Unanimously,

Declares, by way of interpretation, that the Judgment of 15 June 1962 decided that Cambodia had sovereignty over the whole territory of the promontory of Preah Vihear, as defined in paragraph 98 of the present Judgment, and that, in consequence, Thailand was under an obligation to withdraw from that territory the Thai military or police forces, or other guards or keepers, that were stationed there."

*

* *

Judges Owada, Bennouna and Gaja appended a joint declaration to the Judgment of the Court; Judge Cançado Trindade appended a separate opinion to the Judgment of the Court; Judges *ad hoc* Guillaume and Cot appended declarations to the Judgment of the Court.

*

* *

Chronology of the procedure (paras. 1–13)

The Court recalls that on 28 April 2011 Cambodia filed in the Registry an Application instituting proceedings against Thailand, whereby, referring to Article 60 of the Statute and Article 98 of the Rules of Court, it requested the Court to interpret the Judgment delivered by the Court on 15 June 1962 in the case concerning *Temple of Preah Vihear (Cambodia* v. *Thailand).*

On the same day, after filing its Application, Cambodia, referring to Article 41 of the Statute and Article 73 of the Rules of Court, also filed in the Registry of the Court a Request for the indication of provisional measures in order to "cause [the] incursions [by Thailand] onto its territory to cease". On 18 July 2011, the Court issued an Order indicating provisional measures to both Parties.

I. Historical background (paras. 14–29)

The Court recalls that the Temple of Preah Vihear is situated on a promontory of the same name in the eastern part of the Dangrek range of mountains, "which, in a general way, constitutes the boundary between the two countries in this region—Cambodia to the south and Thailand to the north".

On 13 February 1904, France (of which Cambodia was then a protectorate) and Siam (as Thailand was then called) concluded a treaty which specified that the frontier in the Dangrek sector was to follow the watershed line. The 1904 Treaty provided for the establishment of Mixed Commissions composed of officers appointed by the two Parties and responsible for delimiting the frontier between the two territories. The first Mixed Commission was thus established in 1904. The final stage of the operation of delimitation was to be the preparation and publication of maps, a task assigned to a team of four French officers, three of whom had been members of the Mixed Commission. In 1907, that team prepared a series of 11 maps covering a large part of the frontiers between Siam and French Indo-China (of which Cambodia formed part). In particular, it drew up a map entitled "Dangrek—Commission of Delimitation between Indo-China and Siam", on which the frontier passed to the north of Preah Vihear, thus leaving the Temple in Cambodia.

Following Cambodia's independence on 9 November 1953, Thailand occupied the Temple of Preah Vihear in 1954. Negotiations between the parties regarding the Temple were unsuccessful and, on 6 October 1959, Cambodia seised the Court by unilateral application.

During the merits phase of the proceedings, Cambodia relied upon the above-mentioned map entitled "Dangrek Commission of Delimitation between Indo-China and Siam", which was annexed to its pleadings and was referred to as the "Annex I map". Cambodia argued that this map had been accepted by Thailand and had entered into the treaty settlement, thereby becoming binding on the two States. According to Cambodia, the line shown on the Annex I map had thus become the frontier between the two States. Thailand denied that it had accepted the Annex I map, or that the map had otherwise become binding upon it, and maintained that the boundary between the two States followed the watershed line, as provided in the text of the 1904 Treaty, with the result, according to Thailand, that the Temple lay in Thai territory.

The Court recalls that the operative part of the 1962 Judgment reads as follows:

"The Court,

finds that the Temple of Preah Vihear is situated in territory under the sovereignty of Cambodia;

finds in consequence, that Thailand is under an obligation to withdraw any military or police forces, or other guards or keepers, stationed by her at the Temple, or in its vicinity on Cambodian territory; and

that Thailand is under an obligation to restore to Cambodia any objects of the kind specified in Cambodia's fifth Submission which may, since the date of the occupation of the Temple by Thailand in 1954, have been removed from the Temple or the Temple area by the Thai authorities."

Following the delivery of the 1962 Judgment, Thailand withdrew from the Temple buildings. It erected a barbed wire fence which divided the Temple ruins from the rest of the promontory of Preah Vihear. This fence followed the course of a line depicted on the map attached to a resolution, adopted by the Council of Ministers of Thailand on 10 July 1962 but not made public until the present proceedings. By that resolution, the Thai Council of Ministers fixed what it considered to be the limits of the area from which Thailand was required to withdraw.

II. Jurisdiction and admissibility (paras. 30–57)

1. Jurisdiction of the Court under Article 60 of the Statute (paras. 31–52)

The Court begins by recalling that "[its] jurisdiction on the basis of Article 60 of the Statute is not preconditioned by the existence of any other basis of jurisdiction as between the parties to the original case" and that "by virtue of Article 60 of the Statute, [the Court] may entertain a request for interpretation provided that there is a 'dispute as to the meaning or scope' of any judgment rendered by it".

In accordance with the jurisprudence of the Court, "a dispute within the meaning of Article 60 of the Statute must relate to the operative clause of the judgment in question and cannot concern the reasons for the judgment except in so far as these are inseparable from the operative clause". That said, "a difference of opinion as to whether a particular point has or has not been decided with binding force also constitutes a case which comes within the terms of Article 60 of the Statute".

A. The existence of a dispute (paras. 37–45)

The Court observes that the events and statements dating from the period immediately following the 1962 Judgment clearly demonstrate that Thailand was of the view that the Court had left the term "vicinity of the Temple" in the second operative paragraph undefined and that Thailand could thus determine unilaterally the limits of that "vicinity". In particular, this position is reflected in the 1962 Resolution of the Thai Council of Ministers which determined the "location of the limit of the vicinity of the [Temple], from which Thailand has the obligation to withdraw police forces, guards or keepers".

In implementation of this decision, Thailand erected a barbed wire fence on the ground along the line determined by the Resolution, and posted signs stating that "the vicinity of the Temple of [Preah Vihear] does not extend beyond this limit".

Contrary to Thailand's assertions, the record before the Court shows that Cambodia did not accept Thailand's withdrawal as fully implementing the 1962 Judgment. Rather, Cambodia protested the Thai presence on territory which, according to Cambodia, the 1962 Judgment had recognized as Cambodian. Cambodia also complained that the barbed wire fence erected by Thailand "encroach[ed] fairly significantly" upon that territory in contravention of the Court's Judgment.

This divergence of views reappeared in the Parties' correspondence following Cambodia's request for the inscription of the site of the Temple on the UNESCO World Heritage List in 2007–2008.

In the opinion of the Court, these events and statements clearly demonstrate that at the time Cambodia filed its Request for interpretation the Parties had a dispute as to the meaning and scope of the 1962 Judgment. The Court then turns to the precise subject-matter of this dispute in order to ascertain whether it falls within the scope of the Court's jurisdiction under Article 60 of the Statute.

B. Subject-matter of the dispute before the Court (paras. 46–52)

The Court considers that the Parties' positions, expressed during the period following the 1962 Judgment as well as that following Cambodia's request to have the site of the Temple inscribed on the World Heritage List and in the course of the present proceedings, reveal that the dispute between the Parties as to the meaning and scope of the 1962 Judgment relates to three specific aspects thereof. First, there is a dispute over whether the 1962 Judgment did or did not decide with binding force that the line depicted on the Annex I map constitutes the frontier between the Parties in the area of the Temple. Secondly, there is a closely related dispute concerning the meaning and scope of the phrase "vicinity on Cambodian territory", referred to in the second operative paragraph of the 1962 Judgment, a paragraph which the Court stated was a consequence of the finding, in the first operative paragraph, that the Temple is situated in "territory under the sovereignty of Cambodia". Lastly, there is a dispute regarding the nature of Thailand's obligation to withdraw imposed by the second paragraph of the operative part.

2. Admissibility of Cambodia's Request for interpretation (paras. 53–56)

Having regard to the Parties' divergent views over the meaning and scope of the 1962 Judgment, identified above, the Court considers that there is a need for the interpretation of the second operative paragraph of the 1962 Judgment and of the legal effect of what the Court said regarding the Annex I map line. Within these limits, Cambodia's Request is admissible.

3. Conclusion (para. 57)

In the light of the foregoing, the Court concludes that it has jurisdiction to entertain Cambodia's Request for interpretation of the 1962 Judgment and that the Request is admissible.

III. The interpretation of the 1962 Judgment (paras. 58–107)

The Court then turns to the interpretation of the 1962 Judgment.

1. Positions of the Parties (paras. 59–65)

The Court begins by summarizing the positions expressed by the Parties in the course of the proceedings.

2. The role of the Court under Article 60 of the Statute (paras. 66–75)

The Court recalls that its role under Article 60 of the Statute is to clarify the meaning and scope of what the Court decided in the judgment which it is requested to interpret. Accordingly, the Court must keep strictly within the limits of the original judgment and cannot question matters that were settled therein with binding force, nor can it provide answers to questions the Court did not decide in the original judgment.

In determining the meaning and scope of the operative clause of the original 1962 Judgment, the Court, in accordance with its practice, will have regard to the reasoning of that Judgment to the extent that it sheds light on the proper interpretation of the operative clause.

The pleadings and the record of the oral proceedings in 1962 are also relevant to the interpretation of the Judgment, as they show what evidence was, or was not, before the Court and how the issues before it were formulated by each Party.

Further, the Court recalls that the meaning and scope of a judgment of the Court cannot be affected by conduct of the parties occurring after that judgment has been given. More generally, "the Court, when giving an interpretation, refrains from any examination of facts other than those which it has considered in the judgment under interpretation".

3. The principal features of the 1962 Judgment (paras. 76–78)

Three features of the 1962 Judgment stand out when that Judgment is read in the light of the considerations set out above. First, the Court considered that it was dealing with a dispute regarding territorial sovereignty over the area in which the Temple was located and that it was not engaged in delimiting the frontier. No mention was made in the 1962 Judgment of either the Annex I map or the location of the frontier in the operative part. No map was attached to the Judgment, nor did the Court make any comment on the difficulties of transposition of the Annex I map line, a matter which had been discussed by the Parties during the 1962 proceedings and which would have been of obvious importance in a judgment on delimitation of the frontier.

Secondly, however, the Annex I map played a central role in the reasoning of the Court. The Court went on to state that "the acceptance of the Annex I map by the Parties caused the map to enter the treaty settlement and to become an integral part of it" and concluded that it "therefore, feels bound, as a matter of treaty interpretation, to pronounce in favour of the line as mapped in the disputed area".

Thirdly, in defining the dispute before it, the Court made clear that it was concerned only with sovereignty in the "region of the Temple of Preah Vihear".

The Judgment shows that the Court considered that the disputed area was a small one.

4. The operative part of the 1962 Judgment (paras. 79–106)

In the light of these elements in the reasoning of the 1962 Judgment, the Court turns to the operative part of that Judgment. The findings set out in the second and third paragraphs are expressly stated to be consequences following from the decision in the first operative paragraph. It follows that the three operative paragraphs have to be considered as a whole; the task of ascertaining their meaning and scope cannot be reduced to an exercise of construing individual words or phrases in isolation.

A. The first operative paragraph (para. 80)

The Court considers that the meaning of the first operative paragraph is clear. In that paragraph, the Court ruled on Cambodia's principal claim by finding that the Temple was situated in territory under the sovereignty of Cambodia. It states, however, that it will be necessary to return to the scope of this paragraph once the Court has examined the second and third operative paragraphs.

B. The second operative paragraph (paras. 81–99)

The principal dispute between the Parties concerns the second operative paragraph. In that paragraph, the Court required, as a consequence of the decision in the first operative paragraph, the withdrawal of Thai military or police forces, or other guards or keepers "stationed by her at the Temple, or in its vicinity on Cambodian territory". The second operative paragraph did not indicate expressly the Cambodian territory from which Thailand was required to withdraw its personnel, nor did it state to where those personnel had to be withdrawn.

Since the second operative paragraph of the 1962 Judgment required Thailand to withdraw "any [of its] military or police forces, or other guards or keepers, stationed by her at the Temple, or in its vicinity on Cambodian territory", the Court considers that it must begin by examining the evidence that was before the Court in 1962 regarding the locations at which such Thai personnel were stationed.

The only such evidence was given by Professor Ackermann, who was called by Thailand as an expert and witness and who had visited the Temple for several days in July 1961 in the course of preparing a report to be submitted in the proceedings. Professor Ackermann testified that, during that visit, the only people he had seen at the Preah Vihear promontory were a detachment of Thai frontier police and one Temple guard. He stated that the police had been stationed in blockhouses at a camp located to the north-east of the Temple, while the guard had lived in a separate house a short distance to the west of the police camp.

The location of the police station was subsequently confirmed by counsel for Thailand, according to whom the police camp was located south of the Annex I map line but north of a line which Cambodia maintained was the watershed line.

When the Court required Thailand to withdraw military or police forces, guards or keepers which it had stationed in the Temple, or in the vicinity of the Temple on Cambodian territory, it must have intended that obligation to apply to the police detachment referred to by Professor Ackermann, since,

except for the solitary Temple guard, there was no evidence of the presence of any other Thai personnel anywhere near the Temple. Accordingly, the term "vicinity on Cambodian territory" has to be construed as extending at least to the area where the police detachment was stationed at the time of the original proceedings. Since that area lies north of the Thai Council of Ministers' line, that line cannot represent the correct interpretation of the territorial scope of the second operative paragraph as Thailand contends.

That conclusion is confirmed by a number of other factors. As the Court emphasized in its description of the area around the Temple, the Temple is located on an easily identifiable geographical feature. This feature is a promontory. In the east, south and south-west, the promontory descends by a steep escarpment to the Cambodian plain. In the west and north-west, the ground drops into what Professor Ackermann described in his evidence as a "valley … between the Pnom Trap mountain and the Phra Viharn mountain". It is through this valley that access to the Temple from the Cambodian plain can most easily be obtained. The hill of Phnom Trap rises from the western side of this valley. A natural understanding of the concept of the "vicinity" of the Temple would extend to the entirety of the Preah Vihear promontory.

Furthermore, the Court's reasoning regarding the significance of the Annex I map shows that the Court considered that Cambodia's territory extended in the north as far as, but no farther than, the Annex I map line. The Court was therefore dealing with a small area with clearly defined geographical limits to the east, south, west and north-west, and bounded in the north by what the Court had stated in its reasoning was the limit of Cambodian territory. In these circumstances, the Court considers that the territorial scope of the second operative paragraph must be construed as extending to the whole of the promontory, rather than being confined to the part of it chosen by the Thai Council of Ministers in 1962.

Turning to the position of Cambodia, the Court is also unable to accept its interpretation of "vicinity". In its answer to the question put by a Member of the Court, Cambodia maintained that the vicinity includes not only the promontory of Preah Vihear but also the hill of Phnom Trap. There are several reasons why the Court considers that this is not the correct interpretation of the second operative paragraph.

First, Phnom Trap and the promontory of Preah Vihear are distinct geographical features which are clearly shown as separate on the maps used in the 1962 proceedings and, in particular, on the Annex I map, which was the only map to which the Court made more than passing reference in the Judgment. Secondly, there are certain indications in the record of the 1962 proceedings that Cambodia did not treat Phnom Trap as falling within the "region of the Temple" or "Temple area" (the terms used by the Court in defining the scope of the dispute before it). Thirdly, there was no evidence before the Court of any Thai military or police presence on Phnom Trap in 1962 and no suggestion that Phnom Trap was relevant to Cambodia's claim that Thailand should be required to withdraw its forces. Lastly, Cambodia's interpretation depends upon identifying the location of the points at which the Annex I map line intersects with the watershed line advocated by Thailand. Yet, in the 1962 Judgment, the Court made clear that it was not concerned with the location of the watershed and did not decide where the watershed lay. It is, therefore, implausible to suggest that the Court had the watershed line in mind when it used the term "vicinity".

While no one of these considerations is conclusive in itself, taken together they lead the Court to conclude that, in 1962, the Court did not have this wider area in mind and, accordingly, that it did not intend the term "vicinity [of the Temple] on Cambodian territory" to be understood as applicable to territory outside the promontory of Preah Vihear. That is not to say that the 1962 Judgment treated Phnom Trap as part of Thailand; the Court did not address the issue of sovereignty over Phnom Trap, or any other area beyond the limits of the promontory of Preah Vihear.

In paragraph 98 of the Judgment, the Court states the following: From the reasoning in the 1962 Judgment, seen in the light of the pleadings in the original proceedings, it appears that the limits of the promontory of Preah Vihear, to the south of the Annex I map line, consist of natural features. To the east, south and south-west, the promontory drops in a steep escarpment to the Cambodian plain. The Parties were in agreement in 1962 that this escarpment, and the land at its foot, were under Cambodian sovereignty in any event. To the west and north-west, the land drops in a slope, less steep than the escarpment but nonetheless pronounced, into the valley which separates Preah Vihear from the neighbouring hill of Phnom Trap, a valley which itself drops away in the south to the Cambodian plain. For the reasons already given, the Court considers that Phnom Trap lay outside the disputed area and the 1962 Judgment did not address the question whether it was located in Thai or Cambodian territory. Accordingly, the Court considers that the promontory of Preah Vihear ends at the foot of the hill of Phnom Trap, that is to say: where the ground begins to rise from the valley.

In the north, the limit of the promontory is the Annex I map line, from a point to the north-east of the Temple where that line abuts the escarpment to a point in the north-west where the ground begins to rise from the valley, at the foot of the hill of Phnom Trap.

The Court considers that the second operative paragraph of the 1962 Judgment required Thailand to withdraw from the whole territory of the promontory, thus defined, to Thai territory any Thai personnel stationed on that promontory.

C. The relationship between the second operative paragraph and the rest of the operative part (paras. 100–106)

The Court recalls that the three paragraphs of the operative part of the 1962 Judgment have to be considered as a whole. Having determined the meaning and scope of the second paragraph, the Court turns to the relationship between that paragraph and the other two paragraphs of the operative part. While there is no dispute between the Parties regarding the third operative paragraph, it is nonetheless relevant to the extent that it sheds light on the meaning and scope of the rest of the operative part.

The Court, having decided in the first operative paragraph of the 1962 Judgment that the Temple was located in territory under the sovereignty of Cambodia, determined, as a consequence of that finding, that Thailand was under an obligation to withdraw its forces and other personnel stationed "at the Temple, or in its *vicinity* on Cambodian territory" and to restore objects removed from "the Temple or *the Temple area*" (emphasis added). The second and third operative paragraphs each, therefore, imposed obligations with respect to an area of territory which extended beyond the Temple itself. The second operative paragraph expressly described this area as Cambodian territory. The third operative paragraph did not do so but the Court considers that such a description was implicit; an obligation to restore artefacts taken from the "area of the Temple" would be a logical consequence of a finding of sovereignty only to the extent that the area in question was covered by that finding.

The Court considers that the terms "vicinity [of the Temple] on Cambodian territory", in the second paragraph, and "area of the Temple", in the third paragraph, refer to the same small parcel of territory. The obligations which the Court imposed in respect of that parcel of territory were stated to be a consequence of the finding in the first paragraph. The obligations imposed by the second and third paragraphs would be a logical consequence of the finding of sovereignty in the first operative paragraph only if the territory referred to in the first paragraph corresponded to the territory referred to in the second and third paragraphs.

Accordingly, the Court concludes that the territorial scope of the three operative paragraphs is the same: the finding in the first paragraph that "the Temple of Preah Vihear is situated in territory under the sovereignty of Cambodia" must be taken as referring, like the second and third paragraphs, to the promontory of Preah Vihear, within the limits described in paragraph 98 of the present Judgment.

In these circumstances, the Court does not consider it necessary further to address the question whether the 1962 Judgment determined with binding force the boundary line between Cambodia and Thailand. In a dispute concerned only with sovereignty over the promontory of Preah Vihear, the Court concluded that that promontory, extending in the north to the Annex I map line but not beyond it, was under Cambodian sovereignty. That was the issue which was in dispute in 1962 and which the Court considers to be at the heart of the present dispute over interpretation of the 1962 Judgment.

Nor is it necessary for the Court to address the question whether the obligation imposed on Thailand by the second operative paragraph was a continuing obligation, in the sense maintained by Cambodia. In the present proceedings, Thailand has accepted that it has a general and continuing legal obligation to respect the integrity of Cambodian territory, which applies to any disputed territory found by the Court to be under Cambodian sovereignty. Once a dispute regarding territorial sovereignty has been resolved and uncertainty removed, each party must fulfil in good faith the obligation which all States have to respect the territorial integrity of all other States. Likewise, the Parties have a duty to settle any dispute between them by peaceful means.

These obligations, which derive from the principles of the Charter of the United Nations, are of particular importance in the present context. As is clear from the record of both the present proceedings and those of 1959–1962, the Temple of Preah Vihear is a site of religious and cultural significance for the peoples of the region and is now listed by UNESCO as a world heritage site. In this respect, the Court recalls that under Article 6 of the World Heritage Convention, to which both States are parties, Cambodia and Thailand must co-operate between themselves and with the international community in the protection of the site as a world heritage. In addition, each State is under an obligation not to "take any deliberate measures which might damage directly or indirectly" such heritage. In the context of these obligations, the Court wishes to emphasize the importance of ensuring access to the Temple from the Cambodian plain.

5. *Conclusions* (para. 107)

The Court therefore concludes that the first operative paragraph of the 1962 Judgment determined that Cambodia had sovereignty over the whole territory of the promontory of Preah Vihear, as defined in paragraph 98 of the present Judgment, and that, in consequence, the second operative paragraph required Thailand to withdraw from that territory the Thai military or police forces, or other guards or keepers, that were stationed there.

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Joint declaration of Judges Owada, Bennouna and Gaja

The Court's jurisdiction to interpret one of its Judgments under Article 60 of the Statute only extends to matters that were previously decided with binding force. These matters are generally indicated in the operative part of judgments, but may also be included in reasons that are "inseparable" from the operative part, when this is not self-standing and contains an express or implicit reference to those reasons. "Essential" reasons, namely those on which the operative part is based, cannot be assimilated to "inseparable" reasons, as the Court appears to do. What is binding in a judgment has to be determined on the basis of the jurisdiction conferred by the parties to the Court and of their submissions. It cannot extend to matters that were not so submitted. Naturally, essential reasons may be resorted to in so far as they contribute to clarify the operative part of a judgment.

Separate opinion of Judge Cançado Trindade

1. Judge Cançado Trindade begins his Separate opinion, composed of nine parts, by pointing out that, given the great importance that he attaches to the matters dealt with by the Court in the present Interpretation of Judgment, or else underlying it, he feels obliged to leave on the records of this case of the *Temple of Preah Vihear* the foundations of his own personal position on them. He does so moved by "a sense of duty in the exercise of the international judicial function"

(part I). This being so, he first addresses "the essence of the resurfaced dispute" before the Court (part II).

2. After recapitulating the arguments of the contending Parties in the course of the present proceedings, he ponders that the case of the *Temple of Preah Vihear* is not one of delimitation, nor of demarcation, of frontier, but rather a case of territorial sovereignty (in respect of the Temple "region" or "area), to be exercised to secure the safety of local populations under the respective jurisdictions of the two contending States, in the light of basic principles of international law, such as those of peaceful settlement of international disputes and of the prohibition of the threat or use of force (part V).

3. Furthermore, this is a case—he adds—of territorial sovereignty to be exercised by the State concerned for the preservation of the Temple at issue as part of the world heritage (reckoned as such in the UNESCO List), to the (cultural) benefit of humankind (para. 12). After proceeding to a couple of "terminological and hermeneutic precisions" (e.g., as to the term "vicinity", and the verb "to withdraw from"—part III), he examines the Parties' submissions concerning the incidents (in 2007–2011, taken to the attention of the United Nations Security Council) which led to Cambodia's concomitant requests for Provisional Measures of Protection and for Interpretation of the Court's 1962 Judgment in the case of the *Temple of Preah Vihear* (part IV).

4. He then recalls (part V) that, by its Order of Provisional Measures of 18 July 2011, the Court determined, as from the basic principle of the prohibition of the threat or use of force, enshrined into the United Nations Charter, the creation of a "provisional demilitarized zone" around the Temple of Preah Vihear and in the proximities of the frontier between the two countries, and the immediate withdrawal of their military personnel, and the guarantee of free access to the Temple of those in charge of supplies to the non-military personnel present therein. He further recalls that, in his Separate opinion appended to that Order of 2011, he endorsed the unprecedented creation of that "provisional demilitarized zone", which sought to protect, in his understanding, "not only the territory at issue, but also the populations that live thereon, as well as the set of monuments found therein, conforming the Temple of Preah Vihear", which came to integrate, as from 2008,—by decision of the World Heritage Committee of UNESCO,—its World Heritage List, which constitutes the cultural and spiritual heritage of humankind (para. 30). Judge Cançado Trindade adds that,

> "[b]eyond the classic territorialist outlook (…) lies the *human factor*, calling for the protection, by the measures indicated or ordered by the ICJ, of the rights to life and personal integrity of the members of the local population, as well as the cultural and spiritual heritage of human kind (…). Underlying this jurisprudential construction, (…) is the *principle of humanity*, orienting the search for improvement of the conditions of living of the population and the realization of the common good (…), in the ambit of the new *jus gentium* of our times (…). In situations of the kind, one cannot consider the territory making abstraction of the local populations (and their cultural and spiritual heritage), who, in my view, constitute the most precious component of statehood.
>
> In its aforementioned Provisional Measures of Protection, the ICJ took into due account not only the territory at issue, but, jointly, the people on territory, i.e., the *protection of the population on territory*" (paras. 31–32).

5. Ever since, the Parties have presented submissions as to the compliance with the Court's Order of 2011, on Provisional Measures of Protection, as also recapitulated by Judge Cançado Trindade (part VI). In sequence, he addresses the States' duties to refrain from the threat or use of force and to reach a peaceful settlement of the dispute at issue (part VII), and ponders that the ICJ, in the exercise of its functions in the peaceful settlement of international disputes, is bound to secure compliance by States with the general principles of international law, enshrined into the United Nations Charter; after all, its Statute forms an integral part of the United Nations Charter (paras. 40–41). And he adds that

> "The necessary attention to those principles brings us closer to the domain of superior *human values*, to be safeguarded, not sufficiently worked upon in international case-law and doctrine. It is, ultimately, those principles that inform and conform the applicable norms, and ultimately any legal system" (para 42).

6. From then onwards, Judge Cançado Trindade concentrates his reflections on the "ineluctable relationship between *motifs* and *dispositif*" in a Judgment of an international tribunal (part VIII). In this respect, he proceeds first to an overview of the case-law of the Hague Court (PCIJ and ICJ) on the matter (paras. 45–49), and then addresses the interplay between *reason and persuasion* (paras. 50–51 and 54) as well as the "everlasting acknowledgment of the relevance of sound legal reasoning". In this connection, he observes that

> "the exercise of legal reasoning (i.e., the elaboration of the *motifs/la motivation*) has historical roots which go back, e.g., to ancient Roman law. In his fragments, Ulpian (*circa* 170–228 A.D.) took *juris-prudencia* (from the verb *providere*) as referring to the knowledge of what is just and unjust; in dispensing justice, *jurisprudencia* was understood as teaching how justice was to be realized, besides showing that the procedure had been well followed. His writings altogether, undertaken in the period 211–222 A.D., are believed to have considerably contributed to Justinian's Digest (the main volume of his *Corpus Juris Civilis*, 538–534) (…)" (para. 52).

7. The elaboration of sound legal reasoning, for its part, sought coherence and harmony; in Judge Cançado Trindade's understanding, it "did not amount to a syllogism, nor did it exhaust itself in the simple identification of the applicable norms. It went further than that, encompassing interpretation, and recourse to sources of law (including principles, doctrine, and equity), bearing in mind human values. Prudence played its role, in *juris-prudencia*" (para. 54). The Judgment of an international tribunal in our days, in his understanding, "encompasses not only the decision reached by the international tribunal (the *dispositif*), but also the reasoning of this latter, the indication of the sources of law it resorts to, the fundamental principles it relies upon, and other considerations that it deems fit to develop (the *motifs*)"; in effect, to his mind, "*motifs* and *dispositif* form an organic, inseparable whole" (para. 55).

8. The issue became object of special attention,—he proceeds,—in the legal doctrine of the XIXth century, which upheld the view that "the *dispositif* is to be approached together with the reasoning (the *motifs*)" which give support to it. This understanding then "prevailed in civil procedural law (in countries of that legal tradition), before being transposed into the international legal procedure" (para. 56). With the passing of time, however, under the influence of legal positivism,—Judge Cançado Trindade adds,—"a more simplistic view came to prevail", to the effect that only the *dispositif* formed the object of a judicial decision, as if the operative part of a judgment could be severed from the other parts of it, and become binding by itself, "independently of the whole reasoning developed by the tribunal in its support". Judge Cançado Trindade comments critically that "[i]t is not surprising that this superficial view became widespread, as it did not require much thinking" (para. 57). In his own assessment, this was a "strictly formalistic approach"; the *res judicata* was thus brought into the picture, "minimizing the reasoning supporting it" (para. 58).

9. Judge Cançado Trindade holds that the reasoning or the *motifs* of a judgment "can be freely resorted to, in the interpretation of any point or passage of the *dispositif* which requires clarification; in fact, it will be hardly possible to determine the exact scope of a *dispositif* without taking into account the reasoning (the *motifs*)". They may indeed appear "inseparable from each other", and there are "even the *dispositifs* that deem it fit to make express cross-references to corresponding paragraphs of the *motifs*". In the present Interpretation of Judgment, for example, "resolutory point n. 2 of the *dispositif* expressly refers to paragraph 98 of the *motifs*" (para. 59). Judge Cançado Trindade then expresses his conception that

> "Legal reasoning is not simply an intellectual output (of logic), as the search for justice is also moved by experience and social equity. (…) [T]he function of the judge is not reduced simply to produce syllogisms, far from it: jurisprudential construction goes further than that, it resorts to all available sources of law, it has a latitude of choice, it matches the facts with the applicable norms, and it tells what the Law is, in the exercise of *juris dictio*. Legal reasoning counts on the subjective element of the judge's thinking" (para. 60).

10. He further recalls that, over half a century ago, P. Calamandrei used to point out that *sententia* derives from *sentiment*, as indicated by etymology. Judge Cançado Trindade adds that the subjects of law (*sujets de droit*) are not transformed into a *dossier* (as hinted by bureaucratic indifference); they remain "living persons". The requisite of providing the *motifs* (*la motivation*) appears as reasoning a "sense of justice". It is, moreover, pedagogical, in seeking to show that the judgment at issue is just, and why it is so. To Judge Cançado Trindade, "*[s]ententia* emanates from human conscience, moved by the sense of justice" (para. 61).

11. Last but not least, Judge Cançado Trindade, moving to his concluding observations (part IX), refers to the considerations he developed in his previous Separate opinion in the Court's Order of 18 July 2011 of Provisional Measures of Protection in the present case of the *Temple of Preah Vihear*, on the perennial issue of *time and Law*; after all, "[w]e all live and work *within time*, and the acceptance of the passing of time is one of the greatest challenges of human existence" (para. 62). In the present Interpretation of Judgment,—he adds,—the Court has "repeatedly taken note of the facts, subsequent to its original Judgment of 1962 in the *cas d'espèce*, which have been brought to its attention by the contending Parties",—and "it could not have done otherwise" (para. 63).

12. In doing so, the Court undertook the exercise of providing the requested Interpretation of the original 1962 Judgment, "focusing on its *dispositif* together with the corresponding *motifs*", to the extent that its own pertinent reasoning shed light on the *dispositif*; it then clarified the meaning of the "vicinity" of the Temple of Preah Vihear. Already in its Provisional Measures of 18July 2011 in the present case of the *Temple of Preah Vihear*, the Court, in *bringing together territory, people and human values* (cf. *supra*) in a "proper inter-temporal dimension", thus endorsed, in his perception, "the ongoing process of *humanization* of international law" (para. 65).

13. A parallel between the Judgment of 1962 and the present Interpretation of Judgment of 2013, he proceeds, gives clear testimony of that. And Judge Cançado Trindade then concludes that, by

> "giving its due to the preservation of world cultural heritage, parallel to the safeguard of territorial sovereignty, the Court is contributing to the avoidance of a *spiritual damage* (…).
>
> It does so at the same time that it draws attention to the relevance of *general principles of international law* (…). The necessary attention to those principles brings us closer to the domain of higher *human values*, shared by the international community as a whole. (…) [I]t is the fundamental principles that (…) give expression to the idea of an *objective justice*, above the will of individual States. They indicate, at last, the *status conscientiae* reached by the international community as a whole" (paras. 65–67).

Declaration of Judge *ad hoc* Guillaume

In his declaration, Judge *ad hoc* Guillaume agrees with the Court's unanimous decision and explains its scope.

He begins by recalling that the second operative paragraph of the 1962 Judgment required Thailand to withdraw any civilian or military personnel stationed by it at the Temple or "in its vicinity on Cambodian territory". He notes that, in its new Judgment, the Court has provided the interpretation to be given to this latter phrase.

The Court first decided that, in the vicinity of the Temple, Cambodian territory extends to the north as far as the line on the Annex I map, and that Thai territory begins beyond that line. The Court thus determined the line of the frontier between the two States in the sector concerned. It did so with binding force, having ruled in that respect in the actual operative part of its Judgment (paragraphs 108 and 98).

Secondly, in that same operative part (paragraphs 108 and 98), the Court determined the extent of the vicinity of the Temple on Cambodian territory in such a way that Cambodia will have free access to the Temple from the plain by the valley

separating the Preah Vihear promontory from the hill of Phnom Trap (paragraphs 89, 98 and 106).

Having settled the dispute between the Parties regarding the meaning to be given to the second operative paragraph of the 1962 Judgment, the Court held that it was unnecessary for it to rule on the other disputes between Cambodia and Thailand.

Thus, having accorded binding force to the Annex I frontier line in the Preah Vihear sector, the Court was not required to rule on Cambodia's submissions regarding, more generally, the binding force of that line as representing the frontier between the Parties: those submissions had been accepted in the Temple sector, the only one to which the 1962 dispute related.

Having, moreover, recognized the territorial sovereignty of Cambodia over the vicinity of the Temple, the Court accordingly concluded that Thailand was under a duty in general international law to respect that sovereignty and was not entitled unilaterally to send civilian or military personnel into Cambodian territory. It was therefore unnecessary for the Court to determine whether the obligation to withdraw as imposed in 1962 was of a continuing or instantaneous nature.

In short, the Judgment has fixed with binding force the line of the frontier between the two States in the Temple sector, and has made it clear what is to be understood by the "vicinity of the Temple" on Cambodian territory within the meaning of the 1962 Judgment.

Declaration of Judge *ad hoc* Cot

Judge *ad hoc* Cot notes that the Court has adhered to a strict conception of the interpretation of the Judgment of 1962. In particular, the Court has declined to rule on the status of the line on the Annex I map. It has taken that line into consideration only in order to determine the perimeter of the vicinity of the Temple and it has refused to carry out any delimitation operation.

The Court has considered that the term "vicinity" of the Temple in the operative part corresponds to the rocky promontory on which the Temple is located. It has therefore logically refused to rule on sovereignty beyond this limited perimeter and, in particular, on the status of the neighbouring hill of Phnom Trap. Judge *ad hoc* Cot agrees with this analysis.

The solution adopted by the Court corresponds closely to one of the options put to the Thai Council of Ministers on 10 July 1962. It was at the time one of the possible interpretations of the Judgment according to the views of the Thai administration. That is the interpretation given by the Court today.

204. CERTAIN ACTIVITIES CARRIED OUT BY NICARAGUA IN THE BORDER AREA (COSTA RICA *v.* NICARAGUA); CONSTRUCTION OF A ROAD IN COSTA RICA ALONG THE SAN JUAN RIVER (NICARAGUA *v.* COSTA RICA) [PROVISIONAL MEASURES]

Order of 22 November 2013

On 22 November 2013, the International Court of Justice delivered its Order on the request for the indication of new provisional measures submitted by Costa Rica on 24 September 2013 in the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)*, which has been joined to the case concerning *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)*. In its Order, the Court reaffirmed unanimously the provisional measures indicated in its Order of 8 March 2011 and indicated several additional provisional measures.

The Court was composed as follows: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari; Judges *ad hoc* Guillaume, Dugard; Registrar Couvreur.

*

* *

The operative paragraph (para. 59) of the Order reads as follows:

"…

The Court,

(1) Unanimously,

Reaffirms the provisional measures indicated in its Order of 8 March 2011;

(2) *Indicates* the following provisional measures:

(*A*) Unanimously,

Nicaragua shall refrain from any dredging and other activities in the disputed territory, and shall, in particular, refrain from work of any kind on the two new *ca*ños;

(*B*) Unanimously,

Notwithstanding the provisions of point 2 (*A*) above and paragraph 86 (1) of the Order of 8 March 2011, Nicaragua shall fill the trench on the beach north of the eastern *caño* within two weeks from the date of the present Order; it shall immediately inform the Court of the completion of the filling of the trench and, within one week from the said completion, shall submit to it a report containing all necessary details, including photographic evidence;

(*C*) Unanimously,

Except as needed for implementing the obligation under point 2 (*B*) above, Nicaragua shall (i) cause the removal from the disputed territory of any personnel, whether civilian, police or security; and (ii) prevent any such personnel from entering the disputed territory;

(*D*) Unanimously,

Nicaragua shall cause the removal from and prevent the entrance into the disputed territory of any private persons under its jurisdiction or control;

(*E*) By fifteen votes to one,

Following consultation with the Secretariat of the Ramsar Convention and after giving Nicaragua prior notice, Costa Rica may take appropriate measures related to the two new *caños*, to the extent necessary to prevent irreparable prejudice to the environment of the disputed territory; in taking these measures, Costa Rica shall avoid any adverse effects on the San Juan River;

In Favour: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari; Judge *ad hoc* Dugard;

Against: Judge *ad hoc* Guillaume;

(3) Unanimously,

Decides that the Parties shall regularly inform the Court, at three-month intervals, as to the compliance with the above provisional measures."

*

* *

Judge Cançado Trindade appended a separate opinion to the Order; Judges *ad hoc* Guillaume and Dugard appended declarations to the Order.

*

* *

Application and request for the indication of provisional measures (paras. 1–20 of the Order)

The Court begins by recalling that, on 18 November 2010, the Government of Costa Rica filed in the Registry of the Court an Application instituting proceedings against the Government of Nicaragua for "the incursion into, occupation of and use by Nicaragua's army of Costa Rican territory", as well as for "serious damage inflicted to its protected rainforests and wetlands", "damage intended [by Nicaragua] to the Colorado River" and "the dredging and canalization activities being carried out by Nicaragua on the San Juan River". According to Costa Rica, these activities were connected to the construction of a canal (referred to in Spanish as *caño*) across Costa Rican territory from the San Juan River to Laguna los Portillos.

Having filed its Application, Costa Rica, on the same day, also submitted a Request for the indication of provisional measures, under Article 41 of the Statute of the Court and Articles 73 to 75 of the Rules of Court. By an Order of 8 March 2011, the Court indicated the following provisional measures to both Parties:

"(1) Each Party shall refrain from sending to, or maintaining in the disputed territory, including the *caño*, any personnel, whether civilian, police or security;

(2) Notwithstanding point (1) above, Costa Rica may dispatch civilian personnel charged with the protection of the environment to the disputed territory, including the *caño*, but only in so far as it is necessary to avoid irreparable prejudice being caused to the part of the wetland where that territory is situated; Costa Rica shall consult with the Secretariat of the Ramsar Convention in regard to these actions, give Nicaragua prior notice of them and use its best endeavours to find common solutions with Nicaragua in this respect;

(3) Each Party shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve;

(4) Each Party shall inform the Court as to its compliance with the above provisional measures."

The Court notes that by two separate Orders dated 17 April 2013, the Court joined the proceedings in the present case with those in the case concerning the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)*, hereinafter the "*Nicaragua* v. *Costa Rica* case", which had been brought by Nicaragua against Costa Rica on 22 December 2011.

The Court recalls that, at the time of the filing of its Memorial in the *Nicaragua* v. *Costa Rica* case, Nicaragua requested the Court, *inter alia*, to "decide *proprio motu* whether the circumstances of the case require[d] the indication of provisional measures". By letters dated 11 March 2013, the Registrar informed the Parties that the Court was of the view that the circumstances of the case, as they presented themselves to it at that time, were not such as to require the exercise of its powers under Article 75 of the Rules of Court to indicate provisional measures *proprio motu*.

The Court further recalls that, on 23 May 2013, Costa Rica, with reference to Article 41 of the Statute of the Court and Article 76 of the Rules of Court, filed with the Registry a request for the modification of the Order indicating provisional measures of 8 March 2011. In its written observations thereon, Nicaragua asked the Court to reject Costa Rica's request, while in its turn requesting the Court to modify or adapt the Order of 8 March 2011 on the basis of Article 76 of the Rules of Court. By an Order of 16 July 2013, the Court found that the circumstances, as they then presented themselves to the Court, were not such as to require the exercise of its power to modify the measures indicated in the Order of 8 March 2011. By the same Order, the Court also reaffirmed the provisional measures indicated in its Order of 8 March 2011, in particular the requirement that the Parties "shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve".

The Court observes that, on 24 September 2013, Costa Rica, with reference to Article 41 of the Statute of the Court and Articles 73 to 75 of the Rules of Court, filed in the Registry a new Request for the indication of provisional measures in the present case. Costa Rica clarified that it was not seeking the modification of the Order of 8 March 2011, but rather that its request was "an independent [one] based on new facts". The Registrar immediately communicated a copy of the said request to the Government of Nicaragua.

The Court recalls that Costa Rica, in outlining the facts which led it to bring the present request, stated that since the Court's Order of 16 July 2013 on the Parties' requests to modify the measures indicated in its Order of 8 March 2011, it had found out about "new and grave activities by Nicaragua in the disputed territory", through the receipt of satellite imagery of that area. In particular, Costa Rica contended that Nicaragua had commenced construction of two new artificial *caños* in the disputed territory.

The Court further recalls that, at the end of its Request for the indication of new provisional measures, Costa Rica asked the Court:

"as a matter of urgency to order the following provisional measures so as to prevent further breaches of Costa Rica's territorial integrity and further irreparable harm to the territory in question, pending the determination of [the] case on the merits:

(1) the immediate and unconditional suspension of any work by way of dredging or otherwise in the disputed territory, and specifically the cessation of work of any kind on the two further artificial *caños* in the disputed territory, as shown in the satellite images attached as Attachment PM-8 [to the Request];

(2) that Nicaragua immediately withdraw any personnel, infrastructure (including lodging tents) and equipment (including dredgers) introduced by it, or by any persons under its jurisdiction or coming from its territory, from the disputed territory;

(3) that Costa Rica be permitted to undertake remediation works in the disputed territory on the two new artificial *caños* and the surrounding areas, to the extent necessary to prevent irreparable prejudice being caused to the disputed territory; and

(4) that each Party shall immediately inform the Court as to its compliance with the above provisional measures not later than one week of the issuance of the Order".

*

* *

The Court observes that public hearings on Costa Rica's Request for the indication of new provisional measures were held on 14, 15, 16 and 17 October 2013, during which oral observations were presented by the Agents and Counsel of the Governments of Costa Rica and Nicaragua. During the hearings, questions were put by some Members of the Court to Nicaragua, to which replies were given orally; Costa Rica availed itself of its right to comment orally on those replies.

The Court recalls that, at the end of its second round of oral observations, Costa Rica asked the Court to indicate provisional measures in the same terms as included in its Request, while Nicaragua, at the end of its second round of oral observations, stated the following:

"In accordance with Article 60 of the Rules of Court and having regard to the Request for the indication of provisional measures of the Republic of Costa Rica and its oral pleadings, the Republic of Nicaragua respectfully submits that,

— for the reasons explained during these hearings and any other reasons the Court might

deem appropriate, the Republic of Nicaragua asks the Court to dismiss the Request for provisional measures filed by the Republic of Costa Rica."

Reasoning of the Court (paras. 21–58)

I. Prima facie jurisdiction (paras. 21–23)

The Court begins by observing that when dealing with a request for the indication of provisional measures, there is no need for the Court, before deciding whether or not to indicate such measures, to satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case; it only has to satisfy itself that the provisions relied on by the Applicant appear, *prima facie*, to afford a basis on which its jurisdiction could be founded.

The Court notes that Costa Rica seeks to found the jurisdiction of the Court on Article XXXI of the American Treaty on Pacific Settlement signed at Bogotá on 30 April 1948, as well as on the declarations made by the Parties accepting compulsory jurisdiction.

The Court recalls that, in its Order of 8 March 2011, it found that "the instruments invoked by Costa Rica appear, *prima facie*, to afford a basis on which the Court might have jurisdiction to rule on the merits, enabling it to indicate provisional measures if it considers that the circumstances so require". Moreover, the Court notes that, within the time-limit set out in Article 79, paragraph 1, of the Rules of Court, Nicaragua did not raise any objection to the jurisdiction of the Court. In these circumstances, the Court considers that it may entertain the present Request for the indication of new provisional measures.

II. The rights whose protection is sought and the measures requested (paras. 24–33)

The Court recalls that its power to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the requesting party are at least plausible. Moreover, a link must exist between the rights which form the subject of the proceedings before the Court on the merits of the case and the provisional measures being sought.

The Court notes that the rights which Costa Rica seeks to protect are the rights it claims to sovereignty over the territory which it refers to as Isla Portillos, to territorial integrity and its right to protect the environment in those areas over which it is sovereign. The Court recalls its statement, in its Order of 8 March 2011, that while "the provisional measures it may indicate would not prejudge any title", it appears "that the title to sovereignty claimed by Costa Rica over the entirety of Isla Portillos is plausible". The Court sees no reason to depart from this conclusion in the context of Costa Rica's present Request. Moreover, to the extent that Costa Rica's claimed title is plausible, the Court considers that any future environmental harm caused in the disputed territory would infringe Costa Rica's alleged territorial rights. The Court therefore finds that the rights for which Costa Rica seeks protection are plausible.

The Court then turns to the issue of the link between the rights claimed and the provisional measures requested. It recalls that the first provisional measure requested by Costa Rica is aimed at ensuring the immediate and unconditional suspension of dredging or other activity, and specifically the cessation of work of any kind on the two new *caños* in the disputed territory. In this regard, Costa Rica has called the Court's attention to the possible effect of the construction of these two *caños* on the disputed territory and on the course of the San Juan River. The Court considers that this construction could affect Costa Rica's rights of sovereignty, as well as environmental rights connected thereto, to be adjudged on the merits. Therefore, the Court concludes that a link exists between Costa Rica's claimed rights and the first provisional measure being sought.

The Court observes that the second provisional measure requested by Costa Rica is that Nicaragua immediately withdraw from the disputed territory any personnel, infrastructure (including lodging tents) and equipment (including dredgers) introduced by it, or by any persons under its jurisdiction or coming from its territory. In this regard, the Court considers that the presence of Nicaraguan personnel, infrastructure and equipment on the disputed territory would be likely to affect the rights of sovereignty which might be adjudged on the merits to belong to Costa Rica. Therefore, the Court concludes that a link exists between Costa Rica's claimed rights of sovereignty and the second provisional measure being sought.

With respect to the third provisional measure sought by Costa Rica, aimed at ensuring that it be permitted to undertake remediation works in the disputed territory on the two new *caños* and the surrounding areas, to the extent necessary to prevent irreparable prejudice being caused to the disputed territory, the Court considers that this is linked to Costa Rica's claimed rights of sovereignty over the disputed territory.

Finally, the Court recalls that the fourth provisional measure requested by Costa Rica is that each Party shall inform the Court as to its compliance with any provisional measures that may be indicated by the Court, not later than one week from the issuance of the Order. The Court considers that this request does not aim to protect Costa Rica's rights and there is therefore no need to establish a link between it and Costa Rica's claimed rights.

III. Risk of irreparable prejudice and urgency (paras. 34–50)

The Court recalls that it has the power to indicate provisional measures when irreparable prejudice could be caused to the rights which are in dispute, and that this power will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice may be caused to those rights.

It observes that, since its Order of 16 July 2013 on the requests for the modification of the Order of 8 March 2011 indicating provisional measures, there has been a change in the

situation in the "disputed territory" as identified by the Court in its Order of 8 March 2011. It notes that the evidence submitted to it shows that two new *caños* have been built in that territory. Furthermore, a photograph of 18 September 2013 presented by Costa Rica depicts a shallow trench which begins at the seaward end of the eastern *caño*. In the Court's view, it is apparent from a satellite image of 5 October 2013 that this trench has been extended and currently cuts across the beach, with only a narrow stretch of sand separating it from the sea. The Court further notes that Nicaragua recognizes the existence of the two new *caños* and the trench, although it states that all work relating to these features stopped following instructions given by President Ortega on 21 September 2013.

The Court points out that Nicaragua admits that the dredging operations for the construction of the *caños* were carried out by a group of its nationals led by Mr. Pastora, in the context of the implementation of a project for the improvement of navigation on the San Juan River. It further recalls that this project was approved by the Nicaraguan Ministry of Environmental and Natural Resources, and that Mr. Pastora was appointed by the President of Nicaragua to carry out this project and was addressed by the National Port Authority as "Government Delegate for Dredging Works".

The Court observes that the evidence submitted to it establishes the presence in the disputed territory of Nicaraguan personnel carrying out dredging operations, as well as infrastructure (including lodging tents), and equipment (including dredgers). In addition, the Court notes that the presence of a Nicaraguan army encampment on the beach is visible on a photograph dated 5 February 2013, allowing the Court to conclude that, at least since that date, Nicaraguan military personnel have been stationed there. The Court notes that Nicaragua acknowledges the presence of its military encampment on the beach north of the two new *caños* which it understands to be a sand bank. The Court considers however that, contrary to what Nicaragua alleges, this encampment is located on the beach and close to the line of vegetation, and is therefore situated in the disputed territory as defined by the Court in its Order of 8 March 2011. The Court observes that the ongoing presence of this encampment is confirmed by satellite images of 5 and 14 September 2013 and the photograph of 18 September 2013.

The Court concludes that, in view of the length, breadth and position of the trench next to the eastern *caño*, as visible on the satellite image of 5 October 2013, there is a real risk that it could reach the sea either as a result of natural elements or by human actions, or a combination of both. Such an outcome would have the effect of connecting the San Juan River with the Caribbean Sea through the eastern *caño*. Given the evidence before it, the Court is satisfied that an alteration of the course of the San Juan River could ensue, with serious consequences for the rights claimed by Costa Rica. The Court is therefore of the opinion that the situation in the disputed territory reveals the existence of a real risk of irreparable prejudice to the rights claimed by the Applicant in this case.

The Court moreover considers that there is urgency. First, during the rainy season, the increased flow of water in the San Juan River and consequently in the eastern *caño* could extend the trench and connect it with the sea, thereby potentially creating a new course for the San Juan River. Secondly, the trench could also easily be connected to the sea, with minimum effort and equipment, by persons accessing this area from Nicaraguan territory. Thirdly, a Nicaraguan military encampment is located only metres away from the trench, in an area that Nicaragua regards as lying outside the disputed territory. Fourthly, in response to a question from a Member of the Court regarding the location of equipment used in the construction of the *caños*, Nicaragua advised the Court of the location of the dredgers, but did not rule out the presence in the disputed territory of other equipment that could be used to extend the trench.

IV. Measures to be adopted (paras. 51–58)

The Court concludes from the foregoing that, in view of the circumstances, and given that all the conditions required by its Statute for it to indicate provisional measures have been met, it ought to indicate such measures to address the new situation prevailing in the disputed territory. These measures will supplement those already in force under the Order of 8 March 2011.

The Court recalls that it has the power, under its Statute, when a request for provisional measures has been made, to indicate measures that are in whole or in part other than those requested. In the present case, having considered the terms of the provisional measures requested by Costa Rica, the Court finds that the measures to be indicated need not be identical to those requested.

The Court is of the opinion that the filling of the trench next to the eastern *caño* must be carried out immediately. In light of the circumstances of the case and in particular of the fact that the digging of the trench was carried out by Nicaragua's personnel, it is for Nicaragua now to fill it, notwithstanding point 1 of paragraph 86 of the Court's Order of 8 March 2011. Nicaragua shall do so within two weeks of the date of the present Order. It shall immediately inform the Court of the completion of the filling of the trench and shall submit to it, within one week of said completion, a report containing all necessary details, including photographic evidence.

With regard to the two new *caños*, the Court recalls that they are situated in the disputed territory in the "Humedal Caribe Noreste" wetland in respect of which Costa Rica bears obligations under the Ramsar Convention. Therefore, pending delivery of the Judgment on the merits, Costa Rica shall consult with the Secretariat of the Ramsar Convention for an evaluation of the environmental situation created by the construction of the two new *caños*. The Court states that, taking into account any expert input from the Secretariat, Costa Rica may take appropriate measures related to the new *caños*, to the extent necessary to prevent irreparable prejudice to the environment of the disputed territory. The Court adds that, in taking these measures, Costa Rica shall avoid any adverse effects on the San Juan River, and Costa Rica shall give Nicaragua prior notice of any such measures.

With regard to the presence of Nicaraguan personnel, infrastructure and equipment on the disputed territory, the Court considers that, in view of its findings with regard to

the presence in the disputed territory of the personnel carrying out the dredging operations and the Nicaraguan army encampment, the first provisional measure indicated in its Order of 8 March 2011 must be reinforced and supplemented. Therefore, the Court considers that Nicaragua, after having filled the trench on the beach, shall (i) cause the removal from the disputed territory of any personnel, whether civilian, police or security; and (ii) prevent any such personnel from entering the disputed territory. In addition, in view of the continuing access of the members of the *Guardabarranco Environmental Movement* to the disputed territory, the Court considers that Nicaragua shall cause the removal from and prevent the entrance into the disputed territory of any private persons under its jurisdiction or control.

The Court emphasizes that its orders on provisional measures have binding effect and thus create international legal obligations with which both Parties are required to comply. It further recalls that the question of compliance with provisional measures indicated in a case may be considered by the Court in the principal proceedings. Finally, the Court adds that the decision given in the present proceedings in no way prejudges any questions relating to the merits or any other issues to be decided at that stage and leaves unaffected the right of the Governments of Costa Rica and Nicaragua to submit arguments in respect of those questions.

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Separate opinion of Judge Cançado Trindade

1. Judge Cançado Trindade begins his Separate opinion, composed of five parts, by identifying some points, raised in the present Order, which appear to him deserving closer attention. Given the importance that he attributes to them, he feels obliged, moved by a sense of duty in the exercise of the international judicial function, to leave on the records the foundations of his own personal position thereon (part I).

2. He first examines the factual context, as presented to the Court by the submissions of the Parties in the course of the present proceedings, in both the written phase as well as in the two rounds of oral arguments (part II). The evidence submitted to the Court has led to its finding of a change in the situation (since its previous Orders of 8 March 2011, and of 16 July 2013), given the construction of two new *caños*, and the presence of a Nicaraguan military encampment, in the disputed territory (paras. 16–19).

3. Judge Cançado Trindade then moves on, from the factual to the juridico-epistemological level, so as to focus his reflections on the questions of the configuration of the *autonomous legal regime* (as he perceives and conceives it) of Provisional Measures of Protection. In doing so, he addresses the task of international tribunals, and a reassuring jurisprudential construction (2000–2013), to this effect (part III). He recalls that "it has been in the era of contemporary international tribunals that Provisional Measures of Protection have seen the light of day, and have flourished, in international legal procedure" (para. 20).

4. This brings to the fore the issue of *compliance* with those measures and the legal consequences ensuing therefrom. This issue—he proceeds—has not yet been sufficiently studied and developed, in spite of being closely linked to the pursuit of the realization of justice at international level. Judge Cançado Trindade thus observes that closer attention needs to be drawn to the legal regime of provisional measures, their *legal effects* and the faithful compliance with them, and the legal consequences for non-compliance (paras. 22–24). In his perception, some endeavours have been undertaken to the effect of jurisprudential construction (paras. 25–28), but there still remains, in this domain, a long way to go, in the long-standing search for the realization of justice.

5. In sequence, Judge Cançado Trindade stresses the need to persevere in the ongoing construction of an autonomous legal regime of provisional measures of protection (part IV). In his understanding, by means of such construction of the propounded autonomous legal regime of provisional measures of protection, contemporary international tribunals can contribute effectively to the avoidance or prevention of irreparable harm in situations of urgency, to the ultimate benefit of *all* subjects of international law, all *justiciables*,—States as well as groups of individuals, and *simples particuliers* (para. 31).

6. In his final considerations (part V), Judge Cançado Trindade observes that, once a new situation appears—like the present one in the disputed territory—disclosing urgency and the risk of irreparable harm, the Court ought to indicate or order promptly *new* provisional measures, without postponing a decision to this effect. To him, responsibility for non-compliance with those measures "is necessarily accompanied by the attribution of that responsibility to the State concerned. There is an autonomous breach of a conventional obligation (concerning provisional measures), without prejudice to what will later be decided by the Court as to the merits" (para. 37).

7. In Judge Cançado Trindade's conception, non-compliance with provisional measures of protection "reveals an *additional* ground of responsibility (irrespective of any decision on the merits)" (para. 39), and the task ahead of the Court is "to extract the consequences ensuing therefrom" (para. 40). Without prejudice to the subsequent decision of the Court as to the merits of the case, the *legal effects* of such provisional measures can be more appropriately examined within the framework of their *autonomous* legal regime. The day this is done,—he concludes,—"an additional service will be rendered to the cause of the realization of justice at international level" (para. 40).

Declaration of Judge *ad hoc* Guillaume

Judge *ad hoc* Guillaume disagrees with the Court as regards point 2 (E) of the operative part of the Order. In that point the Court envisages the very unlikely scenario that a risk of irreparable prejudice to the wetlands protected by the Ramsar Convention would become apparent in future in the disputed territory as a result of the works in question. The Court has given Costa Rica, and Costa Rica alone, the right to

take the necessary measures to prevent the occurrence of such prejudice. Judge *ad hoc* Guillaume considers that it would have been preferable to provide for such action to be taken by the two States acting jointly.

Declaration of Judge *ad hoc* Dugard

In his declaration Judge *ad hoc* Dugard expresses his full support for the Order but states that the Court would have been wise to provide for the regulation of Costa Rica's access to the disputed territory to carry out remediation works on the new *caños* on account of the disagreement among the Parties over the question whether Costa Rica might use the San Juan River for this purpose.

205. CONSTRUCTION OF A ROAD IN COSTA RICA ALONG THE SAN JUAN RIVER (NICARAGUA *v.* COSTA RICA); CERTAIN ACTIVITIES CARRIED OUT BY NICARAGUA IN THE BORDER AREA (COSTA RICA *v.* NICARAGUA) [PROVISIONAL MEASURES]

Order of 13 December 2013

On 13 December 2013, the Court delivered its Order on the request for the indication of provisional measures submitted by Nicaragua on 11 October 2013 in the case concerning the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)* which has been joined to the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)*. In its Order, the Court found unanimously that the circumstances, as they now presented themselves to it, were not such as to require the exercise of its power under Article 41 of its Statute to indicate provisional measures.

The Court was composed as follows: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari; Judges *ad hoc* Guillaume, Dugard; Registrar Couvreur.

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* *

The operative paragraph (para. 39) of the Order reads as follows:

"…

The Court,

Unanimously,

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."

*

* *

The Application and the Request for provisional measures (paras. 1–11 of the Order)

The Court begins by recalling that, by an Application filed with the Registry of the Court on 22 December 2011, the Republic of Nicaragua (hereinafter "Nicaragua") instituted proceedings against the Republic of Costa Rica (hereinafter "Costa Rica") for "violations of Nicaraguan sovereignty and major environmental damages on its territory", contending, in particular, that Costa Rica was undertaking construction works near the border area between the two countries along the San Juan River, namely the construction of a road (Route 1856) (case concerning the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica*), hereinafter the *"Nicaragua* v. *Costa Rica case"*). In its Application Nicaragua further claimed that the new road was causing ongoing damage to the river, on a large scale, "by the impetus it inevitably gives to agricultural and industrial activities".

At the time of filing of its Memorial, Nicaragua had requested the Court, *inter alia*, to "decide *proprio motu* whether the circumstances of the case require[d] the indication of provisional measures". By letters dated 11 March 2013, the Registrar informed the Parties that the Court was of the view that the circumstances of the case, as they presented themselves to it at that time, were not such as to require the exercise of its power under Article 75 of the Rules of Court to indicate provisional measures *proprio motu*.

The Court explains that, by two separate Orders dated 17 April 2013, the Court had joined the proceedings in the *Nicaragua* v. *Costa Rica* case with those in the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* (hereinafter the "*Costa Rica* v. *Nicaragua* case"), which had been brought by Costa Rica against Nicaragua on 18 November 2010, accompanied by a Request for the indication of provisional measures. By an Order of 8 March 2011 in the latter case, the Court had indicated certain provisional measures to both Parties. Following successive requests by Costa Rica and Nicaragua for the modification of that Order, the Court, by an Order of 16 July 2013, found that the circumstances, as they then presented themselves to the Court, were not such as to require the exercise of its power to modify the measures indicated in its Order of 8 March 2011. On 24 September 2013, Costa Rica filed with the Registry a Request for the indication of new provisional measures in the *Costa Rica* v. *Nicaragua* case. The full procedural history of *the Costa Rica* v. *Nicaragua* case is set out in the Court's Order dated 22 November 2013 on Costa Rica's Request for the indication of new provisional measures in that case.

The Court states that, on 11 October 2013, Nicaragua filed with the Registry a Request for the indication of provisional measures in the *Nicaragua* v. *Costa Rica* case, specifying that it was not seeking the modification of the Order of 8 March 2011 in the *Costa Rica* v. *Nicaragua* case, but rather "the adoption of new provisional measures linked with the *Nicaragua* v. *Costa Rica* case". Nicaragua further suggested that its Request be heard concurrently with Costa Rica's Request for the indication of new provisional measures at the same set of oral proceedings. By letter of 14 October 2013, Costa Rica objected to Nicaragua's suggestion. By letters dated 14 October 2013, the Registrar informed the Parties that the Court had decided that it would consider the two Requests separately.

The Court recalls that Nicaragua, in outlining the facts which led it to bring the present Request, stated that Costa Rica "has repeatedly refused to give [it] appropriate information on the road works" and "has denied that it has any obligation to prepare an Environmental Impact Assessment or to provide such a document to Nicaragua". In its Request Nicaragua contended that,

> "[a]s the rainy season enters into its heaviest stage washing even greater quantities of sediment and run-off into the river's waters, Costa Rica has still not provided the necessary information to Nicaragua, nor has it taken the necessary actions along the 160-km road to avoid or mitigate the irreparable damage that is being inflicted on the river and its surrounding environment, including on navigation and

the health and well-being of the population living along its margins".

The Court adds that, at the end of its Request, Nicaragua asked the Court:

> "as a matter of urgency to prevent further damage to the River and to avoid aggravation of the dispute, to order the following provisional measures:
>
> (1) that Costa Rica immediately and unconditionally provides Nicaragua with the Environmental Impact Assessment Study and all technical reports and assessments on the measures necessary to mitigate significant environmental harm to the River;
>
> (2) that Costa Rica immediately takes the following emergency measures:
>
> *(a)* Reduce the rate and frequency of road fill failure slumps and landslides where the road crosses the steeper hill slopes, especially in locations where failed or eroded soil materials have been or could potentially be delivered to the Río San Juan.
>
> *(b)* Eliminate or significantly reduce the risk of future erosion and sediment delivery at all stream crossings along Route 1856.
>
> *(c)* Immediately reduce road surface erosion and sediment delivery by improving dispersion of concentrated road runoff and increasing the number and frequency of road drainage structures.
>
> *(d)* Control surface erosion and resultant sediment delivery from bare soil areas that were exposed during clearing, grubbing and construction activities in the last several years.
>
> (3) Order Costa Rica not to renew any construction activities of the road while the Court is seised of the present case."

The Court recalls that, at the public hearings held on 5, 6, 7 and 8 November 2013, oral observations were presented by the Agents and counsel of the Governments of Nicaragua and Costa Rica.

The Court states that, at the end of its second round of oral observations, Nicaragua asked it to indicate provisional measures in the same terms as included in its Request, while, at the end of its second round of oral observations, Costa Rica stated the following:

> "In accordance with Article 60 of the Rules of Court and having regard to the Request for the indication of provisional measures of the Republic of Nicaragua and its oral pleadings, the Republic of Costa Rica submits that,
>
> — for the reasons explained during these hearings and any other reasons the Court might deem appropriate, the Republic of Costa Rica asks the Court to dismiss the Request for provisional measures filed by the Republic of Nicaragua."

The Court's reasoning (paras. 12–38)

I. Prima facie jurisdiction (paras. 12–14)

The Court begins by observing that it may indicate provisional measures only if the provisions relied on by the Applicant appear, *prima facie*, to afford a basis on which its jurisdiction could be founded, but that the Court need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case.

The Court notes that Nicaragua seeks to found the jurisdiction of the Court on Article XXXI of the American Treaty on Pacific Settlement signed at Bogotá on 30 April 1948, as well as on both Parties' declarations of acceptance of the Court's compulsory jurisdiction.

The Court considers that these instruments appear, *prima facie*, to afford a basis on which it might have jurisdiction to rule on the merits of the case *(cf. Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of* 8 *March 2011, I.C.J. Reports 2011 (I),* p. 18, para. 52).

The Court further notes that, within the time-limit set out in Article 79, paragraph 1, of the Rules of Court, Costa Rica did not, moreover, contest the Court's jurisdiction in the present proceedings. In these circumstances, the Court finds that it may entertain the Request for the indication of provisional measures submitted to it by Nicaragua.

II. The rights whose protection is sought and the measures requested (paras. 15–23)

The Court recalls that its power to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the requesting party are at least plausible. Moreover, a link must exist between the rights which form the subject of the proceedings before the Court on the merits of the case and the provisional measures being sought.

The Court notes that, according to Nicaragua, the rights which it seeks to protect are its "rights of territorial sovereignty and integrity", its "right to be free from transboundary harm" and its "right to receive a transboundary environmental impact assessment from Costa Rica".

The Court further states that, at this stage of the proceedings, it is not called upon to determine definitively whether the rights which Nicaragua wishes to see protected exist; it need only decide whether the rights claimed by Nicaragua on the merits, and for which it is seeking protection, are plausible.

The Court initially observes that, under the 1858 Treaty of Limits between Costa Rica and Nicaragua, the latter enjoys "dominion and sovereign jurisdiction over the waters of the San Juan River" and that thus the river "belongs to Nicaragua". The Court notes that the claimed right to be free from transboundary harm is the principal right underpinning Nicaragua's Request and that it is derived from the right of a State to sovereignty and territorial integrity. The Court recalls in this regard that "[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment". The Court therefore considers that a correlative right to be free from such

transboundary harm is plausible. With respect to Nicaragua's claimed right to receive a transboundary environmental impact assessment from Costa Rica, the Court states that it has had occasion to state in another context that,

> "in accordance with a practice, which in recent years has gained so much acceptance among States … it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context …".

Accordingly, the Court considers that the rights for which Nicaragua seeks protection are plausible.

The Court then turns to the issue of whether the provisional measures requested are linked to the rights claimed and do not prejudge the merits of the case.

The Court recalls that the first provisional measure requested by Nicaragua is that Costa Rica "immediately and unconditionally" provide it with an Environmental Impact Assessment Study and all technical reports and assessments on the measures necessary to mitigate significant environmental harm to the San Juan River. The Court observes that this request is exactly the same as one of Nicaragua's claims on the merits contained at the end of its Application and Memorial in the present case. A decision by the Court to order Costa Rica to provide Nicaragua with such an Environmental Impact Assessment Study as well as technical reports at this stage of the proceedings would therefore amount to prejudging the Court's decision on the merits of the case.

The Court notes that the second provisional measure requested by Nicaragua is that Costa Rica immediately take a number of emergency measures in order to reduce or eliminate instances of erosion, landslides and sediment delivery into the San Juan River as a result of the construction of the road. The Court considers that any instance of this kind would be likely to affect Nicaragua's claimed right to be free from transboundary harm. Therefore, a link exists between Nicaragua's claimed rights and the second provisional measure sought.

Finally, the third provisional measure sought by Nicaragua is that Costa Rica be ordered not to renew any construction activities with respect to the road while the Court is seised of the present case. In this regard, the Court considers that, should Costa Rica's construction activities continue, in particular on the 41-km stretch of road running along the San Juan River upstream from its intersection with the San Carlos River, there is a possibility that Nicaragua's right to be free from transboundary harm, which it seeks to protect by the second provisional measure requested, may also be affected. The Court thus concludes that a link exists between Nicaragua's claimed rights and the third provisional measure sought.

III. Risk of irreparable prejudice and urgency (paras. 24–38)

The Court recalls that, pursuant to Article 41 of its Statute, it has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of judicial proceedings, and that this power will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights in dispute before the Court has given its final decision.

The Court considers that, on the basis of the evidence adduced, Nicaragua has not established in the current proceedings that the ongoing construction works have led to a substantial increase in the sediment load in the river. It notes that Nicaragua did not contest the statement of Costa Rica's expert, Professor Thorne, that, even according to the figures provided by Nicaragua's expert, Professor Kondolf, the construction activities are only contributing 1 to 2 per cent of the total sediment load in the San Juan River and 2 to 3 per cent in the lower San Juan River. The Court is of the view that this seems too small a proportion to have a significant impact on the river in the immediate future. It observes, moreover, that the photographic and video evidence submitted by Nicaragua does nothing to substantiate Nicaragua's allegations relating to increased sedimentation levels. Neither has the Court been presented, at this stage, with evidence as to any long-term effect on the river by aggradations of the river channel allegedly caused by additional sediment from the construction on the road. Finally, with respect to the alleged effect on the ecosystem including individual species in the river's wetlands, the Court finds that Nicaragua has not explained how the road works could endanger such species, and that it has not identified with precision which species are likely to be affected.

The Court accordingly finds that Nicaragua has not shown that there is any real and imminent risk of irreparable prejudice to the rights it invokes.

The Court concludes from the foregoing that the Request for the indication of provisional measures by Nicaragua cannot be upheld.

Having concluded that no provisional measures should be indicated, the Court observes nevertheless that Costa Rica acknowledged during the course of the oral proceedings that it has a duty not to cause any significant transboundary harm as a result of the construction works on its territory, and that it would take the measures that it deemed appropriate to prevent such harm. The Court further observes that Costa Rica has in any event recognized the necessity of remediation works, in order to mitigate damage caused by the effects of poor planning and execution of the road works in 2011, and has indicated that a number of measures to that end have already been undertaken.

Finally, the Court notes that Costa Rica announced, during the same oral proceedings, that, with its Counter-Memorial, due to be filed by 19 December 2013, it would submit what it described as an "Environment Diagnostic" study covering the stretch of the road running along the south bank of the San Juan River.

The Court ends by stating that the decision given in the present proceedings in no way prejudges any questions relating to the merits or any other issues to be decided at that stage. It leaves unaffected the right of the Governments of Nicaragua and Costa Rica to submit arguments in respect of those questions.

206. MARITIME DISPUTE (PERU *v.* CHILE)

Judgment of 27 January 2014

On 27 January 2014, the International Court of Justice rendered its Judgment in the case concerning the *Maritime Dispute (Peru* v. *Chile)*.

The Court was composed as follows: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Xue, Donoghue, Gaja, Sebutinde, Bhandari; Judges *ad hoc* Guillaume, Orrego Vicuña; Registrar Couvreur.

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The operative paragraph (para.198) of the Judgment reads as follows:

"…

The Court,

(1) By fifteen votes to one,

Decides that the starting-point of the single maritime boundary delimiting the respective maritime areas between the Republic of Peru and the Republic of Chile is the intersection of the parallel of latitude passing through Boundary Marker No. 1 with the low-water line;

In favour: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Xue, Donoghue, Sebutinde, Bhandari; Judges *ad hoc* Guillaume, Orrego Vicuña;

Against: Judge Gaja;

(2) By fifteen votes to one,

Decides that the initial segment of the single maritime boundary follows the parallel of latitude passing through Boundary Marker No. 1 westward;

In favour: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Xue, Donoghue, Gaja, Bhandari; Judges *ad hoc* Guillaume, Orrego Vicuña;

Against: Judge Sebutinde;

(3) By ten votes to six,

Decides that this initial segment runs up to a point (Point A) situated at a distance of 80 nautical miles from the starting-point of the single maritime boundary;

In favour: Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Donoghue; Judge *ad hoc* Guillaume;

Against: President Tomka; Judges Xue, Gaja, Sebutinde, Bhandari; Judge *ad hoc* Orrego Vicuña;

(4) By ten votes to six,

Decides that from Point A, the single maritime boundary shall continue south-westward along the line equidistant from the coasts of the Republic of Peru and the Republic of Chile, as measured from that point, until its intersection (at Point B) with the 200-nautical-mile limit measured from the baselines from which the territorial sea of the Republic of Chile is measured. From Point B, the single maritime boundary shall continue southward along that limit until it reaches the point of intersection (Point C) of the 200-nautical-mile limits measured from the baselines from which the territorial seas of the Republic of Peru and the Republic of Chile, respectively, are measured;

In favour: Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Donoghue; Judge *ad hoc* Guillaume;

Against: President Tomka; Judges Xue, Gaja, Sebutinde, Bhandari; Judge *ad hoc* Orrego Vicuña;

(5) By fifteen votes to one,

Decides that, for the reasons given in paragraph 189 above, it does not need to rule on the second final submission of the Republic of Peru.

In favour: President Tomka; Vice-President Sepúlveda-Amor; *Judges* Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Xue, Donoghue, Gaja, Sebutinde, Bhandari; Judge *ad hoc* Guillaume;

Against: Judge *ad hoc* Orrego Vicuña."

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* *

President Tomka and Vice-President Sepúlveda-Amor appended declarations to the Judgment of the Court; Judge Owada appended a separate opinion to the Judgment of the Court; Judge Skotnikov appended a declaration to the Judgment of the Court; Judges Xue, Gaja, Bhandari and Judge *ad hoc* Orrego Vicuña appended a joint dissenting opinion to the Judgment of the Court; Judges Donoghue and Gaja appended declarations to the Judgment of the Court; Judge Sebutinde appended a dissenting opinion to the Judgment of the Court; Judge *ad hoc* Guillaume appended a declaration to the Judgment of the Court; Judge *ad hoc* Orrego Vicuña appended a separate, partly concurring and partly dissenting, opinion to the Judgment of the Court.

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Chronology of the procedure (paras. 1–15)

The Court recalls that, on 16 January 2008, the Republic of Peru (hereinafter "Peru") filed in the Registry of the Court an Application instituting proceedings against the Republic of Chile (hereinafter "Chile") in respect of a dispute concerning, on the one hand, "the delimitation of the boundary between the maritime zones of the two States in the Pacific Ocean, beginning at a point on the coast called Concordia … the terminal point of the land boundary established pursuant to the Treaty … of 3 June 1929" and, on the other, the recognition in favour of Peru of a "maritime zone lying within 200 nautical miles of Peru's coast" and which should thus appertain to it, "but which Chile considers to be part of the high seas".

I. Geography (para. 16)

The area within which the delimitation sought is to be carried out lies in the Pacific Ocean. In that region, Peru's coast runs in a north-west direction from the starting-point of the land boundary between the Parties on the Pacific coast and Chile's generally follows a north-south orientation. (See sketch-map No. 1: Geographical context.)

II. Historical background (paras. 17–21)

Having succinctly recalled the relevant historical facts, the Court more specifically observes that the land boundary between Peru and Chile was fixed in the 1929 Treaty of Lima. It also notes that, in 1947, both Parties unilaterally proclaimed certain maritime rights extending 200 nautical miles from their coasts (the relevant instruments are hereinafter referred to collectively as the "1947 Proclamations"). The Court then recalls that in subsequent years Chile, Ecuador and Peru negotiated twelve instruments to which the Parties to the present case make reference. Four of them, among which the Declaration on the Maritime Zone, referred to as the Santiago Declaration, were adopted in August 1952 during the Conference on the Exploitation and Conservation of the Marine Resources of the South Pacific. Six others—including the Complementary Convention to the Santiago Declaration, the Agreement relating to Measures of Supervision and Control in the Maritime Zones of the Signatory Countries and the Agreement Relating to a Special Maritime Frontier Zone—were adopted in Lima in December 1954. And, finally, two agreements relating to the functioning of the Permanent Commission for the South Pacific were signed in Quito in May 1967.

III. Positions of the parties (paras. 22–23)

The Court recalls that Peru and Chile have adopted fundamentally different positions in this case. Peru argues that no agreed maritime boundary exists between the two countries and asks the Court to plot a boundary line using the equidistance method in order to achieve an equitable result. For its part, Chile contends that the 1952 Santiago Declaration established an international maritime boundary along the parallel of latitude passing through the starting-point of the Peru–Chile land boundary and extending to a minimum of 200 nautical miles. It therefore asks the Court to confirm the boundary line accordingly. (See sketch-map No. 2: The maritime boundary lines claimed by Peru and Chile respectively.)

Peru also argues that, beyond the point where the common maritime boundary ends, it is entitled to exercise exclusive sovereign rights over a maritime area lying out to a distance of 200 nautical miles from its baselines. (This maritime area is depicted on sketch-map No. 2 in a darker shade of blue.) Chile responds that Peru has no entitlement to any maritime zone extending to the south of the parallel of latitude along which, as Chile maintains, the international maritime boundary runs.

IV. Whether there is an agreed maritime boundary (paras. 24–151)

In order to settle the dispute before it, the Court must first ascertain whether an agreed maritime boundary exists, as Chile claims.

1. The 1947 Proclamations of Chile and Peru (paras. 25–44)

The Court begins by examining the 1947 Proclamations, whereby Chile and Peru unilaterally proclaimed certain maritime rights extending 200 nautical miles from their respective coasts. Noting that the Parties are in agreement that the 1947 Proclamations do not themselves establish an international maritime boundary, the Court considers them only for the purpose of ascertaining whether those texts represent evidence of the Parties' understanding as far as the establishment of a future maritime boundary between them is concerned. The Court notes that the language of the 1947 Proclamations, as well as their provisional nature, precludes an interpretation of them as reflecting a shared understanding of the Parties concerning maritime delimitation. At the same time, the Court observes that the Parties' 1947 Proclamations contain similar claims concerning their rights and jurisdiction in the maritime zones, giving rise to the necessity of establishing the lateral limits of these zones in the future.

2. The 1952 Santiago Declaration (paras. 45–70)

Turning to the 1952 Santiago Declaration, the Court observes that it is no longer contested that this instrument is an international treaty. The Court's task is to ascertain whether it established a maritime boundary between the Parties. In order to do so, the Court applies the rules of interpretation recognized under customary international law, as reflected in the Vienna Convention on the Law of Treaties. The Court first considers the ordinary meaning to be given to the terms of the 1952 Santiago Declaration in their context. It notes that the Declaration does not make express reference to the delimitation of maritime boundaries of the zones generated by the continental coasts of its States parties. It nonetheless observes that the Santiago Declaration contains certain elements which are relevant to the issue of maritime delimitation. But, having examined the relevant paragraphs of the Declaration, the Court concludes that they go no further than establishing the Parties' agreement concerning the limits between certain insular maritime zones and those zones generated by the continental coasts which abut such insular maritime zones.

The Court then considers the object and purpose of the 1952 Santiago Declaration, observing that the Preamble focuses on the conservation and protection of the Parties' natural resources for the purposes of economic development, through the extension of their maritime zones.

The Court adds that it does not need, in principle, to resort to supplementary means of interpretation, such as the *travaux préparatoires* of the 1952 Santiago Declaration and the circumstances of its conclusion, to determine the meaning of that Declaration. Nevertheless, it has, as in other cases, considered the relevant material, which confirms the above interpretation of the Declaration.

The Court, however, notes that various elements, such as the original Chilean proposal presented to the 1952 Conference (which appeared intended to effect a general delimitation of the maritime zones along lateral lines), and the use of the parallel as the limit of the maritime zone of an island of one State party located less than 200 nautical miles from the general maritime zone of another State party, suggest that there might have been some sort of shared understanding among the States parties of a more general nature concerning their maritime boundaries.

The Court concludes that, contrary to Chile's submission, the 1952 Santiago Declaration did not establish a lateral maritime boundary between Peru and Chile along the line of latitude running into the Pacific Ocean from the seaward terminus of their land boundary.

3. The various 1954 Agreements (paras. 71–95)

The Court next considers agreements adopted by Peru and Chile in 1954, and which Chile invokes in support of its claim that the parallel of latitude constitutes the maritime boundary.

Among the 1954 Agreements, Chile emphasizes, in particular, the Complementary Convention to the 1952 Santiago Declaration, the Agreement relating to Measures of Supervision and Control of the Maritime Zones of the Signatory Countries and the Special Maritime Frontier Zone Agreement. The Court observes that it is common ground that the proposed Complementary Convention was the main instrument addressed by Chile, Ecuador and Peru as they prepared for the South Pacific Permanent Commission meeting and the Inter-State Conference in Lima in the final months of 1954. Given the challenges being made by several States to the 1952 Santiago Declaration, the primary purpose of that Convention was for Chile, Ecuador and Peru to assert, particularly against the major maritime powers, their claim of sovereignty and jurisdiction, made jointly in 1952, to a minimum distance of 200 nautical miles from their coasts. It was also designed to help prepare their common defence of the claim against the protests by those States. In the view of the Court, it does not follow, however, that the "primary purpose" was the sole purpose or even less that the primary purpose determined the sole outcome of the 1954 meetings and the Inter-State Conference.

Chile further seeks support from another of the 1954 Agreements, the Agreement relating to Measures of Supervision and Control of the Maritime Zones of the Signatory Countries. The Court, however, concludes that that text gives no indication as to the location or nature of boundaries of the zones.

The Court then turns to the 1954 Special Maritime Frontier Zone Agreement, signed by Chile, Ecuador and Peru, which established a zone of tolerance, starting at a distance of 12 nautical miles from the coast, "of 10 nautical miles on either side of the parallel which constitutes the maritime boundary". That Zone was intended to benefit small and ill-equipped vessels, in order to avoid "friction between the countries concerned" as a result of inadvertent violations of the maritime frontier by those vessels. The Court first notes that there is nothing at all in the terms of the said Agreement which would limit it only to the Ecuador–Peru maritime boundary. It further observes that Chile's delay in ratifying that Agreement and submitting it for registration has no bearing on its scope and effect. Once ratified by Chile, the Agreement became binding on it.

Finally, the Court states that, although the operative terms and purpose of the 1954 Special Maritime Frontier Zone Agreement are narrow and specific, that is not the matter under consideration at this stage. Rather, the Court's focus is on one central issue, namely, the existence of a maritime boundary. On that issue, the Court notes that the terms of the 1954 Special Maritime Frontier Zone Agreement, especially Article 1 read together with the preambular paragraphs, are clear: they acknowledge in a binding international agreement that a maritime boundary already exists.

The Court, however, observes that the 1954 Special Maritime Frontier Zone Agreement does not indicate when and by what means that boundary was agreed upon. It therefore considers that the Parties' express acknowledgment of the existence of a maritime boundary can only reflect a tacit agreement which they had reached earlier. In this connection, the Court recalls, as it already mentioned, that certain elements of the 1947 Proclamations and the 1952 Santiago Declaration suggested an evolving understanding between the Parties concerning their maritime boundary. In an earlier case, the Court, recognizing that "the establishment of a permanent maritime boundary is a matter of grave importance", underlined that "evidence of a tacit legal agreement must be compelling" (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (*Nicaragua* v. *Honduras*), *Judgment, I.C.J. Reports 2007 (II)*, p. 735, para. 253). In the present case, the Court has before it an Agreement which makes clear that the maritime boundary along a parallel already existed between the Parties. The 1954 Agreement is decisive in this respect. That Agreement cements the tacit agreement.

The Court further notes that the 1954 Special Maritime Frontier Zone Agreement gives no indication of the nature of the maritime boundary. Nor does it indicate its extent, except that its provisions make it clear that the maritime boundary extends beyond 12 nautical miles from the coast.

The Court then recalls that the Parties also referred, in this context, to an Opinion prepared in 1964 in which Mr. Raúl Bazán Dávila, Head of the Legal Advisory Office of the Chilean Ministry of Foreign Affairs, examined the question whether some specific agreement on maritime delimitation existed between the two States. The Court considers that nothing in the Opinion prepared by Mr. Bazán, in response to a request from the Chilean Boundaries Directorate regarding "the delimitation of the frontier between the Chilean and Peruvian territorial seas", or the fact that such an Opinion was requested in the first place, leads it to alter its conclusion, namely, that by 1954 the Parties acknowledged that there existed an agreed maritime boundary.

4. The 1968–1969 lighthouse arrangements (paras. 96–99)

The Court next examines arrangements the Parties entered into in 1968–1969 to build one lighthouse each, "at the point at which the common border reaches the sea, near boundary marker number one". The Court is of the opinion that the purpose and geographical scope of these arrangements were limited, as indeed the Parties recognize. It further observes that the record of the process leading to the arrangements and the building of the lighthouses does not refer to any pre-existent delimitation agreement. What is important in the Court's view, however, is that the arrangements proceed on the basis that a maritime boundary extending along the parallel beyond 12 nautical miles already exists. Along with the 1954 Special Maritime Frontier Zone Agreement, the arrangements acknowledge that fact. Also, like that Agreement, they do not indicate the extent and nature of that maritime boundary.

5. The nature of the agreed maritime boundary (paras. 100–102)

Having found that the Parties acknowledged the existence of a maritime boundary, the Court must determine its nature, that is, whether it is a single maritime boundary applicable to the water column, the sea-bed and its subsoil, or a boundary applicable only to the water column. The Court points out that the tacit agreement, which had been acknowledged in the 1954 Special Maritime Frontier Zone Agreement, must be understood in the context of the 1947 Proclamations and the 1952 Santiago Declaration. It notes that these instruments expressed claims to the sea-bed and to waters above the sea-bed and their resources and that, in this regard, the Parties drew no distinction, at that time or subsequently, between these spaces. The Court therefore concludes that the boundary is an all-purpose one.

6. The extent of the agreed maritime boundary (paras. 103–151)

The Court then comes to the determination of the extent of the agreed maritime boundary. In order to do so, it examines in turn the relevant practice of the Parties in the early and mid-1950s, as well as the wider context, including developments in the law of the sea at that time. It also assesses further elements of practice, for the most part subsequent to 1954.

Starting with fishing potential and activity, the Court recalls that the purpose of the 1954 Special Maritime Frontier Zone Agreement was narrow and specific: it refers to the existing maritime boundary for a particular purpose, namely to establish a zone of tolerance for fishing activity operated by small vessels. Consequently, it must be considered that the maritime boundary whose existence it recognizes, along a parallel, necessarily extends at least to the distance up to which, at the time under review, such activity took place.

In that context, the Court observes that the information referred to by the Parties shows that the species which were being taken in the early 1950s were generally to be found within a range of 60 nautical miles from the coast. It also takes note of the orientation of the coast in this region, and the location of the most important relevant ports of the Parties at the time.

The Court recalls that the purpose of the 1954 Special Maritime Frontier Zone Agreement was to establish a zone of tolerance along the parallel for small fishing boats, which were not sufficiently equipped. Boats departing from Arica (a Chilean port situated just 15 km to the south of the seaward terminus of the land boundary) to catch the above-mentioned species, in a west-north-west direction, in the range of 60 nautical miles from the coast, which runs essentially from north to south at this point, would not cross the parallel beyond a point approximately 57 nautical miles from the starting-point of the maritime boundary. The orientation of the coast turns sharply to the north-west in this region (see sketch-maps Nos. 1 and 2), such that, on the Peruvian side, fishing boats departing seaward from Ilo (a port situated about 120 km north-west of the seaward terminus of the land boundary), in a south-west direction, to the range of those same species would cross the parallel of latitude at a point up to approximately 100 nautical miles from the starting-point of the maritime boundary.

The Court states that it does not see as of great significance the Parties' knowledge of the likely or possible extent of the marine resources out to 200 nautical miles nor the extent of their fishing in later years. The catch figures indicate that the principal maritime activity in the early 1950s was fishing undertaken by small vessels, such as those specifically mentioned in the 1954 Special Maritime Frontier Zone Agreement and which were also to benefit from the 1968–1969 arrangements relating to the lighthouses.

The Court furthermore recalls that the all-purpose nature of the maritime boundary means that evidence concerning fisheries activity, in itself, cannot be determinative of the extent of that boundary. Nevertheless, the fisheries activity provides some support for the view that the Parties, at the time when they acknowledged the existence of an agreed maritime boundary between them, were unlikely to have considered that it extended all the way to the 200-nautical-mile limit.

The Court then moves from the specific, regional context to the broader context as it existed in the 1950s, at the time of the acknowledgment by the Parties of the existence of the maritime boundary. That context is provided by the State practice, as well as by related studies in, and proposals coming from, the International Law Commission and reactions by States or groups of States to those proposals concerning the establishment of maritime zones beyond the territorial sea and the delimitation of those zones. The Court observes that, during the period under consideration, the proposal in respect of the rights of a State over its waters which came nearest to general international acceptance was for a 6-nautical-mile territorial sea with a further fishing zone of 6 nautical miles and some reservation of established fishing rights. As the Court has noted previously, in this period the concept of an exclusive economic zone of 200 nautical miles was "still some long years away" (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 87, para. 70), while its general acceptance in practice and in the 1982 United Nations Convention on the Law of the Sea (UNCLOS) was about 30 years into the future. Furthermore, the Court recalls that, in answering a question from a Member of the Court, both Parties recognized that their claim made in the 1952

Santiago Declaration did not correspond to the international law of that time and was not enforceable against third parties, at least not initially.

On the basis of the fishing activities of the Parties at that time, which were conducted up to a distance of some 60 nautical miles from the main ports in the area, the relevant practice of other States and the work of the International Law Commission on the Law of the Sea, the Court considers that the evidence at its disposal does not allow it to conclude that the agreed maritime boundary along the parallel extended beyond 80 nautical miles from its starting-point.

In light of this tentative conclusion, the Court examines further elements of practice, for the most part subsequent to 1954, which may be of relevance to the issue of the extent of the agreed maritime boundary. The Court first turns to the legislative practice of the Parties before examining the 1955 Protocol of Accession to the 1952 Santiago Declaration and enforcement activities, concerning vessels of third States as well as involving Peru and Chile. The Court then analyses the 1968–1969 lighthouse arrangements and the record of the negotiations entered into by Chile with Bolivia in 1975–1976 regarding a proposed exchange of territory that would provide Bolivia with a "corridor to the sea" and an adjacent maritime zone. The Court also considers the positions of the Parties at the Third United Nations Conference on the Law of the Sea, a memorandum sent by Peruvian Ambassador Bákula to the Chilean Ministry of Foreign Affairs on 23 May 1986—calling for "the formal and definitive delimitation of the marine spaces"—and the Parties' practice after 1986.

The Court finds that the elements which it has reviewed do not lead it to change its earlier tentative conclusion. Therefore, based on an assessment of the entirety of the relevant evidence presented to it, the Court concludes that the agreed maritime boundary between the Parties extended to a distance of 80 nautical miles along the parallel from its starting-point.

V. The starting-point of the agreed maritime boundary (paras. 152–176)

Having concluded that there exists a maritime boundary between the Parties, the Court must identify the location of the starting-point of that boundary. It recalls that both Parties agree that the land boundary between them was settled and delimited more than 80 years ago in accordance with Article 2 of the 1929 Treaty of Lima, which specifies that "the frontier between the territories of Chile and Peru … shall start from a point on the coast to be named 'Concordia', ten kilometres to the north of the bridge over the river Lluta". The Court further recalls that, in accordance with Article 3 of the 1929 Treaty of Lima, the boundary was demarcated by a Mixed Commission, the first marker along the physical demarcation of the land boundary being Boundary Marker No. 1. The Parties, however, disagree on the exact location of Point Concordia. While Peru maintains that Boundary Marker No. 1 was not intended to mark the start of the agreed land boundary, Chile claims this marker is the starting-point of the land boundary. In this regard, the Court observes that a considerable number of the arguments presented by the Parties concern an issue which is clearly not before it, namely, the location of the starting-point of the land boundary identified as "Concordia" in Article 2 of the 1929 Treaty of Lima. It recalls that its task is to ascertain whether the Parties have agreed to any starting-point of their maritime boundary and that its jurisdiction to deal with the issue of the maritime boundary is not contested.

In order to determine the starting-point of the maritime boundary, the Court considers the record of the process leading to the 1968–1969 lighthouse arrangements and certain cartographic evidence presented by the Parties, as well as evidence submitted in relation to fishing and other maritime practice in the region. Considering that the two latter elements are not relevant to the issue, the Court focuses on the 1968–1969 lighthouse arrangements. It is of the view that the maritime boundary which the Parties intended to signal with the lighthouse arrangements was constituted by the parallel passing through Boundary Marker No. 1 and notes that both Parties subsequently built the lighthouses as agreed, thus signalling the parallel passing through Boundary Marker No. 1. The 1968–1969 lighthouse arrangements therefore serve as compelling evidence that the agreed maritime boundary follows the parallel that passes through Boundary Marker No. 1.

Pointing out that it is not called upon to take a position as to the location of Point Concordia, where the land frontier between the Parties starts, the Court notes that it could be possible for the aforementioned point not to coincide with the starting-point of the maritime boundary, as it was just defined. The Court observes, however, that such a situation would be the consequence of the agreements reached between the Parties.

The Court concludes that the starting-point of the maritime boundary between the Parties is the intersection of the parallel of latitude passing through Boundary Marker No. 1 with the low-water line.

VI. The course of the maritime boundary from Point A (paras. 177–195)

Having concluded that an agreed single maritime boundary exists between the Parties, and that that boundary starts at the intersection of the parallel of latitude passing through Boundary Marker No. 1 with the low-water line, and continues for 80 nautical miles along that parallel (to Point A), the Court turns to the determination of the course of the maritime boundary from that point on.

The Court proceeds on the basis of the provisions of Articles 74, paragraph 1, and 83, paragraph 1, of UNCLOS which, as it has recognized, reflect customary international law (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 91, para. 167; *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 674, para. 139). The texts of these provisions are identical, the only difference being that Article 74 refers to the exclusive economic zone and Article 83 to the continental shelf. They read as follows:

> "The delimitation of the exclusive economic zone [continental shelf] between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of

the International Court of Justice, in order to achieve an equitable solution."

The Court recalls that the methodology which it usually employs in seeking an equitable solution involves three stages. In the first, it constructs a provisional equidistance line unless there are compelling reasons preventing that. At the second stage, it considers whether there are relevant circumstances which may call for an adjustment of that line to achieve an equitable result. At the third stage, the Court conducts a disproportionality test, in which it assesses whether the effect of the line, as adjusted, is such that the Parties' respective shares of the relevant area are markedly disproportionate to the lengths of their relevant coasts (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, pp. 101–103, paras. 115–122; *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, pp. 695–696, paras. 190–193).

In the present case, the delimitation of the maritime area must begin at the endpoint of the agreed maritime boundary which the Court has determined is 80 nautical miles long (Point A). Referring to its case law, the Court explains that, in practice, a number of delimitations begin not at the low-water line but at a point further seaward, as a result of a pre-existing agreement between the parties. The situation the Court faces here is, however, unusual in that the starting-point for the delimitation in this case is much further from the coast: 80 nautical miles from the closest point on the Chilean coast and about 45 nautical miles from the closest point on the Peruvian coast.

The Court then proceeds with the first step of its usual methodology and constructs a provisional equidistance line which starts at the endpoint of the existing maritime boundary (Point A). In order to construct such a line, the Court first selects appropriate base points. In view of the location of Point A at a distance of 80 nautical miles from the coast along the parallel, the nearest initial base point on the Chilean coast is situated near the starting-point of the maritime boundary between Chile and Peru, and on the Peruvian coast at a point where the arc of a circle with an 80-nautical-mile radius from Point A intersects with the Peruvian coast. For the purpose of constructing a provisional equidistance line, only those points on the Peruvian coast which are more than 80 nautical miles from Point A can be matched with points at an equivalent distance on the Chilean coast. The arc of a circle indicated on sketch-map No. 3 is used to identify the first Peruvian base point. Further base points for the construction of the provisional equidistance line have been selected as the most seaward coastal points "situated nearest to the area to be delimited" (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 101, para. 117). These base points are situated to the north-west of the initial base point on the Peruvian coast and south of the initial base point on the Chilean coast. No points on the Peruvian coast which lie to the south-east of that initial point on that coast can be matched with points on the Chilean coast, as they are all situated less than 80 nautical miles from Point A (see sketch-map No. 3: Construction of the provisional equidistance line).

The provisional equidistance line thus constructed runs in a general south-west direction, almost in a straight line, reflecting the smooth character of the two coasts, until it reaches the 200-nautical-mile limit measured from the Chilean baselines (Point B). Seaward of this point the 200-nautical-mile projections of the Parties' coasts no longer overlap.

Before continuing the application of the usual methodology, the Court recalls that, in its second submission, Peru requested it to adjudge and declare that, beyond the point where the common maritime boundary ends, Peru is entitled to exercise sovereign rights over a maritime area lying out to a distance of 200 nautical miles from its baselines (this claim is in relation to the area in a darker shade of blue in sketch-map No. 2). Chile in response contends that the 1952 Santiago Declaration establishes a single lateral limit for all maritime areas of its States parties whether actual or prospective, invoking the reference in paragraph II of the Declaration to "a minimum distance of 200 nautical miles". Since the Court has already concluded that the agreed boundary line along the parallel of latitude ends at 80 nautical miles from the coast, the foundation for the Chilean argument does not exist. Moreover, since the Court has decided that it will proceed with the delimitation of the overlapping maritime entitlements of the Parties by drawing an equidistance line, Peru's second submission has become moot and the Court need not rule on it.

Resuming the application of its usual methodology, the Court recalls that, seaward of Point B, the 200-nautical-mile limits of the Parties' maritime entitlements delimited on the basis of equidistance no longer overlap. It observes that, from Point B, the 200-nautical-mile limit of Chile's maritime entitlement runs in a generally southward direction. The final segment of the maritime boundary proceeds from Point B to Point C, where the 200-nautical-mile limits of the Parties' maritime entitlements intersect.

The Court must then determine, at the second stage of its usual methodology, whether there are any relevant circumstances calling for an adjustment of the provisional equidistance line, with the purpose, it must always be recalled, of achieving an equitable result. In the present case, the equidistance line avoids any excessive amputation of either State's maritime projections and no relevant circumstances appear in the record before the Court. There is accordingly no basis for adjusting the provisional equidistance line.

The next and third step is to determine whether the provisional equidistance line drawn from Point A produces a result which is significantly disproportionate in terms of the lengths of the relevant coasts and the division of the relevant area. The purpose is to assess the equitable nature of the result.

As the Court noted earlier, the existence of an agreed line running for 80 nautical miles along the parallel of latitude presents it with an unusual situation. The existence of that line would make difficult, if not impossible, the calculation of the length of the relevant coasts and of the extent of the relevant area, were the usual mathematical calculation of the proportions to be undertaken. The Court recalls that in some instances in the past, because of the practical difficulties arising from the particular circumstances of the case, it has not

undertaken that calculation. It more recently observed that, in this final phase of the delimitation process, the calculation does not purport to be precise and is approximate; "[t]he object of delimitation is to achieve a delimitation that is equitable, not an equal apportionment of maritime areas" (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 100, para. 111). In such cases, the Court engages in a broad assessment of disproportionality. Given the unusual circumstances of the present case, the Court follows the same approach here and concludes that no significant disproportion is evident, such as would call into question the equitable nature of the provisional equidistance line.

The Court accordingly concludes that the maritime boundary between the two Parties from Point A runs along the equidistance line to Point B, and then along the 200-nautical-mile limit measured from the Chilean baselines to Point C (see sketch-map No. 4: Course of the maritime boundary).

VII. Conclusion (paras. 196–197)

The Court concludes that the maritime boundary between the Parties starts at the intersection of the parallel of latitude passing through Boundary Marker No. 1 with the low-water line, and extends for 80 nautical miles along that parallel of latitude to Point A. From this point, the maritime boundary runs along the equidistance line to Point B, and then along the 200-nautical-mile limit measured from the Chilean baselines to Point C.

In view of the circumstances of the case, the Court has defined the course of the maritime boundary between the Parties without determining the precise geographical co-ordinates. Moreover, the Court has not been asked to do so in the Parties' final submissions. The Court expects that the Parties will determine these co-ordinates in accordance with the Judgment, in the spirit of good neighbourliness.

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Declaration of President Tomka

President Tomka concurs with the Court's finding that the single maritime boundary between Peru and Chile starts at the intersection of the parallel of latitude passing through Boundary Marker No. 1 with the low-water line. He also agrees that the single maritime boundary follows that parallel of latitude. However, he parts company with his ten colleagues when they decided that this agreed boundary stops at a distance of 80 nautical miles from its starting-point. Consequently, he is unable to support the Court's drawing of the maritime boundary *de novo* from that point onwards.

President Tomka begins by noting that in the 1954 Agreement Relating to a Special Maritime Frontier Zone, the Parties did not establish the maritime boundary between them but clearly recognized that such boundary had already existed. He does not regard the Parties' practice under that Agreement as relevant in determining the extent of the maritime boundary, and considers that that boundary extends to a distance corresponding to that which the Parties maintained in their claims to maritime zones, namely 200 nautical miles. The Court's Judgment closes the special maritime zone established under the 1954 Agreement at a distance of 80 nautical miles from the coast. However, while the Parties set the eastern, southern and northern limits on this zone, they deliberately chose not to set a western limit. He concludes that this zone was intended to extend seaward along the parallel up to the limit of the Parties' claimed maritime entitlements.

President Tomka considers that the text and negotiating history of the 1952 Santiago Declaration, as well as the domestic acts of the Parties in formulating their maritime claims, support the conclusion that the agreed maritime boundary extended to 200 nautical miles. Moreover, he considers that one can conclude from discussions during the 1954 Lima Conference that the Parties agreed to confirm that the 1952 Declaration was adopted on the understanding that the parallel beginning where their land frontier reaches the sea constituted the line dividing their claimed maritime zones. The drafting and *travaux préparatoires* of the 1954 Agreement on a Special Zone support the existence of this maritime boundary, while the 1955 Supreme Resolution of Peru also implies that the boundary line would follow the parallel.

In conclusion, President Tomka is of the view that the Parties considered that the 1952 Declaration settled issues relating to the delimitation of their maritime zones. He regards the Declaration not as the actual legal source of that settlement, but as evidence of the recognition of such settlement by the Parties. While the Declaration did not expressly establish the parallel as the maritime boundary between the Parties, President Tomka considers that the Minutes of the 1954 Lima Conference and the resulting Agreement on a Special Zone are to be taken into account in its interpretation. Paragraph IV of the Declaration assumes the existence of a general maritime frontier, and the Parties seem to have regarded this issue as uncontroversial. Importantly, officials of the Parties agreed and declared that the issue of the lateral delimitation of their declared 200-nautical-mile zones was settled and the 1954 Agreement on a Special Zone confirms the existence of the boundary along the parallel.

President Tomka goes on to note that, in his view, some of the evidence referred to by the Court, particularly pertaining to the Humboldt Current, points to the boundary extending well beyond a distance of 80 nautical miles.

In disagreeing with the Court's finding that the agreed boundary stops at a distance of 80 nautical miles from its starting-point at the coast, and consequently with the conclusions as to the boundary's continuation from that point, President Tomka makes clear that he does not take issue with the methodology employed by the Court in constructing the continuation of the boundary line, but rather with the distance at which that boundary departs from the parallel.

Finally, President Tomka, noting that the Court's decision is to be respected, agrees that the Court need not rule on Peru's submission concerning the "outer triangle", this area being part of Peru's exclusive economic zone and continental shelf. In his view, this would have been the result even if the agreed maritime boundary had extended to a distance of 200 nautical miles from the coast.

Declaration of Vice-President Sepúlveda-Amor

In his declaration, Vice-President Sepúlveda-Amor expresses serious reservations with regard to the Court's reasoning in support of the existence of a tacit agreement on maritime delimitation.

Vice-President Sepúlveda-Amor accepts that, in appropriate circumstances, a maritime boundary may be grounded upon tacit agreement. He rejects, however, that the 1954 Special Maritime Frontier Zone Agreement (1954 Agreement) proves the existence of such an agreement in compelling terms.

To Vice-President Sepúlveda-Amor, the inquiry into the possible existence of a tacit agreement on maritime delimitation should have led the Court to undertake a systematic and rigorous analysis of the Parties' conduct well beyond the terms of the 1954 Agreement, for it is only through the scrutiny of years of State practice that an agreed maritime boundary may be discerned. Instead he regrets the analysis of State conduct remains underdeveloped and peripheral to the Court's arguments when it should be at the centre of its reasoning.

He fears the approach adopted by the Court may be interpreted as a retreat from the stringent standard of proof formulated in the case *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)* for the establishment of a permanent maritime boundary.

This is not, however, how the Judgment should be read, as it is not predicated upon a departure from the Court's previous jurisprudence.

Separate opinion of Judge Owada

In his separate opinion, Judge Owada states that, although he has accepted the conclusions contained in the operative paragraphs of the Judgment, he has not been able to associate himself fully with the reasoning which has led the Court to its conclusion regarding the concrete delimitation of the single maritime boundary between Peru and Chile.

Judge Owada endorses the Judgment's rejection of Chile's position that the respective maritime zone entitlements of Chile and Peru have been fully delimited by agreement, and further supports the Judgment's rejection of Peru's position that the maritime zones between Chile and Peru have never been delimited by agreement or otherwise. Judge Owada states, however, that he has serious reservations with the finding of the Court that the 1954 Agreement Relating to a Special Maritime Frontier Zone ("1954 Agreement") demonstrates that the Parties acknowledged the existence of an agreement between them delimiting the zones of their respective maritime entitlements along the parallel of latitude passing through Boundary Marker No. 1. In Judge Owada's view, to reach this conclusion the Judgment has to establish (1) that there has been some new legal fact (acts/omissions) on the part of the Parties that legally created such an agreement, and (2) that this boundary extends only to a distance of 80 nautical miles, beyond which there does not exist any delimited maritime boundary accepted by the Parties. Judge Owada submits that the present Judgment does not seem to have substantiated these points with sufficiently convincing supporting evidence.

Judge Owada disagrees with the Judgment's conclusion that the language of the 1954 Agreement is "clear" in acknowledging that a maritime boundary already exists. Judge Owada fails to see how the provisions of the 1954 Agreement can be said to be so "clear" as to justify this conclusion. Judge Owada notes that the crucial words in Article 1 of the 1954 Agreement state that "[a] special zone is hereby established … extending to a breadth of 10 nautical miles on either side of *the parallel which constitutes the maritime boundary between the two countries*" (emphasis added). Judge Owada states that this language, in its plain meaning, does not, as such and without additional evidence, warrant the existence of a tacit agreement establishing such a boundary for all purposes between the Parties. Judge Owada recalls that the Court has previously stated in the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* case that "[e]vidence of a tacit legal agreement must be *compelling*. The establishment of a permanent maritime boundary is a matter of grave importance and agreement is not easily to be presumed." (Emphasis added.) It is Judge Owada's view that this stringent standard is not met in the present case.

Turning to the *travaux préparatoires* of the 1954 Agreement, Judge Owada notes that the 1954 Agreement had its origin in a paper jointly submitted by the delegates of Ecuador and Peru which referred to the creation of a neutral zone on either side of "the parallel which passes through the point of the *coast* that signals the boundary between the two countries" (emphasis added). Judge Owada states that this language suggests what the drafters were indicating was the land boundary between the countries concerned. Judge Owada further notes that the language was amended to its present form upon the urging of the Ecuadorian delegate to the Conference on the Exploitation and Conservation of the Maritime Resources of the South Pacific, who proposed that "the concept already declared in Santiago that the parallel starting at the boundary point on the coast constitutes the maritime boundary between the neighbouring signatory countries, [be] incorporated into this article". According to Judge Owada, this indicates that the language of Article 1 of the 1954 Agreement was drafted reflecting the perception of the delegate of Ecuador that what he was proposing was no more than what had already been "declared in Santiago" in 1952. Judge Owada points out, however, that as the Judgment correctly concluded, the 1952 Santiago Declaration had *not* declared that the parallel starting at the boundary point on the coast constituted a maritime boundary.

Judge Owada adds that the 1968–1969 lighthouses arrangements similarly do not provide "compelling" evidence of the existence of a tacit agreement establishing an all-purpose maritime boundary. According to Judge Owada, these arrangements are no more than a logical follow-up of the 1954 Agreement, and add nothing more (or less) to what the 1954 Agreement prescribes (or does not prescribe) about the nature of the parallel as a line of maritime demarcation.

Consequently, Judge Owada states that, in his view, the Judgment has failed to show that a tacit agreement between the Parties on an all-purpose maritime boundary extending along the parallel came to exist on the basis of some legal acts or omissions of the Parties subsequent to the 1952 Santiago Declaration, but prior to the 1954 Agreement.

Judge Owada also raises the question of how far the alleged maritime boundary should extend. He notes that if, as the Judgment assumes, the Parties had come to accept the parallel of latitude as the definitive maritime boundary line for all purposes, then there should be no reason to think that this line should terminate at a distance of 80 nautical miles from the starting-point, rather than extending to the maximum of 200 nautical miles. Judge Owada points out that the Judgment acknowledges that "the all-purpose nature of the maritime boundary … means that evidence concerning fisheries activity, in itself, cannot be determinative of the extent of that boundary".

If, on the contrary, one starts from the premise that this boundary should stop at some point less than 200 nautical miles for the reason that the real situation on the ground relating to the actual fishing activities extended only to a certain point, then, Judge Owada argues, the rationale for relying upon that distance has to be based on the legal nature of the line not as an all-purpose maritime boundary, but rather as a line for the specific purposes of creating the regulatory régime for fisheries. According to Judge Owada, the Judgment cannot escape this dilemma created by its own reasoning, as long as the Judgment is based on the presumed (but not proven) existence of a tacit agreement on the permanent maritime boundary.

Judge Owada writes that instead of basing its reasoning for the existence of a line of demarcation on the acknowledgment of a tacit agreement on a maritime boundary of an all-purpose nature, the Judgment should base itself on a slightly modified legal reasoning along the following lines:

(1) The Court should reject, as the present Judgment does, Chile's contention that the 1952 Santiago Agreement constitutes an agreement to recognize and accept a maritime boundary line along the parallel of latitude.

(2) The practice of the States involved in the field of exercising national jurisdiction in the sea, in particular, relating to the fishing activities of Chile and Peru in the region, which gradually emerged in the years through the Santiago Declaration and beyond, as reflected in the 1954 Agreement and the 1968–1969 lighthouses arrangements, demonstrates the gradual emergence of a tacit understanding among the Parties to accept some jurisdictional delimitation of the area of national competence in the sea along the line of latitude, especially for the purposes of the regulation of fisheries. This acceptance of the zoning of maritime areas developed *de facto* specifically in the lateral direction to enclose sea areas belonging to each of the Parties for the purposes of fishing activities. The process of this tacit acceptance through State practice developed apparently without taking the form of an agreement, tacit or express, between the Parties, and came to be reflected in the form of a *de facto* delimitation of the maritime boundary along the coasts of Peru and Chile.

(3) It is not possible nor necessary to pinpoint when and how this tacit acceptance crystallized into a normative rule that the Parties came to recognize as constituting the legal delimitation of their respective zones of maritime entitlement.

(4) The 1954 Agreement thus cannot be considered an agreement which *de novo* created a new maritime zone boundary, nor did the 1954 Agreement purport to acknowledge an existing tacit agreement for the maritime zone delimitation that would have definitively defined the limits of the Parties' maritime jurisdiction for all purposes.

(5) The 1954 Agreement nonetheless has had an important legal significance in the process of consolidating the legal title based on tacit acceptance through practice.

(6) Because the tacit acceptance was based in its origin on State practice at that time, it is thus limited to the extent of the actual fishing activities conducted by the coastal fishermen of the two States involved. The precise distance out to sea to which the sea area belonging to the two States was delimited between them has to be determined primarily in light of these fishing activities. Taking into account the predominant pattern of fishing activities by Peru and Chile in the relevant period, the reasonable geographic limit in which such activities could be presumed to have been in operation would seem to be within the distance of 50 nautical miles from the respective coasts of Peru and Chile. When the *distance* from the coast is translated into the *length* of the line of parallel of latitude, this line corresponds to roughly 80 nautical miles from the point where the land boundary between Peru and Chile meets the sea.

Judge Owada is therefore prepared to accept the figure of 80 nautical miles as the length of the parallel line to be drawn from the starting-point where the land boundary between the two countries reaches the sea as most faithfully reflecting the reality of State practice as primarily reflected in the fishing activities of the region in those days.

Judge Owada adds that, on the basis of this analysis, the argument based on the consideration of equitable allocation of the entire sea area in dispute between the two contending States should have no place in the Court's consideration of the problem of how far this line of parallel of latitude should extend.

Declaration of Judge Skotnikov

Judge Skotnikov has voted in favour of the Court's conclusions set forth in the operative clause. However, he does not agree with the Court's treatment of the issue of the extent of the maritime boundary between Peru and Chile.

Judge Skotnikov supports the Court's conclusion that, prior to the signing of the 1954 Special Maritime Frontier Zone Agreement, there was a tacit agreement between the Parties concerning a maritime boundary between them along the parallel running through the point at which their land frontier reaches the sea. He agrees that the 1954 Special Maritime Frontier Zone Agreement, which acknowledged the existence of the tacit agreement, did leave some uncertainty as to the precise extent of the maritime boundary. In his opinion, the Court could have dealt with this in the same manner that it resolved the issue of whether the maritime boundary is all-purpose in nature, namely, within the context of the 1947 Proclamations and the 1952 Santiago Declaration. Judge Skotnikov regrets that the Court has instead considered the issue of the extent of the maritime boundary outside this context.

Judge Skotnikov is unconvinced by the Court's argument that the state of general international acceptance concerning a State's maritime entitlements during the 1950s indicates that the Parties were unlikely to have established their maritime boundary running to a distance of 200 nautical miles. He notes that the 1947 Proclamations and the 1952 Santiago Declaration demonstrate that the Parties were willing to make maritime claims which did not enjoy widespread contemporaneous international acceptance.

Judge Skotnikov is equally unconvinced by the Court's treatment of the various practices, such as fisheries and enforcement activities, as largely determinative of the extent of the agreed maritime boundary. He fails to see how the extent of an all-purpose maritime boundary can be determined by the Parties' extractive and enforcement capacity at the time of the signing of the 1954 Agreement, which merely acknowledged the existing maritime boundary.

Even if one follows the line of reasoning adopted by the Court, Judge Skotnikov points out that the determination of the figure of 80 nautical miles as the extent of the agreed maritime boundary does not seem to be supported by the evidence which the Court finds relevant. Some such evidence supports an agreed maritime boundary of at least 100 nautical miles.

However, Judge Skotnikov concludes that given that the Parties' treatment of the extent of the agreed maritime boundary lacks the clarity which would have been expected, it has been possible for him to join the majority in voting in favour of the third operative paragraph.

Joint dissenting opinion of Judges Xue, Gaja, Bhandari and Judge *ad hoc* Orrego Vicuña

In their joint dissenting opinion, Judges Xue, Gaja, Bhandari and Judge *ad hoc* Orrego Vicuña take the view that the text of paragraph IV of the 1952 Declaration on the Maritime one (the Santiago Declaration) implies that the parallel that passes through the point where the land frontier reaches the sea represents the lateral boundary between the maritime zones of the Parties generated by their continental coasts. On the basis of the Parties' maritime claims as stated in the Santiago Declaration, this boundary extends to 200 nautical miles. Some subsequent agreements concluded between the Parties confirm this interpretation of the Santiago Declaration, in particular the 1954 Agreement relating to a Special Maritime Frontier Zone (the 1954 Agreement), the 1955 Protocol of Accession to the Declaration on "Maritime Zone" of Santiago (the 1955 Protocol) and the 1968 agreement on the installation of lighthouses between Peru and Chile (the 1968 agreement).

The four judges first point out that the Santiago Declaration is a treaty and that it has been accepted as such by the parties. Paragraph IV of the Declaration states:

> "In the case of island territories, the zone of 200 nautical miles shall apply to the entire coast of the island or group of islands. If an island or group of islands belonging to one of the countries making the declaration is situated less than 200 nautical miles from the general maritime zone belonging to another of those countries, the maritime zone of the island or group of islands shall be limited by the parallel at the point at which the land frontier of the States concerned reaches the sea."

The judges observe that under paragraph IV the criterion for delimiting one general maritime zone from another such zone has not been explicitly set forth. However, when paragraph IV refers to an island or a group of islands at a distance less than 200 nautical miles from the general maritime zone of another State, it implies that some criterion has also been adopted for delimiting that general maritime zone, because it would otherwise be impossible to know whether an island or a group of islands is situated at less than 200 nautical miles from that zone.

Recalling the fundamental rule of treaty interpretation that every term of a treaty should be given meaning and effect in light of the object and purpose of the treaty, the judges underscore that the phrases in this paragraph referring to "the general maritime zone belonging to another of those countries" and determining that the maritime zone of islands "shall be limited by the parallel at the point at which the land frontier of the States concerned reaches the sea" have a direct bearing on the islands' entitlement as well as on the lateral boundaries between the general maritime zones of the parties.

The judges also find support for their conclusion in the minutes of the Juridical Affairs Committee of the Santiago Conference, which record the understanding of the parties to the Santiago Declaration that the respective parallel from the point at which the borders of the countries touches or reaches the sea would mark the lateral boundary between the general maritime zones of the three States.

Moreover, in their opinion, given that the parties publicly proclaimed that they each possessed exclusive sovereignty and jurisdiction over the sea along the continental coasts of their respective countries to a minimum distance of 200 nautical miles from their coasts, and that they provided explicitly in the Santiago Declaration that the islands off their coasts would be entitled to 200 nautical mile maritime zones, it is unpersuasive to draw the conclusion that they could have reached a tacit agreement that their maritime boundary from the coast would only run for 80 nautical miles, which is clearly contrary to their position as stated in the Santiago Declaration.

As regards Peru's argument that its relevant maritime zone was defined on the basis of the "arcs-of-circles" method, the judges review the domestic laws promulgated by the Parties around the time of the Santiago Conference, and conclude that both States arguably employed the method of "tracé parallèle" in determining the scope of their respective general maritime zones. They further point out that even supposing that Peru indeed had the arcs-of-circles method in mind at that time, it would immediately have faced the situation of an overlap between its claim and that of Chile concerning their general maritime zones. There is, however, no single document in the records before the Court showing that this issue was envisaged at the Santiago Conference. In view of all the evidence, the judges observe that Peru did not raise the issue until 1986 and gave expression to the arcs-of-circles method only in its Law on Baselines of 2005.

The judges acknowledge that in 1952 the issue of delimitation between the adjacent States was not given as much attention as the assertion of their 200 nautical mile position towards those States which were hostile to such claims, and that when Peru signed the Santiago Declaration, it could not foresee that the subsequent development of the law of the sea would render the *tracé parallèle* method unfavourable to itself. That issue, however, is a separate matter. They emphasize that what the Court has to decide in this case is whether or not Peru and Chile reached in the Santiago Declaration an agreement on their maritime boundary. The judges further note that while the claims of the parties to the Santiago Declaration for a 200-nautical-mile maritime zone could hardly find a basis in customary international law at the time they were made, a delimitation could be agreed by the three States even with regard to their potential entitlements. This was arguably done by the Santiago Declaration.

With regard to the subsequent agreements, the judges first refer to the 1954 Agreement, which constitutes an integral and supplementary part of the Santiago Declaration. Under the 1954 Agreement, the parties established a special zone of tolerance on each side of the maritime frontier between the adjacent States in which innocent and inadvertent trespasses by small fishing boats would not be penalized.

In the view of the judges, in order to establish such a tolerance zone, the existence of a maritime boundary between the parties was a prerequisite. In identifying the maritime frontier between the parties, paragraph 1 of the 1954 Agreement explicitly refers to "the parallel which constitutes the maritime boundary between the two countries". The definite article "the" before the word "parallel" indicates a pre-existing line as agreed on by the parties. The only relevant agreement on their maritime zones that existed between the parties before 1954 was the Santiago Declaration. Given the context of the 1954 Agreement, the parallel referred to can be no other line than that running through the endpoint of the land boundary, i.e., the parallel identified in the Santiago Declaration.

The judges observe that the 1954 Agreement has a rather limited purpose, only targeting innocent and inadvertent incidents caused by small vessels. It does not provide where, and with regard to what kind of fishing activities, larger vessels of each State party should operate. Logically, ships other than the small boats referred to in the Agreement could fish well beyond the special zone. Moreover, the parties' enforcement activities were not in any way confined by the tolerance zone. In the context of the Santiago Declaration, by no means could the parties to the 1954 Agreement have intended to use the fishing activities of small vessels as a pertinent factor for the determination of the extent of their maritime boundary. Should that have been the case, it would have seriously restrained the potential catching capacity of the parties to the detriment of their efforts to preserve fishing resources within 200 nautical miles, thus contradicting the very object and purpose of the Santiago Declaration.

Consequently, the judges find that, given the object and purpose of the 1954 Agreement, it is rather questionable for the majority of the Court to construe the 1954 Agreement as limiting the maritime boundary to the extent of the inshore fishing activities as of 1954 (assumed to be 80 nautical miles). In their opinion, the 1954 Agreement indicates that the parties had not only delimited the lateral boundary of their maritime zones which extends to 200 nautical miles, but also intended to maintain it. In establishing the special zone, each party committed itself to observe the lateral boundary, which was only confirmed rather than determined by the parties in the 1954 Agreement.

Secondly, the judges consider the 1955 Protocol. They note that when the Santiago Declaration was opened to other Latin-American States for accession, the parties reiterated in the Protocol the basic principles of the Santiago Declaration, but omitted paragraph IV of the Santiago Declaration. In their opinion, the content of the Protocol shows that at the time of the conclusion of the Santiago Declaration, notwithstanding their primary concern with their 200-nautical-mile maritime claims, the parties did have the issue of maritime delimitation in mind, albeit as a less significant question. It also illustrates that the parties did not envisage any general rule applicable to delimitation and that paragraph IV was a context-specific clause, applicable only to the parties to the Santiago Declaration. The judges add that, as a legal instrument adopted by the parties subsequent to the 1954 Agreement, even if it did not enter into force, this Protocol offers an important piece of evidence that disproves any tacit agreement between Peru and Chile that their maritime boundary would run only up to 80 rather than 200 nautical miles along the parallel passing through the point where the land frontier meets the sea.

Finally, the judges turn to the 1968 agreement, according to which Peru and Chile agreed to install two lighthouses at the seashore so as "to materialise the parallel of the maritime frontier originating at Boundary Marker number one (No. 1)". The judges are of the view that the installation of the two lighthouses was apparently designed to enforce the maritime delimitation between the Parties. Even if done for a limited purpose, such activity further confirms that the parallel at the point at which the land frontier of the States concerned reaches the sea constitutes the lateral boundary between Peru and Chile. The judges take the view that consistent with the Parties' position taken at Santiago, the boundary as materialized by the lighthouses should run for 200 nautical miles.

Declaration of Judge Donoghue

In a declaration, Judge Donoghue notes that neither Party's pleaded case convinced the Court. Instead, the Court concluded that there is "compelling evidence" of tacit agreement to a maritime boundary running along the parallel that crosses Boundary Marker No. 1, meeting the standard that the Court has previously articulated in *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*. Judge Donoghue observes, however, that the Parties did not address the existence or terms of such an agreement, and did not present evidence focused specifically on the extent of such a boundary. Nor did either Party address the possibility that the initial segment of the maritime boundary had been settled by agreement of the Parties, leaving the remainder of the boundary to be delimited on the basis of customary international law. The Court thus addressed these issues without the benefit of the Parties' views. The case serves as a reminder of procedural approaches that may offer advantages when important issues have not been squarely addressed by the parties, such as asking the parties for additional legal briefing or evidence, or rendering an interim or partial decision.

Declaration of Judge Gaja

As explained in the joint dissenting opinion, the maritime delimitation between Chile and Peru according to the Santiago Declaration follows the parallel running through the point where the land frontier reaches the sea. Article 2 of the 1929 Treaty of Lima fixes as the starting-point of the land frontier a point on the coast which is situated 10 km to the north of the bridge over the river Lluta. In 1930 the bilateral Mixed Commission competent for demarcation was given instructions to trace an arc with a radius of 10 km from that bridge and to take as the starting-point of the land frontier the intersection of that arc with the seashore. Although for practical reasons the Parties have later used a marker placed near that point for the purpose of identifying their maritime boundary, there is no evidence that they ever reached an agreement for adopting a starting-point other than the one referred to in the Santiago Declaration.

Dissenting opinion of Judge Sebutinde

In her dissenting opinion, Judge Sebutinde expresses her disagreement with the Court's findings relating to the merits of the dispute as contained in points 2, 3 and 4 of the operative paragraph of the Judgment. In particular, Judge Sebutinde takes issue on the Court's conclusion that an all-purpose maritime boundary already exists between the Parties along the parallel of latitude passing through the Boundary Marker No. 1 on the basis of a tacit agreement between the Parties. In her view, this conclusion is not in line with the stringent standard of proof which the Court itself set in the *Nicaragua* v. *Honduras* case for establishing a permanent maritime boundary in international law on the basis of a tacit agreement. In particular, Judge Sebutinde does not find the evidence, from which the Court infers the tacit agreement between the Parties, "compelling". Rather, she considers that the evidence before the Court does not enable a firm conclusion that it was the intention of the Parties under the 1952 Santiago Declaration or the 1954 Agreement to establish such a boundary.

In this regard, Judge Sebutinde notes that the practice of the Parties (contemporaneous with and subsequent to the 1952/1954 agreements) indicates that their intention at the time of the conclusion of the 1952/1954 agreements was to regulate the sharing of a common resource and to protect that resource *vis-à-vis* third or non-States parties, rather than to effect a maritime delimitation. Acknowledging that certain documents and/or events that were considered by the Court may be said to reflect some degree of the Parties' shared understanding that there was a "maritime boundary" in place between them along the parallel of latitude, Judge Sebutinde notes that there are others that could equally be said to demonstrate the absence of such an agreement. Besides, even those potentially "confirmatory" examples do not unambiguously prove that the Parties were acting (or failing to act) on an assumption that this line constituted an all-purpose and definitive maritime boundary delimiting all possible maritime entitlements of the Parties.

In the same vein, Judge Sebutinde considers that the evidence submitted by the parties does not support the Court's conclusion that the "agreed maritime boundary running along the parallel of latitude" extends up to a distance of 80 nautical miles out to sea.

Accordingly, Judge Sebutinde considers that the Court should have determined the entirety of the single maritime boundary line between the Parties *de novo*, by applying its well-established three-step delimitation method in order to achieve an equitable result.

Declaration of Judge *ad hoc* Guillaume

1. Judge *ad hoc* Guillaume agrees with the Court's decision and shares the approach which it has adopted. He observes in particular that Chile has failed to show that the boundary deriving from the tacit agreement between the Parties extended beyond 60 to 80 nautical miles from the coasts. In Judge *ad hoc* Guillaume's view, the latter figure marks the extreme limit of the boundary under the agreement, and it is in those circumstances that he is able to subscribe to paragraph 3 of the Judgment's operative part.

2. Judge *ad hoc* Guillaume further explains that he has also accepted the solution adopted by the Court as regards the starting-point of the maritime boundary. He points out that this solution necessarily follows from the language of the arrangements of 1968–1969. He adds, however, that it in no way prejudges "the location of the starting-point of the land boundary identified as 'Concordia' in Article 2 of the 1929 Treaty of Lima", which it is not for the Court to determine (Judgment, paragraph 163). The Parties disagree on the location of that point, and for his part Judge *ad hoc* Guillaume tends to believe that it is located not at boundary marker No. 1, which is located inland, but at "the point of intersection between the Pacific Ocean and an arc with a radius of 10 km having its centre on the bridge over the river Lluta"

(see the Parties' "Joint Instructions" of April 1930, Judgment, paragraph 154). Accordingly, the coast between the starting-point of the maritime boundary and Point Concordia falls under the sovereignty of Peru, whilst the sea belongs to Chile. However, that situation is not unprecedented, as Chile pointed out at the hearings (CR 2012/31, pp. 35–38); it concerns just a few tens of metres of shoreline, and it may be hoped that it will not give rise to any difficulties.

Separate, partly concurring and partly dissenting, opinion of Judge *ad hoc* Orrego Vicuña

Judge *ad hoc* Orrego Vicuña submits, in addition to the joint dissent with Judges Xue, Gaja and Bhandari, a separate opinion, which in part explains those aspects of the Judgment with which he concurs, and in part notes those matters from which he dissents. Among the former there is, first, the starting-point of maritime delimitation, established at the point where the parallel that passes through Boundary Marker No. 1 intersects with the low-water line. Equal importance is attached to the recognition of the parallel as a criterion for effecting the maritime delimitation to a certain extent. The concurring view of Judge *ad hoc* Orrego Vicuña also notes the importance of recognizing the existence of a single maritime boundary, and assigns special significance to the fact that the Court notes Peru's statement to the effect that its Maritime Domain is applied in a manner consistent with the 1982 United Nations Convention on the Law of the Sea. As a consequence of this statement, ships flying the flags of all nations shall now have complete freedom of navigation and overflight beyond the 12-nautical-mile territorial sea admitted under international law.

Judge *ad hoc* Orrego Vicuña's dissent concerns the fact that the Judgment establishes the endpoint of the parallel used for effecting the maritime delimitation at the distance of 80 nautical miles, a decision that does not find support in the applicable law as set out under the 1947 Presidential declarations, the 1952 Santiago Declaration and the 1954 Agreement on a Special Maritime Frontier Zone, nor in the abundant practice of both Peru and Chile. The combined effect of the equidistance line that the Judgment follows as from the endpoint of the parallel, and the area of the "outer triangle", when added to Peru's maritime entitlements results in a disproportionate assignment of maritime areas to each Party. The prospects of a negotiated access of Chilean vessels to the resources of the resulting Peruvian exclusive economic zone as envisaged under Article 62, paragraph 2, of the Convention on the Law of the Sea would have a mitigating effect on this disproportionate result. The dissent also notes in concluding that the role which the Court assigns to equity in maritime delimitation is at odds with the meaning of "equity" as bound by international law, which is expressly provided for under that Convention.

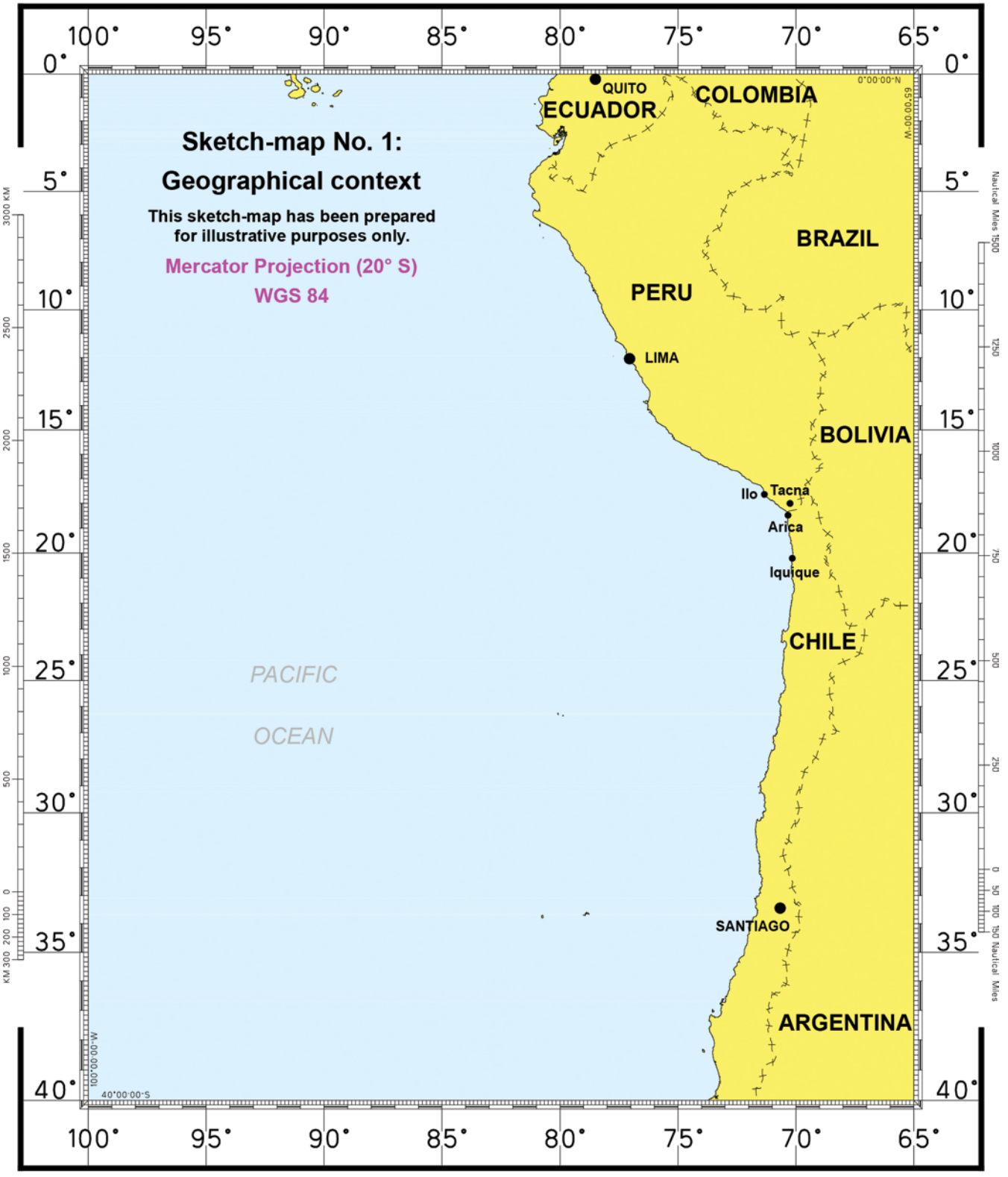
Annex

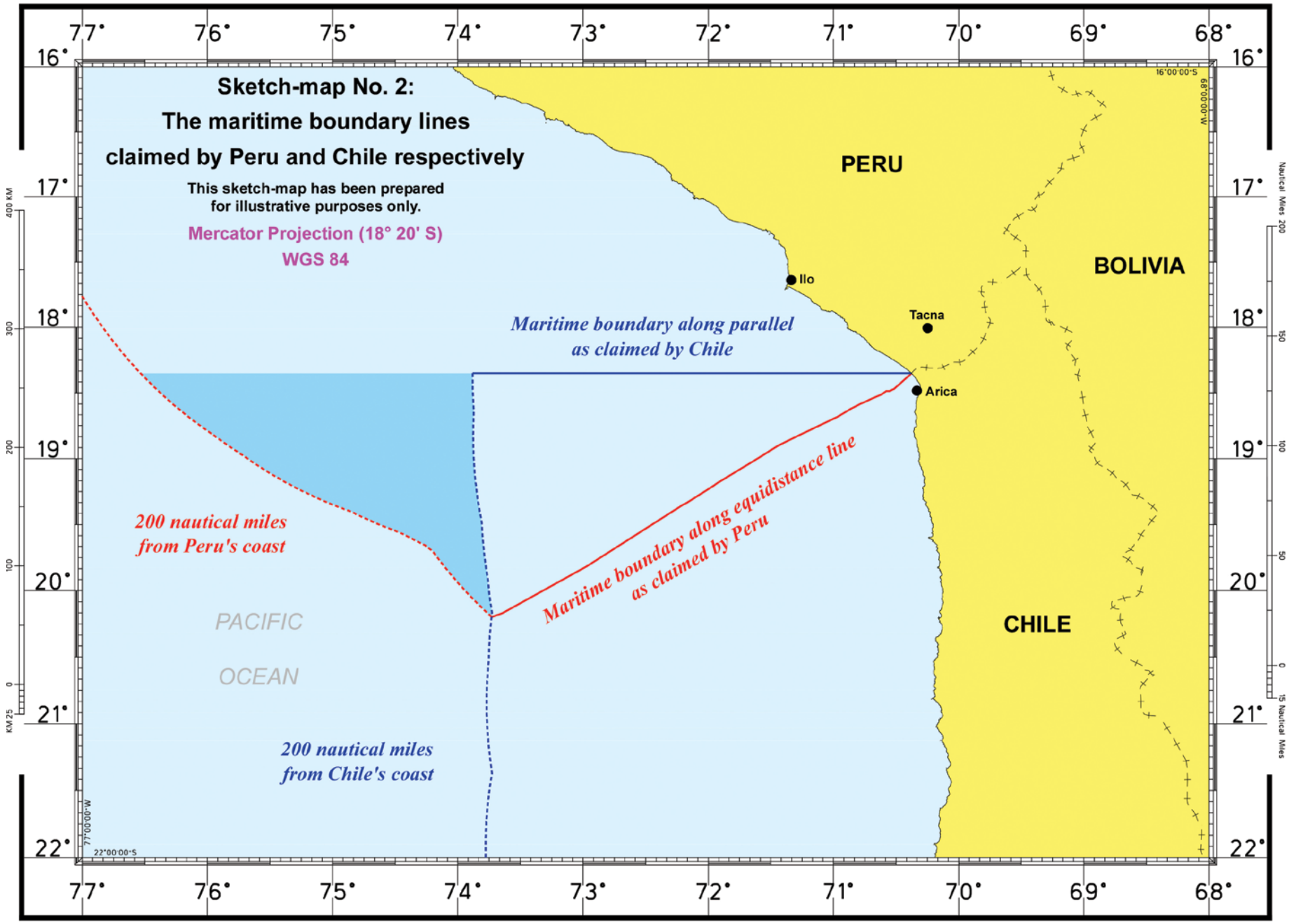
— Sketch map No. 1: Geographical context;

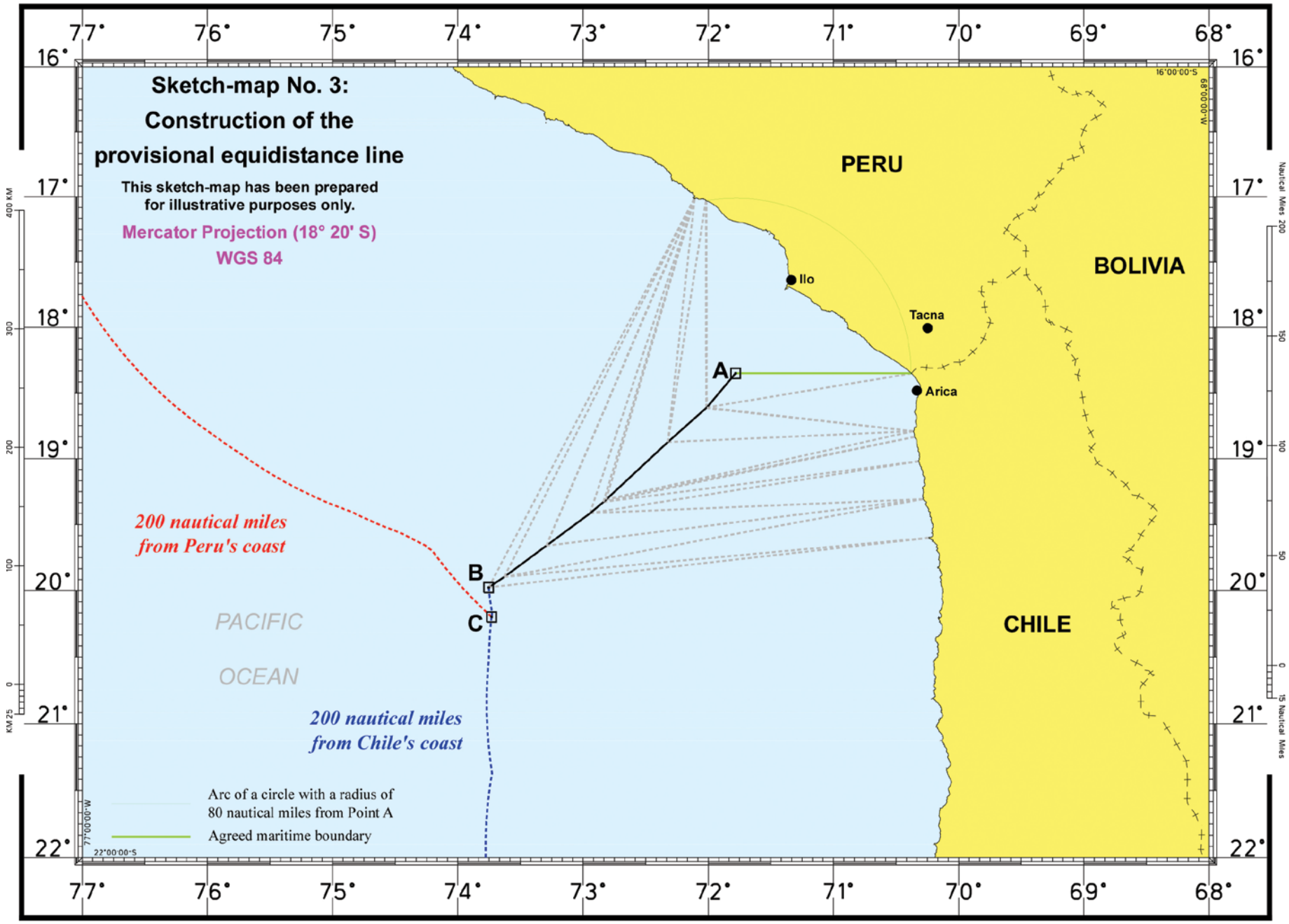
— Sketch map No. 2: The maritime boundary lines claimed by Peru and Chile respectively;

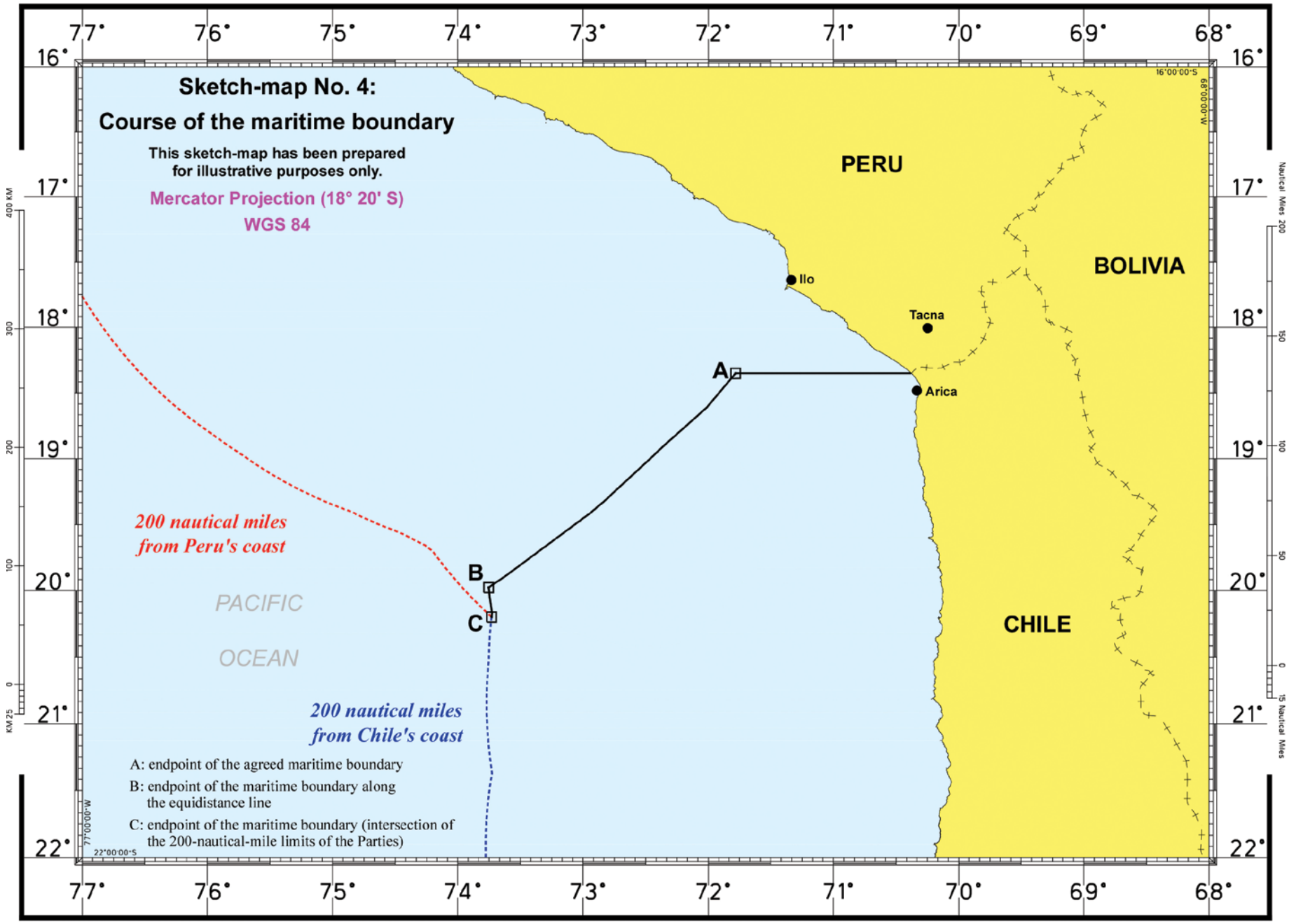
— Sketch map No. 3: Construction of the provisional equidistance linel;

— Sketch map No. 4: Course of the maritime boundary.


Sketch-map No. 1:
Geographical context
This sketch-map has been prepared for illustrative purposes only.
Mercator Projection (20° S)
WGS 84
QUITO
ECUADOR
COLOMBIA
BRAZIL
PERU
LIMA
BOLIVIA
Ilo
Tacna
Arica
Iquique
CHILE
SANTIAGO
ARGENTINA
PACIFIC
OCEAN
100°
95°
90°
85°
80°
75°
70°
65°
0°
5°
10°
15°
20°
25°
30°
35°
40°
Nautical Miles
KM


Sketch-map No. 2:
The maritime boundary lines
claimed by Peru and Chile respectively
This sketch-map has been prepared
for illustrative purposes only.
Mercator Projection (18° 20' S)
WGS 84
PERU
BOLIVIA
CHILE
Ilo
Tacna
Arica
Maritime boundary along parallel
as claimed by Chile
Maritime boundary along equidistance line
as claimed by Peru
200 nautical miles
from Peru's coast
200 nautical miles
from Chile's coast
PACIFIC
OCEAN
77°
76°
75°
74°
73°
72°
71°
70°
69°
68°
16°
17°
18°
19°
20°
21°
22°
16°00'00"S
68°00'00"W
22°00'00"S
77°00'00"W
Nautical Miles 200
150
100
50
0
15 Nautical Miles
400 KM
300
200
100
0
KM 25


Sketch-map No. 3:
Construction of the
provisional equidistance line
This sketch-map has been prepared
for illustrative purposes only.
Mercator Projection (18° 20' S)
WGS 84
PERU
BOLIVIA
CHILE
Ilo
Tacna
Arica
A
B
C
200 nautical miles
from Peru's coast
200 nautical miles
from Chile's coast
PACIFIC
OCEAN
Arc of a circle with a radius of
80 nautical miles from Point A
Agreed maritime boundary
77°
76°
75°
74°
73°
72°
71°
70°
69°
68°
16°
17°
18°
19°
20°
21°
22°
16°00'00"S
68°00'00"W
22°00'00"S
77°00'00"W
Nautical Miles 200
150
100
50
0
15 Nautical Miles
400 KM
300
200
100
0
KM 25


Sketch-map No. 4:
Course of the maritime boundary
This sketch-map has been prepared for illustrative purposes only.
Mercator Projection (18° 20' S)
WGS 84
PERU
BOLIVIA
CHILE
Ilo
Tacna
Arica
A
B
C
200 nautical miles from Peru's coast
200 nautical miles from Chile's coast
PACIFIC
OCEAN
A: endpoint of the agreed maritime boundary
B: endpoint of the maritime boundary along the equidistance line
C: endpoint of the maritime boundary (intersection of the 200-nautical-mile limits of the Parties)
77°
76°
75°
74°
73°
72°
71°
70°
69°
68°
16°
17°
18°
19°
20°
21°
22°
Nautical Miles
KM

207. QUESTIONS RELATING TO THE SEIZURE AND DETENTION OF CERTAIN DOCUMENTS AND DATA (TIMOR-LESTE *v.* AUSTRALIA) [PROVISIONAL MEASURES]

Order of 3 March 2014

On 3 March 2014, the Court delivered its Order on the request for the indication of provisional measures submitted by Timor-Leste on 17 December 2013 in the case concerning *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia).* In its Order, the Court indicated various provisional measures.

The Court was composed as follows: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Bhandari; Judges *ad hoc* Callinan, Cot; Registrar Couvreur.

*

* *

The operative paragraph of the Order (para. 55) reads as follows:

"…

The Court,

Indicates the following provisional measures:

(1) By twelve votes to four,

Australia shall ensure that the content of the seized material is not in any way or at any time used by any person or persons to the disadvantage of Timor-Leste until the present case has been concluded;

In Favour: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Xue, Gaja, Bhandari; Judge *ad hoc* Cot;

Against: Judges Keith, Greenwood, Donoghue; Judge *ad hoc* Callinan;

(2) By twelve votes to four,

Australia shall keep under seal the seized documents and electronic data and any copies thereof until further decision of the Court;

In Favour: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Xue, Gaja, Bhandari; Judge *ad hoc* Cot;

Against: Judges Keith, Greenwood, Donoghue; Judge *ad hoc* Callinan;

(3) By fifteen votes to one,

Australia shall not interfere in any way in communications between Timor-Leste and its legal advisers in connection with the pending *Arbitration under the Timor Sea Treaty of* 20 *May 2002* between Timor-Leste and Australia, with any future bilateral negotiations concerning maritime delimitation, or with any other related procedure between the two States, including the present case before the Court.

In Favour: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Bhandari; Judge *ad hoc* Cot;

Against: Judge *ad hoc* Callinan."

*

* *

Judge Keith appended a dissenting opinion to the Order of the Court; Judge Cançado Trindade appended a separate opinion to the Order of the Court; Judge Greenwood appended a dissenting opinion to the Order of the Court; Judge Donoghue appended a separate opinion to the Order of the Court; Judge *ad hoc* Callinan appended a dissenting opinion to the Order of the Court.

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Application and Request for the indication of provisional measures (paras. 1–17 of the Order)

The Court begins by recalling that, by an Application filed with the Registry on 17 December 2013, the Democratic Republic of Timor-Leste (hereinafter "Timor-Leste") instituted proceedings against Australia with respect to a dispute concerning the seizure on 3 December 2013, and subsequent detention, by "agents of Australia of documents, data and other property which belongs to Timor-Leste and/or which Timor-Leste has the right to protect under international law". In particular, Timor-Leste claims that these items were taken from the business premises of a legal adviser to Timor-Leste in Narrabundah, in the Australian Capital Territory, allegedly pursuant to a warrant issued under section 25 of the Australian Security Intelligence Organisation Act 1979. The seized material, according to Timor-Leste, includes, *inter alia*, documents, data and correspondence between Timor-Leste and its legal advisers relating to a pending *Arbitration under the Timor Sea Treaty of 20 May 2002* between Timor-Leste and Australia (hereinafter the "Timor Sea Treaty Arbitration").

On the same day, Timor-Leste also submitted a Request for the indication of provisional measures, pursuant to Article 41 of the Statute of the Court and Articles 73 to 75 of the Rules of Court. The Court recalls that, at the end of its Request, Timor-Leste asks the Court to

"indicate the following provisional measures:

(a) [t]hat all of the documents and data seized by Australia from 5 Brockman Street, Narrabundah, in the Australian Capital Territory on 3 December 2013 be immediately sealed and delivered into the custody of the International Court of Justice;

(b) [t]hat Australia immediately deliver to Timor-Leste and to the International Court of Justice (*i*) a list of any and all documents and data that it has disclosed or transmitted,

or the information contained in which it has disclosed or transmitted to any person, whether or not such person is employed by or holds office in any organ of the Australian State or of any third State, and (*ii*) a list of the identities or descriptions of and current positions held by such persons;

(c) [t]hat Australia deliver within five days to Timor-Leste and to the International Court of Justice a list of any and all copies that it has made of any of the seized documents and data;

(d) [t]hat Australia (*i*) destroy beyond recovery any and all copies of the documents and data seized by Australia on 3 December 2013, and use every effort to secure the destruction beyond recovery of all copies that it has transmitted to any third party, and (*ii*) inform Timor-Leste and the International Court of Justice of all steps taken in pursuance of that order for destruction, whether or not successful;

(e) [t]hat Australia give an assurance that it will not intercept or cause or request the interception of communications between Timor-Leste and its legal advisers, whether within or outside Australia or Timor-Leste."

The Court then recalls that Timor-Leste further requested that, pending the hearing and decision of the Court on the Request for the indication of provisional measures, the President of the Court exercise his power under Article 74, paragraph 4, of the Rules of Court. It states in that regard that, by a letter dated 18 December 2013, the President of the Court, acting under that article, called upon Australia "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, in particular to refrain from any act which might cause prejudice to the rights claimed by the Democratic Republic of Timor-Leste in the present proceedings".

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The Court then states that public hearings on Timor-Leste's Request for the indication of provisional measures were held on 20, 21 and 22 January 2014, during which Agents and counsel for the Governments of Timor-Leste and Australia presented oral observations. During the hearings, questions were put by some Members of the Court to the Parties, to which replies were given orally. Timor-Leste availed itself of the possibility given by the Court to comment in writing on Australia's reply to one of these questions.

The Court recalls that, at the end of its second round of oral observations, Timor-Leste asked the Court to indicate provisional measures in the same terms as included in its Request (see above) and that Australia, for its part, stated the following:

"1. Australia requests the Court to refuse the Request for the indication of provisional measures submitted by the Democratic Republic of Timor-Leste.

2. Australia further requests the Court to stay the proceedings until the Arbitral Tribunal has rendered its judgment in the *Arbitration under the Timor Sea Treaty*."

The Court then states that, by an Order dated 28 January 2014, the Court decided not to accede to Australia's request for a stay of the proceedings, considering, *inter alia*, that the dispute before it between Timor-Leste and Australia is sufficiently distinct from the dispute being adjudicated upon by the Arbitral Tribunal in the Timor Sea Treaty Arbitration. The Court therefore, after having taken into account the views of the Parties, proceeded to fix time-limits for the filing of the written pleadings.

Reasoning of the Court (paras. 18–54)

I. Prima facie jurisdiction (paras. 18–21)

The Court begins by observing that, when a request for the indication of provisional measures has been made, it need not, before deciding whether or not to indicate such measures, satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case; it only has to satisfy itself that the provisions relied on by the Applicant appear, *prima facie*, to afford a basis on which its jurisdiction could be founded.

The Court notes that Timor-Leste seeks to found the jurisdiction of the Court in this case on the declaration it made by it on 21 September 2012 under Article 36, paragraph 2, of the Statute, and on the declaration made by Australia on 22 March 2002 under the same provision. The Court adds that, in the course of the oral pleadings, Australia stated that, while reserving its "right to raise questions of jurisdiction and admissibility at the merits stage", it would not be "raising those matters in relation to Timor-Leste's Request for provisional measures".

The Court considers therefore that the declarations made by both Parties under Article 36, paragraph 2, of the Statute appear, *prima facie*, to afford a basis on which it might have jurisdiction to rule on the merits of the case. The Court thus finds that it may entertain the Request for the indication of provisional measures submitted to it by Timor-Leste.

II. The rights whose protection is sought and the measures requested (paras. 22–30)

The Court recalls that its power to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the requesting party are at least plausible. Moreover, a link must exist between the rights which form the subject of the proceedings before the Court on the merits of the case and the provisional measures being sought.

The Court begins by considering whether the rights claimed by Timor-Leste on the merits, and for which it is seeking protection, are plausible. It first observes that it is not disputed between the Parties that at least part of the documents and data seized by Australia relate to the Timor Sea Treaty Arbitration, or to possible future negotiations on maritime delimitation between the Parties, and that they concern communications of Timor-Leste with its legal advisers. It notes, moreover, that the principal claim of Timor-Leste is that a violation has occurred of its right to communicate with its counsel and lawyers in a confidential manner with

regard to issues forming the subject-matter of pending arbitral proceedings and future negotiations between the Parties. The Court notes that this claimed right might be derived from the principle of the sovereign equality of States, which is one of the fundamental principles of the international legal order and is reflected in Article 2, paragraph 1, of the Charter of the United Nations. More specifically, equality of the parties must be preserved when they are involved, pursuant to Article 2, paragraph 3, of the Charter, in the process of settling an international dispute by peaceful means. If a State is engaged in the peaceful settlement of a dispute with another State through arbitration or negotiations, it would expect to undertake these arbitration proceedings or negotiations without interference by the other party in the preparation and conduct of its case. It would follow that in such a situation, a State has a plausible right to the protection of its communications with counsel relating to an arbitration or to negotiations, in particular to the protection of the correspondence between them, as well as to the protection of confidentiality of any documents and data prepared by counsel to advise that State in such a context.

Accordingly, the Court considers that at least some of the rights for which Timor-Leste seeks protection—namely, the right to conduct arbitration proceedings or negotiations without interference by Australia, including the right of confidentiality of and non-interference in its communications with its legal advisers—are plausible.

The Court then turns to the issue of the link between the rights claimed and the provisional measures requested. The Court recalls that the provisional measures requested by Timor-Leste are aimed at preventing further access by Australia to this seized material, at providing the former with information as to the scope of access of Australia to the documents and data seized, and at ensuring the non-interference of Australia in future communications between Timor-Leste and its legal advisers. The Court considers that these measures by their nature are intended to protect Timor-Leste's claimed rights to conduct, without interference by Australia, arbitral proceedings and future negotiations, and to communicate freely with its legal advisers, counsel and lawyers to that end. The Court thus concludes that a link exists between Timor-Leste's claimed rights and the provisional measures sought.

III. Risk of irreparable prejudice and urgency (paras. 31–48)

The Court recalls that it has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are in dispute, and that this power will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to those rights.

Timor-Leste claims that Australia's actions in seizing confidential and sensitive material from its legal adviser's office create a real risk of irreparable prejudice to its rights. Timor-Leste asserts that it is highly probable that most of the documents and data in question relate to its legal strategy, both in the context of the Timor Sea Treaty Arbitration and in the context of future maritime negotiations with Australia. Timor-Leste affirms that the risk of irreparable prejudice is imminent because it is currently considering which strategic and legal position to adopt in order to best defend its national interests *vis-à-vis* Australia in relation to the 2002 Timor Sea Treaty and the 2006 Treaty on Certain Maritime Arrangements in the Timor Sea.

According to Australia, there is no risk of irreparable prejudice to Timor-Leste's rights. It states that the comprehensive undertakings provided by the Attorney-General of Australia demonstrate that any rights which Timor-Leste may be found to possess are sufficiently protected pending final judgment in the current case.

Australia first explains that on 4 December 2013 the Attorney-General of Australia made a Ministerial Statement to Parliament on the execution by Australia's security intelligence agency ("ASIO") of the search warrants on the business premises of a legal adviser to Timor-Leste in Canberra and that, on that occasion, he emphasized "that the material taken into possession in execution of the warrants [was] not under any circumstances to be communicated to those conducting the [arbitration] proceedings on behalf of Australia".

Australia then notes that its Attorney-General provided a written undertaking to the Timor Sea Treaty Arbitral Tribunal, dated 19 December 2013, in which he declared that the material seized would not be used by any part of the Australian Government for any purpose related to the Timor Sea Treaty Arbitration and undertook that he would not make himself aware or otherwise seek to inform himself of the content of the material or any information derived from the material.

Australia further informed the Court that, following the letter from the President under Article 74, paragraph 4, of the Rules of the Court (see above), the Attorney-General of Australia wrote a letter dated 23 December 2013 to the Director-General of Security of ASIO, directing that the measures set out in the undertaking to the Arbitral Tribunal on 19 December 2013 be implemented equally in relation to the proceedings instituted before the Court. In his letter, the Attorney-General stated, in particular, that "it would be desirable and appropriate for Australia to satisfy the President's request by ensuring that, from now until the conclusion of the hearing on 20–22 January, the material is sealed, that it is not accessed by any other officer of ASIO, and that ASIO ensure that it is not accessed by any other person".

Furthermore, the Attorney-General provided the Court with a written undertaking dated 21 January 2014. Australia points out that this written undertaking contains comprehensive assurances that the confidentiality of the seized documents will be safeguarded. It points, in particular, to the following declarations made by the Attorney-General in his written undertaking:

> "that until final judgment in this proceeding or until further or earlier order of the Court:
>
> 1. I will not make myself aware or otherwise seek to inform myself of the content of the Material or any information derived from the Material; and
>
> 2. Should I become aware of any circumstance which would make it necessary for me to inform myself of the Material, I will first bring that fact to the attention of the Court, at which time further undertakings will be offered; and

3. The Material will not be used by any part of the Australian Government for any purpose other than national security purposes (which include potential law enforcement referrals and prosecutions); and

4. Without limiting the above, the Material, or any information derived from the material, will not be made available to any part of the Australian Government for any purpose relating to the exploitation of resources in the Timor Sea or related negotiations, or relating to the conduct of:

(a) these proceedings; and

(b) the proceedings in the Arbitral Tribunal [constituted under the 2002 Timor Sea Treaty]."

Lastly, during the oral proceedings, with reference to the letter dated 23 December 2013 from the Attorney-General of Australia to the Director-General of Security of ASIO, the Solicitor-General of Australia stated that "ASIO to date has not inspected any of the documents" and he noted that the documents [were] being kept under seal for all purposes until [Australia had] this Court's decision on provisional measures".

With respect to the undertakings given by the Attorney-General of Australia on 4, 19 and 23 December 2013, Timor-Leste argues that they are "far from adequate" to protect Timor-Leste's rights and interests in the present case. According to Timor-Leste, in the first place they lack binding force, at least at the international level; secondly, they are in serious respects more limited than the provisional measures requested by Timor-Leste, as they do not address the wider issues going beyond the Timor Sea Treaty Arbitration; and thirdly, the instructions set out in the letter dated 23 December 2013 from the Attorney-General of Australia to the Director-General of ASIO are given only until the conclusion of the hearings in the present phase of the case.

With reference to the written undertaking dated 21 January 2014, Timor-Leste asserts that it does not suffice to prevent the risk of irreparable harm and that it "should be backed up by an order of the Court that deals with the treatment of the materials".

On the basis of this information, the Court is of the view that the right of Timor-Leste to conduct arbitral proceedings and negotiations without interference could suffer irreparable harm if Australia failed to immediately safeguard the confidentiality of the material seized by its agents on 3 December 2013 from the office of a legal adviser to the Government of Timor-Leste. In particular, the Court considers that there could be a very serious detrimental effect on Timor-Leste's position in the Timor Sea Treaty Arbitration, and in future maritime negotiations, with Australia should the seized material be divulged to any person or persons involved or likely to be involved in that arbitration or in negotiations on behalf of Australia. Any breach of confidentiality may not be capable of remedy or reparation, as it might not be possible to revert to the *status quo ante* following disclosure of the confidential information.

The Court notes, however, that the written undertaking given by the Attorney-General of Australia on 21 January 2014 includes commitments to the effect that the seized material will not be made available to any part of the Australian Government for any purpose in connection with the exploitation of resources in the Timor Sea or related negotiations, or in connection with the conduct of the current case before the Court or of the proceedings of the Timor Sea Treaty Tribunal. The Court observes that the Solicitor-General of Australia moreover clarified during the hearings, in answer to a question from a Member of the Court, that no person involved in the arbitration or negotiation has been informed of the content of the documents and data seized.

The Court further notes that the Agent of Australia stated that "the Attorney-General of the Commonwealth of Australia [had] the actual and ostensible authority to bind Australia as a matter of both Australian law and international law". The Court states that it has no reason to believe that the written undertaking dated 21 January 2014 will not be implemented by Australia. Once a State has made such a commitment concerning its conduct, its good faith in complying with that commitment is to be presumed.

The Court, however, takes cognizance of the fact that, in paragraph 3 of his written undertaking dated 21 January 2014, the Attorney-General states that the seized material will not be used "by any part of the Australian Government for any purpose other than national security purposes (which include potential law enforcement referrals and prosecutions)". It further notes that, in paragraph 2 of the same document, the Attorney-General underlined that "[s]hould [he] become aware of any circumstance which would make it necessary for [him] to inform [himself] of the Material, [he] would first bring that fact to the attention of the Court, at which time further undertakings will be offered".

Given that, in certain circumstances involving national security, the Government of Australia envisages the possibility of making use of the seized material, the Court finds that there remains a risk of disclosure of this potentially highly prejudicial information. The Court notes that the Attorney-General of Australia has given an undertaking that any access to the material, for considerations of national security, would be highly restricted and that the contents of the material would not be divulged to any persons involved in the conduct of the Timor Sea Treaty Arbitration, in the conduct of any future bilateral negotiations on maritime delimitation, or in the conduct of the proceedings before this Court. However, once disclosed to any designated officials in the circumstances provided for in the written undertaking dated 21 January 2014, the information contained in the seized material could reach third parties, and the confidentiality of the materials could be breached. Moreover, the Court observes that the commitment of Australia to keep the seized material sealed has only been given until the Court's decision on the Request for the indication of provisional measures.

In light of the above, the Court considers that the written undertaking dated 21 January 2014 makes a significant contribution towards mitigating the imminent risk of irreparable prejudice created by the seizure of the above-mentioned material to Timor-Leste's rights, particularly its right to the confidentiality of that material being duly safeguarded, but does not remove this risk entirely.

The Court concludes from the foregoing that, in view of the circumstances, the conditions required by its Statute

for it to indicate provisional measures have been met in so far as, in spite of the written undertaking dated 21 January 2014, there is still an imminent risk of irreparable prejudice as demonstrated. It is therefore appropriate for the Court to indicate certain measures in order to protect Timor-Leste's rights pending the Court's decision on the merits of the case.

IV. Measures to be adopted (paras. 49–54)

The Court recalls that it has the power, under its Statute, when a request for provisional measures has been made, to indicate measures that are in whole or in part other than those requested. In the present case, having considered the terms of the provisional measures requested by Timor-Leste, the Court finds that the measures to be indicated need not be identical to those requested.

The Court first notes that the Solicitor-General of Australia clarified during the oral proceedings that the written undertaking of the Attorney-General of 21 January 2014 "will not expire" without prior consultation with the Court. Thus, this undertaking will not expire once the Court has ruled on Timor-Leste's Request for the indication of provisional measures. As the written undertaking of 21 January 2014 does not contain any specific reference to the seized documents being sealed, the Court must also take into account the duration of Australia's commitment to keep the said material under seal contained in the letter dated 23 December 2013 from the Attorney-General of Australia to the Director-General of ASIO. The Court takes note of the fact that, under the terms of that letter, the commitment was given until the close of the oral proceedings on the Request for the indication of provisional measures. The Court further observes that, during the oral proceedings, Australia gave assurances that the seized material would remain sealed and kept inaccessible until the Court had rendered its decision on that Request.

Noting moreover the likelihood that much of the seized material contains sensitive and confidential information relevant to the pending arbitration and that it may also include elements that are pertinent to any future maritime negotiations which may take place between the Parties, the Court finds that it is essential to ensure that the content of the seized material is not in any way or at any time divulged to any person or persons who could use it, or cause it to be used, to the disadvantage of Timor-Leste in its relations with Australia over the Timor Sea. It is therefore necessary to keep the seized documents and electronic data and any copies thereof under seal until further decision of the Court.

The Court then notes that Timor-Leste has expressed concerns over the confidentiality of its ongoing communications with its legal advisers concerning, in particular, the conduct of the Timor Sea Treaty Arbitration, as well as the conduct of any future negotiations over the Timor Sea and its resources, a matter which is not covered by the written undertaking of the Attorney-General of 21 January 2014. The Court further finds it appropriate to require Australia not to interfere in any way in communications between Timor-Leste and its legal advisers, either in connection with the pending arbitral proceedings and with any future bilateral negotiations concerning maritime delimitation, or in connection with any other related procedure between the two States, including the present case before the Court.

The Court emphasizes, finally, that its orders on provisional measures have binding effect and thus create international legal obligations with which both parties are required to comply. It adds that the decision given in the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application, or relating to the merits themselves, and that it leaves unaffected the right of the Governments of Timor-Leste and Australia to submit arguments in respect of those questions.

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Dissenting opinion of Judge Keith

At the outset of his dissent, Judge Keith expresses his understanding of the "deep offence and shock" felt by Timor-Leste regarding the actions on 3 December 2013 of the Australian Security and Intelligence Organization. He does not consider, however, that grounds for two of the provisional measures adopted by the Court have been made out.

Judge Keith recalls that in its Application Timor-Leste invoked its property and other rights in documents and data sent to, held or prepared by its legal advisers, particularly in the context of an ongoing arbitration between the Parties. Its Request for provisional measures adopted a broader position, both in terms of substantive rights at issue, and the purpose for which the material had been prepared, including longer-term negotiations relating to the Timor Sea.

Judge Keith considers the different undertakings which have been given by Australia, and Timor-Leste's responses. Initially the Australian undertakings prevented the use of the seized material only by persons involved in the arbitration, and did not extend to the other dealings between the Parties. In response to Timor-Leste's concerns, the Australian Attorney-General provided a broader undertaking on 21 January 2014. Judge Keith notes that, from this point, Timor-Leste no longer took issue with the breadth of the undertaking, but only with its binding nature. In his opinion, that matter was adequately resolved by the end of the proceedings.

Judge Keith concludes that Timor-Leste's request for an undertaking that was broader substantively and temporally, and clearly binding on Australia in international law, has been satisfied. The undertaking of 21 January 2014 applies, as it should, "until final Judgment or until further or earlier order of the Court".

Judge Keith proceeds on the basis that the plausible right of Timor-Leste at issue in this case is the right of a State to enjoy a confidential relationship with its legal advisers, in particular in respect of disputes with another State which are or may be the subject of litigation or negotiation or other form of peaceful settlement. In view of the undertakings given by the Australian government, Judge Keith is of the opinion that there is currently no risk of irreparable prejudice being caused to this right. He does not find it necessary to address

the rights and interests of Australia regarding its national security, or the balance between the Parties' respective rights.

Separate opinion of Judge Cançado Trindade

1. Judge Cançado Trindade begins his Separate opinion, composed of ten parts, by identifying some points, raised in the present Order, which appear to him deserving of closer attention. Although he has concurred with his vote to the adoption of the present Order, he considers that the provisional measures of protection ordered by the Court should have gone further, and that the ICJ should have ordered the measure requested by Timor-Leste, to the effect of having the documents and data (containing information belonging to it) seized by Australia, immediately sealed and delivered into the *custody of the Court itself* at its *siège* at the Peace Palace at The Hague.

2. Given the importance that he attributes to the points not sufficiently developed in the present Order, he feels obliged, moved by a sense of duty in the exercise of the international judicial function, to leave on the records the foundations of his own personal position thereon (part I). He first examines the arguments, advanced in particular by the respondent State, singling out, first, the impertinence of reliance on local remedies in the circumstances of the present case, of alleged *direct* injury to the State itself, in which the applicant State is vindicating what it regards as its own right, and, in doing so, is acting on its own behalf. *Par in parem non habet imperium, non habet jurisdictionem*.

3. Judge Cançado Trindade then observes that the Court has rightly dismissed the argument of avoidance of "concurrent jurisdiction" (judicial and arbitral procedures), likewise impertinent. Recourse to another judicial authority to obtain provisional measures of protection is allowed by the Rules of Procedure of the Permanent Court of Arbitration Arbitral Tribunal itself, which sees no need of reliance on avoidance of "concurrent" jurisdictions. That argument,—he proceeds,—misses the central point of the need of realization of justice (part II). Judge Cançado Trindade adds a word of caution as to the "empty and misleading rhetoric" of euphemisms like "forum shopping", "parallelism", avoidance of "fragmentation" of international law and of "proliferation" of international tribunals,—which unduly diverts attention from the quest for justice to alleged "problems" of "delimitation" of competences between international tribunals (para. 9).

4. He understands that the "current enlargement of access to justice to the *justiciables* is reassuring. International courts and tribunals have a *common mission* to impart justice, which brings their endeavours together, in a harmonious way, and well above zeals of so-called 'delimitation' of competences" (para. 11). To him, in the present case, in dismissing that argument, "the ICJ has put the issue in the right perspective" (para. 12).

5. Turning to the next point, he observes that in the *cas d'espèce* the Court has, however, insisted on relying upon unilateral acts of States (such as promise, in the form of assurances or "undertakings"), here failing to extract the lessons from its own practice in recent cases (part III). He ponders that promises or assurances or "undertakings" have been relied upon in a distinct context, that of diplomatic relations; when they are unduly brought into the domain of international legal procedure, "they cannot serve as basis for a decision of the international tribunal at issue"; judicial settlement cannot rely upon unilateral acts of States as basis for the reasoning of the decisions to be rendered" (para. 14).

6. He recalls that reliance upon such unilateral acts "has been the source of uncertainties and apprehension in the course of international legal proceedings", and has put at greater risk their outcome, as illustrated by the recent case concerning *Questions Relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, the Court,—as he warned in his separate opinion in the Judgment on the merits of 20 July 2012, as well as in his dissenting opinion in the Court's Order of 28 May 2009 in the same case (para. 15). He stressed therein that a pledge or promise made in the course of legal proceedings before the Court "does not remove the prerequisites (of urgency and of probability of irreparable damage) for the indication of provisional measures by the Court" (para. 16). To his mind, *ex factis jus non oritur* (para. 17).

7. He further recalls that, in its recent Order of 22 November 2013 in the merged cases of *Certain Activities Carried out by Nicaragua in the Border Area* and of the *Construction of a Road in Costa Rica along the San Juan River*, the Court conceded precisely that it was "not convinced" by unilateral assurances given to it in the course of international legal proceedings, which had not removed "the imminent risk of irreparable prejudice". In his Separate opinion appended thereto, Judge Cançado Trindade again made the point of

> "the need to devote greater attention to the *legal nature* of provisional measures of protection, and their *legal effects*, particularly those endowed with a *conventional* basis such as the provisional measures ordered by the ICJ (…). Only in this way they will contribute to the progressive development of international law. Persistent reliance on unilateral 'undertakings' or assurances or promises formulated in the context of provisional measures in no way contributes to the proper understanding of the expanding legal institute of provisional measures of protection in contemporary international law.
>
> Expert writing on unilateral acts of States has been very careful to avoid the pitfalls of 'contractual' theories in international law, as well as the dangers of unfettered State voluntarism underlying unilateralist manifestations in the decentralized international legal order. Unilateral acts (…) do not pass without qualifications. (…) It is not surprising to find that expert writing on the matter has thus endeavoured to single out those unilateral acts to which legal effects can be ascribed,—and all this in the domain of diplomatic relations, *certainly not in the realm of international legal procedure*" (paras. 18–20).

8. Judge Cançado Trindade then points out that other contemporary international tribunals have likewise been faced with uncertainties and apprehension deriving from unilateral assurances by contending parties (para. 21). He adds that international legal procedure has "a logic of its own", which is not to be equated to that of diplomatic relations. In his understanding, "[i]nternational legal procedure is not

properly served with the insistence on reliance on unilateral acts proper of diplomatic relations,—even less so in face of the perceived need of assertion that *ex injuria jus non oritur*. Even if an international tribunal takes note of unilateral acts of States, it is not to take such acts as the basis for the reasoning of its own decisions" (para. 22). And he adds:

> "In effect, to allow unilateral acts to be performed (in the course of international legal proceedings), irrespectively of their discretionary—if not arbitrary—character, and to accept subsequent assurances or "undertakings" ensuing therefrom, is to pave the way to uncertainties and unpredictability, to the possibility of creation of *faits accomplis* to one's own advantage and to the other party's disadvantage. The certainty of the application of the law would be reduced to a mere probability" (para. 25).

9. Judge Cançado Trindade then recalls that, in the past, a trend of legal doctrine—favoured by so-called "realists"—attempted to deprive some of the strength of the general principle *ex injuria jus non oritur* by invoking the maxim *ex factis jus oritur* (part IV). In doing so,—he adds, "it confused the validity of norms with the required coercion (at times missing in the international legal order) to implement them. The validity of norms is not dependent on coercion (for implementation); they are binding as such (objective obligations)" (para. 27). And he concludes on this point:

> "The maxim *ex factis jus oritur* wrongfully attributes to facts law-creating effects which facts *per se* cannot generate. Not surprisingly, the "*fait accompli*" is very much to the liking of those who feel strong or powerful enough to try to impose their will upon others. It so happens that contemporary international law is grounded on some fundamental general principles, such as the principle of the *juridical equality of States*, which points in the opposite direction. Factual inequalities between States are immaterial, as all States are juridically equal, with all the consequences ensuing therefrom. Definitively, *ex factis jus non oritur.* Human values and the idea of objective justice stand above facts. *Ex conscientia jus oritur*" (para. 28).

10. An issue, addressed by the contending Parties in the course of the present proceedings, was that of the ownership of the seized documents and data. From the start, and repeatedly, Timor-Leste refers to the seized documents as its own property, while Australia prefers not to dwell upon the issue of the ownership of the seized documents and data, which it does not clarify. This is a point which cannot pass unnoticed in the proper consideration of the requested provisional measures in the *cas d'espèce* (part V). Even more significant is the relevance, for such consideration of the requested measures, of the general principles of international law (part VI).

11. The Court—Judge Cançado Trindade continues—has before it such general principles, and "cannot be obfuscated by allegations of 'national security', which fall outside the scope of the applicable law here. In any case, an international tribunal cannot pay lip-service to allegations of 'national security' made by one of the parties in the course of legal proceedings" (para. 38). He then refers to examples of the difficulties faced by international tribunals whenever "national security" concerns were raised before them (paras. 39–40). International tribunals

> "keep in mind the imperative of due process of law in the course of international legal proceedings, and preserve the equality of arms (égalité des armes), in the light of the principle of the proper administration of justice (*la bonne administration de la justice*). Allegations of State secrecy or 'national security' cannot at all interfere with the work of an international tribunal, in judicial settlement or arbitration" (para. 41).

12. In Judge Cançado Trindade's perception, the present case concerning *Questions Relating to the Seizure and Detention of Certain Documents and Data*, bears witness to the relevance of the principle of the *juridical equality* of States (part VII), and "an international tribunal such as the ICJ is to make sure that the principle of the juridical equality of States prevails, so as to discard eventual repercussions in the international legal procedure of *factual inequalities* between States" (para. 43). That principle, enshrined nowadays in the United Nations Charter (Article 2(1)), "is ineluctably intermingled with the quest for justice, (…) embodying the *idée de justice*, emanated from the universal juridical conscience" (paras. 44–45).

13. Turning his attention to provisional measures of protection independently of unilateral "undertakings" or assurances (part VIII), Judge Cançado Trindade observes that, in the present Order, as the ICJ reckons that "equality of the parties must be preserved" in the process of peaceful settlement of an international dispute, one would expect it to order its own provisional measures of protection "independently of any promise or unilateral 'undertaking'" on the part of the State which has unduly seized the documents and data (para. 47); yet, it has not done so, having preferred to reason "on the basis of the 'undertaking' or assurance by Australia to secure the confidentiality of the material seized by its agents in Canberra on 3 December 2013", to "the additional disadvantage of Timor-Leste" (para. 49).

14. In his view, "it cannot be denied with certainty that, with the seizure of the documents and data containing its privileged information, Timor-Leste has already suffered an irreparable harm" (para. 51). Accordingly, the Court should have ordered that the seized documents and data "be promptly sealed and delivered into its custody here at its *siège* at the Peace Palace at The Hague", so as to "prevent *further* irreparable harm to Timor-Leste" (para. 52, and cf. paras. 53–54).

15. In distinct contexts,—he proceeds,—the inviolability of State papers and documents has been an old concern in diplomatic relations,—as from the reference of the 1946 United Nations Convention on the Privileges and Immunities of the United Nations to the "inviolability for all papers and documents" of Member States participating in the work of its main and subsidiary organs, or in conferences convened by the United Nations (Article IV), and from a resolution of the United Nations General Assembly of the same year which asserted that such inviolability of all State papers and documents was granted by the 1946 Convention "in the interests of the good administration of justice". Thus,—Judge Cançado Trindade adds,—"already in 1946, the United Nations General Assembly had given expression in a resolution to the presumption of the inviolability of the correspondence between Member States and their legal advisers. This is an

international law obligation, not one derived from a unilateral 'undertaking' or assurance by a State following its seizure of documents and data containing information belonging to another State" (para. 55).

16. Instead of unilateral "undertakings" or assurances or promises formulated in the course of the international legal proceedings,—he ponders,—"precepts of law provide a much safer ground for its reasoning in the exercise of its judicial function. Those precepts are of a perennial value, such as the ones (Ulpian's) opening book I (item I, para. 3) of Justinian's Institutes (early VIth century): *honeste vivere, alterum non laedere, suum cuique tribuere* (to live honestly, not to harm anyone, to give each one his/her due)" (para. 58).

17. Judge Cançado Trindade's last line of reflections pertains to what he characterizes as *the autonomous legal regime of provisional measures of protection* (part IX). He begins by recalling that he has addressed this particular issue also in his earlier Dissenting Opinion in the merged cases of *Certain Activities Carried out by Nicaragua in the Border Area* and of the *Construction of a Road in Costa Rica along the San Juan River* (Order of 16 July 2013), opposing Costa Rica to Nicaragua (and *vice-versa*), wherein he pointed out that the object of requests for provisional measures of protection is different from the object of applications lodged with international tribunals, as to the merits. Furthermore,

> "the rights to be protected are not necessarily the same in the two respective proceedings. Compliance with provisional measures runs parallel to the course of proceedings as to the merits of the case at issue. The obligations concerning provisional measures ordered and decisions as to the merits (and reparations) are not the same, being autonomous from each other. The same can be said of the legal consequences of non-compliance (with provisional measures, or else with judgments as to the merits), the breaches (of ones and the others) being distinct from each other" (para. 60).

18. What ensues hereinafter is "the pressing need to dwell upon, and to develop conceptually, the *autonomous legal regime* of provisional measures of protection" (para. 61), as he observed not only in his Dissenting Opinion in the two aforementioned merged cases opposing Costa Rica to Nicaragua, but also in his previous Dissenting Opinion (paras. 80–81) in the case of *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium *versus* Senegal, Order of 28 May 2009), and which he sees it fit to reiterate here, in the present case on *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia)*. This point, he adds, has marked presence in these recent cases and the present one, irrespective of the distinct circumstances surrounding them. He then reiterates that, in the *cas d'espèce*, the ICJ should have decided, from now on, to keep "custody itself, as master of its own jurisdiction, of the seized documents and data containing information belonging to Timor-Leste, here in its premises in the Peace Palace at The Hague" (para. 62).

19. Last but not least, in an epilogue, Judge Cançado Trindade summarizes, in recapitulation (part X), the foundations of his own position in the present case, as explained in the present Separate opinion, for the sake of clarity, and in order to stress their interrelatedness. *Primus*: When a State pursues the safeguard of its own right, acting on its own behalf, it cannot be compelled to appear before the national tribunals of another State, its contending Party. The local remedies rule does not apply in cases of this kind; *par in parem non habet imperium, non habet jurisdictionem*. *Secundus*: The centrality of the search for justice prevails over concerns to avoid "concurrent jurisdiction". *Tertius*: The imperative of the realization of justice prevails over manifestations of a State's will. *Quartus*: Euphemisms *en vogue*—like the empty and misleading rhetoric of "proliferation" of international tribunals, and "fragmentation" of international law, among others, are devoid of any meaning, and divert attention to false issues of "delimitation" of competences, oblivious of the need to secure an enlarged access to justice to the *justiciables*.

20. *Quintus*: International courts and tribunals share a *common mission* to impart justice, which stands above zeal of "delimitation" of competences. *Sextus*: Unilateral "undertakings" or assurances by a contending party cannot serve as basis for provisional measures of protection. *Septimus*: Reliance on unilateral "undertakings" or assurances has been the source of uncertainties and apprehension; they are proper to the realm of inter-State (diplomatic) relations, and reliance upon such unilateral acts is to be avoided in the course of international legal proceedings; *ex factis jus non oritur*. *Octavus*: International legal procedure has a logic of its own, which is not to be equated to that of diplomatic relations, even less so in face of the perceived need of assertion that *ex injuria jus non oritur*. *Nonus*: To allow unilateral acts to be performed with the acceptance of subsequent "undertakings" or assurances ensuing therefrom would not only generate uncertainties, but also create *faits accomplis* threatening the certainty of the application of the law. *Decimus*: Facts only do not *per se* generate law-creating effects. Human values and the idea of objective justice stand above facts; *ex conscientia jus oritur*.

21. *Undecimus*: Arguments of alleged "national security", as raised in the *cas d'espèce,* cannot be made the concern of an international tribunal. Measures of alleged "national security", as raised in the *cas d'espèce*, are alien to the exercise of the international judicial function. *Duodecimus*: General principles of international law, such as the juridical equality of States (enshrined into Article 2(1) of the United Nations Charter), cannot be obfuscated by allegations of "national security". *Tertius decimus*: The basic principle of the juridical equality of States, embodying the *idée de justice*, is to prevail, so as to discard eventual repercussions in international legal procedure of factual inequalities among States.

22. *Quartus decimus*: Due process of law, and the equality of arms (égalité des armes), cannot be undermined by recourse by a contending party to alleged measures of "national security". *Quintus decimus*: Allegations of State secrecy or "national security" cannot interfere in the work of an international tribunal (in judicial or arbitral proceedings), carried out in the light of the principle of the proper administration of justice (*la bonne administration de la justice*). *Sextus decimus*: Provisional measures of protection cannot be erected upon unilateral "undertakings" or assurances ensuing from alleged "national security" measures; provisional measures of protection cannot rely on such unilateral acts, they are independent from them, they carry the authority of the international

tribunal which ordered them. *Septimus decimus*: In the circumstances of the *cas d'espèce*, it is the Court itself that should keep custody of the documents and data seized and detained by a contending party; the Court should do so as master of its own jurisdiction, so as to prevent further irreparable harm.

23. *Duodevicesimus*: The inviolability of State papers and documents is recognized by international law, in the interests of the good administration of justice. *Undevicesimus*: The inviolability of the correspondence between States and their legal advisers is an international law obligation, not one derived from a unilateral "undertaking" or assurance by a State following its seizure of documents and data containing information belonging to another State. *Vicesimus*: There is an autonomous legal regime of provisional measures of protection, in expansion in our times. This autonomous legal regime comprises: *a*) the rights to be protected, not necessarily the same as in the proceedings on the merits of the concrete case; *b*) the corresponding obligations of the States concerned; *c*) the legal consequences of non-compliance with provisional measures, distinct from those ensuing from breaches as to the merits. The acknowledgment of such autonomous legal regime is endowed with growing importance in our days.

Dissenting opinion of Judge Greenwood

Judge Greenwood considers that caution on the part of the Court is necessary in the consideration of whether to indicate provisional measures, since such measures impose a legal obligation upon a party before the existence and application of either party's rights have been established. The legal criteria for the indication of provisional measures allows the Court to employ a degree of caution in the exercise of its powers under Article 41 of its Statute.

Judge Greenwood is of the opinion that the undertaking given to the Court by the Attorney-General of Australia dated 21 January 2014 makes the first two paragraphs of the *dispositif* unnecessary. A formal undertaking given by a State is legally binding, and it is presumed that a State will act in good faith in honouring its commitment to the Court. The effect of the undertaking is that there is therefore no real and imminent risk of irreparable harm to Timor-Leste's rights, and accordingly, the conditions for the indication of provisional measures are not satisfied in respect of the seized material. Moreover, Judge Greenwood is concerned that the plausible rights of Australia to exercise its criminal jurisdiction and its right to protect the safety of its officials have not been taken into account by the Order. Judge Greenwood is, however, of the opinion that there is a real and imminent risk of Australia's interference with Timor-Leste's future communications with its lawyers. For these reasons, Judge Greenwood voted against paragraphs (1) and (2) of the *dispositif*, but in favour of paragraph (3).

Separate opinion of Judge Donoghue

Judge Donoghue finds much common ground between her views and those contained in the Order. She agrees with the Court that there is *prima facie* jurisdiction in this case, that at least some of the rights asserted by Timor-Leste are plausible and that there is a link between the measures sought and the rights asserted by Timor-Leste in its Application.

As to the risk of irreparable prejudice, Judge Donoghue agrees with the Court that the prejudice to Timor-Leste could be irreparable if the seized materials were shared with persons involved in the pending arbitration, future proceedings relating to maritime delimitation or the present case. She has voted against the first two provisional measures, however, in light of the assurances contained in the 21 January 2014 undertaking made by Australia's Attorney-General to the Court. The Attorney General, who has the authority to bind Australia under international law, has undertaken that the seized material and information derived from it will not be shared with officials responsible for the present case, for the Timor Sea Treaty arbitration, or for purposes relating to the exploitation of resources in the Timor Sea or related negotiations. Australia's good faith is to be presumed and nothing in the record suggests that it lacks the capacity to meet its commitment to the Court. For these reasons, Judge Donoghue considers that there is only a remote possibility that the seized material or information derived from it will be transmitted to persons involved in the matters referred to in the Attorney-General's undertaking. The 21 January 2014 undertaking therefore addresses any irreparable prejudice to the rights asserted by Timor-Leste that are at least plausible.

Judge Donoghue has voted in favour of the third provisional measure because Australia has not taken comparable steps to address prospective acts of interference with communications between Timor-Leste and its legal advisers with regard to the pending arbitration, future proceedings relating to maritime delimitation, or other related procedures, including the present case.

Dissenting opinion of Judge *ad hoc* Callinan

Judge *ad hoc* Callinan concludes that it is unnecessary for the Court to indicate provisional measures.

Context and factual background

Judge *ad hoc* Callinan first observes that the true and full facts can rarely be confidently ascertained at any interlocutory stage of curial proceedings. In the present proceedings, these difficulties may be heightened by an understandable concern of Australia that it not disclose certain details relating to the national security issues involved.

With this observation in mind, Judge *ad hoc* Callinan proceeds to outline some of the factual background to the present proceedings, based on the materials put before the Court thus far. He recalls the continuing arbitral proceedings between the Parties regarding a 2006 treaty relating to the Timor Sea, and various media reports of alleged incidents involving officials of the Parties and legal advisers of Timor-Leste. Judge *ad hoc* Callinan notes that the evidence relied on in these reports is untested, and often involves double hearsay. He also observes that, on the record before the Court, there appears to be some doubt regarding who would be entitled to

claim legal professional privilege in respect of the documents and other material seized by Australian officials.

The legal position

Turning to the legal requirements for the indication of provisional measures by the Court, Judge *ad hoc* Callinan recalls that the case must, *prima facie*, be within the Court's jurisdiction and admissible, that the rights invoked by the Applicant must be at least plausible, and that there must be an urgent risk of irreparable harm to these rights. Even where these conditions are satisfied, however, indication of provisional measures is not mandatory: the Court, like any court elsewhere in the world, retains a discretion to indicate interlocutory relief.

Judge *ad hoc* Callinan observes that the distinction between jurisdiction and admissibility is not always a clear one. Australia has hinted at a number of potential objections to jurisdiction and/or the admissibility of Timor-Leste's Application (referring, for example, to the exceptions in its declaration of acceptance of the Court's compulsory jurisdiction under Article 36 (2) of the Court's Statute), but has not yet presented these as formal objections.

Judge *ad hoc* Callinan suggests that the Applicant State's failure to have recourse to available domestic remedies may be a relevant factor to be weighed by the Court in exercising its discretion to order provisional measures.

Judge *ad hoc* Callinan observes that the concept of irreparable damage, as a condition for the indication of provisional measures by the Court, is analogous with the common law principle that interlocutory relief will not be ordered where damages, for example, would be an adequate remedy. In this respect, an adequate undertaking by the Respondent could constitute an adequate remedy.

On the plausible nature of the rights invoked, Judge *ad hoc* Callinan suggests that the existence of a sovereign right to inviolability of documents in the possession of a lawyer in another country is a large and, possibly, novel claim. The extent to which there is a settled principle of legal professional privilege, immune to any limitation in an international or national interest, will require detailed and careful argument at the merits phase. The same is true of the relevance, if any, of the so-called fraud or crime exception to legal professional privilege.

Judge *ad hoc* Callinan doubts whether the Australian Attorney-General, in authorizing the warrants at issue in the present proceedings, was carrying out a judicial or quasi-judicial function. Rather, the Australian Constitution and relevant case law suggests that the Attorney-General is a member of the Executive, and neither a judge nor a quasi-judge.

Conclusion

Finally, Judge *ad hoc* Callinan expresses the view that the undertakings offered by Australia, as extended, enhanced and clarified in the oral and written submissions, are adapted to and sufficient for the circumstances of the case. Regarding dispositive paragraph 3, Judge *ad hoc* Callinan doubts the grounds for this measure, and suggests that the breadth and unspecific nature of the word "interfere" may be problematic.

208. WHALING IN THE ANTARCTIC (AUSTRALIA *v.* JAPAN: NEW ZEALAND INTERVENING)

Judgment of 31 March 2014

On 31 March 2014, the International Court of Justice rendered its Judgment in the case concerning *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening)*.

The Court was composed as follows: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari; Judge *ad hoc* Charlesworth; Registrar Couvreur.

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The operative paragraph of the Judgment (para. 247) reads as follows:

"…

The Court,

(1) Unanimously,

Finds that it has jurisdiction to entertain the Application filed by Australia on 31 May 2010;

(2) By twelve votes to four,

Finds that the special permits granted by Japan in connection with JARPA II do not fall within the provisions of Article VIII, paragraph 1, of the International Convention for the Regulation of Whaling;

In favour: President Tomka; Vice-President Sepúlveda-Amor; Judges Keith, Skotnikov, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari; Judge *ad hoc* Charlesworth;

Against: Judges Owada, Abraham, Bennouna, Yusuf;

(3) By twelve votes to four,

Finds that Japan, by granting special permits to kill, take and treat fin, humpback and Antarctic minke whales in pursuance of JARPA II, has not acted in conformity with its obligations under paragraph 10 *(e)* of the Schedule to the International Convention for the Regulation of Whaling;

In favour: President Tomka; Vice-President Sepúlveda-Amor; Judges Keith, Skotnikov, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari; Judge *ad hoc* Charlesworth;

Against: Judges Owada, Abraham, Bennouna, Yusuf;

(4) By twelve votes to four,

Finds that Japan has not acted in conformity with its obligations under paragraph 10 *(d)* of the Schedule to the International Convention for the Regulation of Whaling in relation to the killing, taking and treating of fin whales in pursuance of JARPA II;

In favour: President Tomka; Vice-President Sepúlveda-Amor; Judges Keith, Skotnikov, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari; Judge *ad hoc* Charlesworth;

Against: Judges Owada, Abraham, Bennouna, Yusuf;

(5) By twelve votes to four,

Finds that Japan has not acted in conformity with its obligations under paragraph 7 *(b)* of the Schedule to the International Convention for the Regulation of Whaling in relation to the killing, taking and treating of fin whales in the "Southern Ocean Sanctuary" in pursuance of JARPA II;

In favour: President Tomka; Vice-President Sepúlveda-Amor; Judges Keith, Skotnikov, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari; Judge *ad hoc* Charlesworth;

Against: Judges Owada, Abraham, Bennouna, Yusuf;

(6) By thirteen votes to three,

Finds that Japan has complied with its obligations under paragraph 30 of the Schedule to the International Convention for the Regulation of Whaling with regard to JARPA II;

In favour: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja;

Against: Judges Sebutinde, Bhandari; Judge *ad hoc* Charlesworth;

(7) By twelve votes to four,

Decides that Japan shall revoke any extant authorization, permit or licence granted in relation to JARPA II, and refrain from granting any further permits in pursuance of that programme.

In favour: President Tomka; Vice-President Sepúlveda-Amor; Judges Keith, Skotnikov, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari; Judge *ad hoc* Charlesworth;

Against: Judges Owada, Abraham, Bennouna, Yusuf."

*

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Judges Owada and Abraham appended dissenting opinions to the Judgment of the Court. Judge Keith appended a declaration to the Judgment of the Court; Judge Bennouna appended a dissenting opinion to the Judgment of the Court; Judge Cançado Trindade appended a separate opinion to the Judgment of the Court; Judge Yusuf appended a dissenting opinion to the Judgment of the Court; Judges Greenwood, Xue, Sebutinde and Bhandari appended separate opinions to the Judgment of the Court; Judge *ad hoc* Charlesworth appended a separate opinion to the Judgment of the Court.

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Chronology of the procedure (paras. 1–29)

The Court recalls that, on 31 May 2010, Australia filed in the Registry of the Court an Application instituting proceedings against Japan in respect of a dispute concerning "Japan's continued pursuit of a large-scale program of whaling under the Second Phase of its Japanese Whale Research Program

under Special Permit in the Antarctic ('JARPA II')", in breach of obligations assumed by Japan under the International Convention for the Regulation of Whaling (hereinafter the "Convention" or the "ICRW"). The Court further recalls that, on 20 November 2012, New Zealand, pursuant to Article 63, paragraph 2, of the Statute, filed in the Registry of the Court a Declaration of Intervention in the case. In its Declaration, New Zealand stated that it "avail[ed] itself of the right … to intervene as a non-party in the proceedings brought by Australia against Japan in this case". By an Order of 6 February 2013, the Court decided that the Declaration of Intervention filed by New Zealand was admissible.

I. Jurisdiction of the Court (paras. 30–41)

The Court notes that Australia invokes as the basis of the Court's jurisdiction the declarations made by both Parties under Article 36, paragraph 2, of the Court's Statute. It observes that Japan, for its part, contests the Court's jurisdiction over the dispute, arguing that it falls within reservation *(b)* of Australia's declaration, which Japan invokes on the basis of reciprocity. This reservation excludes from the Court's jurisdiction "any dispute concerning or relating to the delimitation of maritime zones, including the territorial sea, the exclusive economic zone and the continental shelf, or arising out of, concerning, or relating to the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation".

The Court considers that the disputes to which Australia's reservation *(b)* refers must either concern maritime delimitation in an area where there are overlapping claims or relate to the exploitation of such an area or of an area adjacent thereto. The existence of a dispute concerning maritime delimitation between the Parties is thus required according to both parts of the reservation. After noting that both Parties acknowledge that the present dispute is not about maritime delimitation, the Court examines whether JARPA II involves the exploitation of an area which is the subject of a dispute relating to delimitation or of an area adjacent to it. The Court observes in this regard that part of the whaling activities envisaged in JARPA II take place in the maritime zone claimed by Australia as relating to the asserted Australian Antarctic Territory or in an adjacent area, and the taking of whales, especially in considerable numbers, could be viewed as a form of exploitation of a maritime area even if this occurs according to a programme for scientific research. However, while Japan has contested Australia's maritime claims generated by the asserted Australian Antarctic Territory, it does not claim to have any sovereign rights in those areas. The fact that Japan questions those maritime entitlements does not render the delimitation of these maritime areas under dispute as between the Parties. The Parties to the present proceedings have no overlapping claims to maritime areas which may render reservation *(b)* applicable. Moreover, the Court considers that the nature and extent of the claimed maritime zones are immaterial to the present dispute, which is about whether or not Japan's activities are compatible with its obligations under the ICRW. The Court therefore concludes that Japan's objection to the Court's jurisdiction cannot be upheld.

II. Alleged violations of international obligations under the Convention (paras. 42–243)

1. Introduction (paras. 42–50)

The Court notes that the ICRW was preceded by the 1931 Convention for the Regulation of Whaling (which prohibited the killing of certain categories of whales and required whaling operations by vessels of States parties to be licensed, but failed to address the increase in overall catch levels) and the 1937 International Agreement for the Regulation of Whaling (which, *inter alia*, prohibited the taking of certain categories of whales, designated seasons for different types of whaling, closed certain geographic areas to whaling and imposed further regulations on the industry; it also provided for the issuance by Contracting Governments of special permits to their nationals authorizing them to kill, take and treat whales for purposes of scientific research). Adopted on 2 December 1946, the ICRW entered into force for Australia on 10 November 1948 and for Japan on 21 April 1951; New Zealand deposited its instrument of ratification on 2 August 1949, but gave notice of withdrawal on 3 October 1968; it adhered again to the Convention with effect from 15 June 1976.

The Court notes that, in contrast to its predecessors, the ICRW does not contain substantive provisions regulating the conservation of whale stocks or the management of the whaling industry. These are to be found in the Schedule, which forms an integral part of the Convention and which is subject to amendments, to be adopted by the International Whaling Commission (the "IWC" or the "Commission"). An amendment becomes binding on a State party unless it presents an objection. In 1950, the Commission established a Scientific Committee which, according to paragraph 30 of the Schedule, *inter alia*, reviews and comments on special permits before they are issued by States parties to their nationals for purposes of scientific research under Article VIII, paragraph 1, of the Convention. Since the mid-1980s, the Scientific Committee has conducted its review of special permits on the basis of "Guidelines" issued or endorsed by the Commission. At the time that JARPA II was proposed in 2005, the applicable Guidelines had been collected in a document entitled "Annex Y: Guidelines for the Review of Scientific Permit Proposals" ("Annex Y"). The current Guidelines are set forth in a document entitled "Annex P: Process for the Review of Special Permit Proposals and Research Results from Existing and Completed Permits" ("Annex P").

The Court then proceeds with a presentation of the claims by Australia and responses by Japan. It recalls, in this regard, that Australia alleges that because JARPA II is not a programme for purposes of scientific research within the meaning of Article VIII of the Convention, Japan has breached and continues to breach three substantive obligations under the Schedule: the obligation to respect the moratorium setting zero catch limits for the killing of whales from all stocks for commercial purposes (para. 10 *(e)*), the obligation not to undertake commercial whaling of fin whales in the Southern Ocean Sanctuary (para. 7 *(b)*), and the obligation to observe the moratorium on the taking, killing or treating of whales, except minke whales, by factory ships or whale catchers attached to factory ships (para. 10 *(d)*). Australia further

alleges that Japan has violated procedural requirements for proposed scientific permits set out in paragraph 30 of the Schedule. Japan contests all of these allegations. With regard to the substantive obligations, it argues that none of the provisions invoked by Australia applies to JARPA II, as this programme has been undertaken for purposes of scientific research and is therefore covered by the exemption provided for in Article VIII, paragraph 1, of the Convention. Japan also contests any breach of the procedural requirements stated in paragraph 30 of the Schedule.

2. Interpretation of Article VIII, paragraph 1, of the Convention (paras. 51–97)

The Court then turns to its interpretation of Article VIII, paragraph 1, of the Convention, which reads as follows:

> "Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention. Each Contracting Government shall report at once to the Commission all such authorizations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted."

The Court first examines the function of this provision. It notes that Article VIII is an integral part of the Convention and, therefore, has to be interpreted in light of its object and purpose and taking into account its other provisions, including the Schedule. The Court considers, however, that since Article VIII, paragraph 1, specifies that "the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention", whaling conducted under a special permit which meets the conditions of Article VIII is not subject to the obligations under the above-mentioned paragraphs 10 *(e)*, 7 *(b)*, and 10 *(d)* of the Schedule.

The Court then analyses the relationship between Article VIII and the object and purpose of the Convention. Taking into account the preamble and other relevant provisions of the Convention referred to above, the Court observes that neither a restrictive nor an expansive interpretation of Article VIII is justified. The Court notes that programmes for purposes of scientific research should foster scientific knowledge; they may pursue an aim other than either conservation or sustainable exploitation of whale stocks. This is also reflected in the Guidelines issued by the IWC for the review of scientific permit proposals by the Scientific Committee. In particular, the Guidelines initially applicable to JARPA II, Annex Y, referred not only to programmes that "contribute information essential for rational management of the stock" or those that are relevant for "conduct[ing] the comprehensive assessment" of the moratorium on commercial whaling, but also those responding to "other critically important research needs". The current Guidelines, Annex P, list three broad categories of objectives. Besides programmes aimed at "improv[ing] the conservation and management of whale stocks", they envisage programmes which have as an objective to "improve the conservation and management of other living marine resources or the ecosystem of which the whale stocks are an integral part" and those directed at "test[ing] hypotheses not directly related to the management of living marine resources".

The Court next discusses the power of the State issuing a special permit and considers that Article VIII gives discretion to a State party to the ICRW to reject the request for a special permit or to specify the conditions under which a permit will be granted, but that the question whether the killing, taking and treating of whales pursuant to a requested special permit is for purposes of scientific research cannot depend simply on that State's perception.

The Court then sets out the standard of review it will apply when examining the grant of a special permit authorizing the killing, taking and treating of whales on the basis of Article VIII, paragraph 1, of the Convention: it will assess, first, whether the programme under which these activities occur involves scientific research, and secondly, whether, in the use of lethal methods, the programme's design and implementation are reasonable in relation to achieving its stated objectives.

The Court observes that, in applying the above standard of review, it is not called upon to resolve matters of scientific or whaling policy. The Court is aware that members of the international community hold divergent views about the appropriate policy towards whales and whaling, but it is not for the Court to settle these differences. The Court's task is only to ascertain whether the special permits granted in relation to JARPA II fall within the scope of Article VIII, paragraph 1, of the ICRW.

With regard to the meaning of the phrase "for purposes of scientific research" the Court considers that the two elements of that phrase "scientific research" and "for purposes of" are cumulative. As a result, even if a whaling programme involves scientific research, the killing, taking and treating of whales pursuant to such a programme does not fall within Article VIII unless these activities are "for purposes of" scientific research. The Court notes that the term "scientific research" is not defined by the Convention and that Australia, relying primarily on the views of one of the scientific experts that it called, maintains that scientific research (in the context of the Convention) has four essential characteristics: defined and achievable objectives (questions or hypotheses) that aim to contribute to knowledge important to the conservation and management of stocks; "appropriate methods", including the use of lethal methods only where the objectives of the research cannot be achieved by any other means; peer review; and the avoidance of adverse effects on stock. The Court is not persuaded that activities must satisfy the four criteria advanced by Australia in order to constitute "scientific research" in the context of Article VIII. The Court states that these criteria appear largely to reflect what one of the experts called by Australia regarded as well-conceived scientific research, rather than serving as an interpretation of the term as used in the Convention. Nor does the Court consider it necessary

to devise alternative criteria or to offer a general definition of "scientific research".

Turning next to the meaning of the term "for purposes of", the Court observes that even if the stated research objectives of a programme are the foundation of a programme's design, it does not need to pass judgment on the scientific merit or importance of those objectives in order to assess the purpose of the killing of whales under such a programme, nor is it for the Court to decide whether the design and implementation of a programme are the best possible means of achieving its stated objectives. The Court reiterates that in order to ascertain whether a programme's use of lethal methods is for purposes of scientific research, it will consider whether the elements of a programme's design and implementation are reasonable in relation to its stated scientific objectives. Such elements may include: decisions regarding the use of lethal methods; the scale of the programme's use of lethal sampling; the methodology used to select sample sizes; a comparison of the target sample sizes and the actual take; the time frame associated with a programme; the programme's scientific output; and the degree to which a programme co-ordinates its activities with related research projects.

The Court notes that, as the Parties and the intervening State accept, Article VIII, paragraph 2, permits the processing and sale of whale meat incidental to the killing of whales pursuant to the grant of a special permit under Article VIII, paragraph 1. In the Court's view, the fact that a programme involves the sale of whale meat and the use of proceeds to fund research is not sufficient, taken alone, to cause a special permit to fall outside Article VIII. Other elements would have to be examined, such as the scale of a programme's use of lethal sampling, which might suggest that the whaling is for purposes other than scientific research. In particular, a State party may not, in order to fund the research for which a special permit has been granted, use lethal sampling on a greater scale than is otherwise reasonable in relation to achieving the programme's stated objectives.

The Court observes that a State often seeks to accomplish more than one goal when it pursues a particular policy. Moreover, an objective test of whether a programme is for purposes of scientific research does not turn on the intentions of individual government officials, but rather on whether the design and implementation of a programme are reasonable in relation to achieving the stated research objectives. Accordingly, the Court considers that whether particular government officials may have motivations that go beyond scientific research does not preclude a conclusion that a programme is for purposes of scientific research within the meaning of Article VIII. At the same time, such motivations cannot justify the granting of a special permit for a programme that uses lethal sampling on a larger scale than is reasonable in relation to achieving the programme's stated research objectives. The research objectives alone must be sufficient to justify the programme as designed and implemented.

3. JARPA II in light of Article VIII of the Convention (paras. 98–227)

The Court then describes JARPA II and its predecessor, JARPA, before examining whether the design and implementation of JARPA II are reasonable in relation to achieving the programme's stated research objectives.

A. Description of the programmes (paras. 100–126)

The Court recalls that in 1982, the IWC amended the Schedule of the Convention to adopt a moratorium on commercial whaling. Japan made a timely objection to the amendment, which it withdrew in 1986. The following season, it began the JARPA programme, for which it issued special permits pursuant to Article VIII, paragraph 1, of the Convention. The 1987 JARPA Research Plan described JARPA as, *inter alia*, "a program for research on the southern hemisphere minke whale and for preliminary research on the marine ecosystem in the Antarctic", which was "designed to estimate the stock size" of southern hemisphere minke whales in order to provide a "scientific basis for resolving problems facing the IWC" relating to "the divergent views on the moratorium". To those ends, it proposed annual lethal sample sizes of 825 Antarctic minke whales and 50 sperm whales from two "management areas" in the Southern Ocean. Later, the proposal to sample sperm whales by lethal methods was dropped from the programme and the sample size for Antarctic minke whales was reduced to 300 for JARPA's first seven seasons. Japan explains that the decision to reduce the sample size from 825 to 300 resulted in the extension of the research period, which made it possible to obtain accurate results with smaller sample sizes. Beginning in the 1995–1996 season, the maximum annual sample size for Antarctic minke whales was increased to 400, plus or minus 10 per cent. In total, more than 6,700 Antarctic minke whales were killed over the course of JARPA's 18-year history.

In March 2005, Japan submitted the JARPA II Research Plan to the Scientific Committee and launched the new programme in November 2005, prior to the December 2006 final review of JARPA by the Scientific Committee. As was the case under JARPA, the special permits for JARPA II are issued by Japan to the Institute of Cetacean Research, a foundation established in 1987 as a "public-benefit corporation" under Japan's Civil Code. JARPA II contemplates the lethal sampling of three whale species (Antarctic minke whales, fin whales and humpback whales) and its Research Plan describes the key elements of the programme's design, including: (*i*) its four research objectives (monitoring of the Antarctic ecosystem, modelling competition among whale species and future management objectives, elucidation of temporal and spatial changes in stock structure, and improving the management procedure for Antarctic minke whale stocks); (*ii*) its research period and area (structured in six-year phases, JARPA II is a long-term research programme without a specified termination date, which operates in an area that is located within the Southern Ocean Sanctuary established in paragraph 7 *(b)* of the Schedule); (*iii*) its research methods and sample sizes (a mixture of lethal sampling of 850 Antarctic minke whales, 50 fin whales and 50 humpback whales, as well as non-lethal methods, namely biopsy sampling, satellite tagging and whale sighting surveys); and (iv) the expected effect on whale stocks (the Research Plan states that, based on current abundance estimates, the planned take of each species is too small to have any negative effect).

B. Whether the design and implementation of JARPA II are reasonable in relation to achieving the programme's stated research objectives (paras. 127–227)

In light of the applicable standard of review, the Court then examines whether the design and implementation of JARPA II are reasonable in relation to achieving the programme's stated objectives.

(a) Japan's decisions regarding the use of lethal methods (paras. 128–144)

The Court considers that the evidence shows that, at least for some of the data sought by JARPA II researchers, non-lethal methods are not feasible. On this basis, and given that the value and reliability of data collected are a matter of scientific opinion, the Court finds no basis to conclude that the use of lethal methods is *per se* unreasonable in the context of JARPA II. Instead, it looks more closely at the details of Japan's decisions regarding the use of lethal methods in JARPA II and the scale of their use in the programme. In this regard, the Court mentions three reasons why the JARPA II Research Plan should have included some analysis of the feasibility of non-lethal methods as a means of reducing the planned scale of lethal sampling in the programme: (*i*) IWC resolutions and Guidelines call upon States parties to take into account whether research objectives can be achieved using non-lethal methods; (*ii*) Japan states that, for reasons of scientific policy, "[i]t does not … use lethal means more than it considers necessary" and that non-lethal alternatives are not practical or feasible in all cases; and (*iii*) the two experts called by Australia referred to significant advances in a wide range of non-lethal research techniques over the past 20 years and described some of those developments and their potential application with regard to JARPA II's stated objectives.

The Court finds no evidence of studies by Japan of the feasibility or practicability of non-lethal methods, either in setting the JARPA II sample sizes or in later years in which the programme has maintained the same sample size targets, or of any examination by Japan whether it would be feasible to combine a smaller lethal take and an increase in non-lethal sampling as a means to achieve JARPA II's research objectives.

(b) The scale of the use of lethal methods in JARPA II (paras. 145–212)

The Court then examines the scale of the use of lethal methods in JARPA II. Comparing JARPA II and JARPA sample sizes, the Court recalls that the JARPA II sample size for minke whales (850 plus or minus 10 per cent) is approximately double the minke whale sample size for the last years of JARPA, and that JARPA II sets sample sizes for two additional species fin and humpback whales that were not the target of lethal sampling under JARPA. The Court notes, however, that the comparison of the two research plans also reveals considerable overlap between the subjects, objectives, and methods of the two programmes. The Court considers that these similarities cast doubt on Japan's argument that the JARPA II objectives relating to ecosystem monitoring and multi-species competition are distinguishing features of the latter programme that call for a significant increase in the minke whale sample size and the lethal sampling of two additional species. The Court also refers to Japan's emphasis on the need for continuity between the two programmes as a justification for launching JARPA II without waiting for the results of the Scientific Committee's final review of JARPA, noting that weaknesses in Japan's explanation for the decision to proceed with the JARPA II sample sizes prior to the final review of JARPA lend support to the view that those sample sizes and the launch date for JARPA II were not driven by strictly scientific considerations.

Regarding the determination of species-specific sample sizes, the Court examines the five steps in the process of sample size determination, noting those steps that give rise to disagreement between the Parties. In this regard, it reiterates that it does not seek to pass judgment on the scientific merit of the JARPA II objectives and that the activities of JARPA II can broadly be characterized as "scientific research". With regard to the setting of sample sizes, the Court indicates also that it is not in a position to conclude whether a particular value for a given variable has scientific advantages over another; it rather seeks only to evaluate whether the evidence supports a conclusion that the sample sizes are reasonable in relation to achieving JARPA II's stated objectives. The Court concludes that, taken together, the evidence relating to the determination of species-specific sample sizes provides scant analysis and justification for the underlying decisions that generate the overall sample size.

Comparing the sample size and actual take, the Court notes a significant gap between the JARPA II target sample sizes and the actual number of whales that have been killed in the implementation of the programme: a total of 18 fin whales have been killed over the first seven seasons of JARPA II, including ten fin whales during the programme's first year when the feasibility of taking larger whales was under study. In subsequent years, zero to three fin whales have been taken annually. No humpback whales have been killed under JARPA II. Japan recounts that after deciding initially not to sample humpback whales during the first two years of JARPA II, it "suspended" the sampling of humpback whales as of 2007. The Court observes, however, that the permits issued for JARPA II since 2007 continue to authorize the take of humpback whales. Concerning minke whales, notwithstanding the target sample size of 850, the actual take under JARPA II has fluctuated from year to year: 853 minke whales during the 2005–2006 season, approximately 450 in the several seasons following, 170 in the 2010–2011 season and 103 in the 2012–2013 season.

Analysing Australia's contention that the gap between the target sample sizes and the actual take undermines Japan's position that JARPA II is a programme for purposes of scientific research, the Court observes that, despite the number of years in which the implementation of JARPA II has differed significantly from the design of the programme, Japan has not made any changes to the JARPA II objectives and target sample sizes, which are reproduced in the special permits granted annually. In the Court's view, Japan's continued reliance on the first two JARPA II objectives to justify the target sample sizes, despite the discrepancy between the actual take and those targets, coupled with its statement that JARPA II can obtain meaningful scientific results based on a far more

limited actual take, cast further doubt on the characterization of JARPA II as a programme for purposes of scientific research. This evidence suggests, in fact, that the target sample sizes are larger than are reasonable in relation to achieving JARPA II's stated objectives. The fact that the actual take of fin and humpback whales is largely, if not entirely, a function of political and logistical considerations, further weakens the purported relationship between JARPA II's research objectives and the specific sample size targets for each species—in particular, the decision to engage in the lethal sampling of minke whales on a relatively large scale.

(c) Additional aspects of the design and implementation of JARPA II (paras. 213–222)

The Court then turns to several additional aspects of JARPA II to which the Parties called attention. With respect to the open-ended time frame of JARPA II, the Court observes that with regard to a programme for purposes of scientific research, as Annex P indicates, a "time frame with intermediary targets" would have been more appropriate. Examining the limited scientific output of JARPA II to date, the Court observes that although the first research phase of JARPA II (2005–2006 to 2010–2011) has already been completed, Japan points to only two peer-reviewed papers that have resulted from the programme to date. Furthermore, the Court notes that these papers do not relate to the JARPA II objectives and rely on data collected from minke whales caught during the JARPA II feasibility study. In light of the fact that JARPA II has been going on since 2005 and has involved the killing of about 3,600 minke whales, the Court considers that the scientific output to date is limited. Concerning co-operation with other research institutions, the Court observes that some further evidence of co-operation between JARPA II and other domestic and international research institutions could have been expected in light of the programme's focus on the Antarctic ecosystem and environmental changes in the region.

(d) Conclusion regarding the application of Article VIII, paragraph 1, to JARPA II (paras. 223–227)

The Court finds that the use of lethal sampling *per se* is not unreasonable in relation to the research objectives of JARPA II. However, as compared to JARPA, the scale of lethal sampling in JARPA II is far more extensive with regard to Antarctic minke whales, and the programme includes the lethal sampling of two additional whale species. The Court thus considers that the target sample sizes in JARPA II are not reasonable in relation to achieving the programme's objectives. First, the broad objectives of JARPA and JARPA II overlap considerably. To the extent that the objectives are different, the evidence does not reveal how those differences lead to the considerable increase in the scale of lethal sampling in the JARPA II Research Plan. Secondly, the sample sizes for fin and humpback whales are too small to provide the information that is necessary to pursue the JARPA II research objectives based on Japan's own calculations, and the programme's design appears to prevent random sampling of fin whales. Thirdly, the process used to determine the sample size for minke whales lacks transparency, as the experts called by each of the Parties agreed. Fourthly, some evidence suggests that the programme could have been adjusted to achieve a far smaller sample size, and Japan does not explain why this was not done. The evidence before the Court further suggests that little attention was given to the possibility of using non-lethal research methods more extensively to achieve the JARPA II objectives and that funding considerations, rather than strictly scientific criteria, played a role in the programme's design.

The Court states that these problems with the design of JARPA II must also be considered in light of its implementation. First, no humpback whales have been taken, and Japan cites non-scientific reasons for this. Secondly, the take of fin whales is only a small fraction of the number that the JARPA II Research Plan prescribes. Thirdly, the actual take of minke whales has also been far lower than the annual target sample size in all but one season. Despite these gaps between the Research Plan and the programme's implementation, Japan has maintained its reliance on the JARPA II research objectives—most notably, ecosystem research and the goal of constructing a model of multi-species competition—to justify both the use and extent of lethal sampling prescribed by the JARPA II Research Plan for all three species. Neither JARPA II's objectives nor its methods have been revised or adapted to take account of the actual number of whales taken. Nor has Japan explained how those research objectives remain viable given the decision to use six-year and 12-year research periods for different species, coupled with the apparent decision to abandon the lethal sampling of humpback whales entirely and to take very few fin whales. Other aspects of JARPA II also cast doubt on its characterization as a programme for purposes of scientific research, such as its open-ended time frame, its limited scientific output to date, and the absence of significant co-operation between JARPA II and other related research projects.

Taken as a whole, the Court considers that JARPA II involves activities that can broadly be characterized as scientific research, but that the evidence does not establish that the programme's design and implementation are reasonable in relation to achieving its stated objectives. The Court therefore concludes that the special permits granted by Japan for the killing, taking and treating of whales in connection with JARPA II are not "for purposes of scientific research" pursuant to Article VIII, paragraph 1, of the Convention.

4. Conclusions regarding alleged violations of the Schedule (paras. 228–233)

The Court turns next to the implications of the above conclusion, in light of Australia's contention that Japan has breached three provisions of the Schedule that set forth restrictions on the killing, taking and treating of whales: the obligation to respect zero catch limits for the killing for commercial purposes of whales from all stocks (para. 10 *(e)*); the factory ship moratorium (para. 10 *(d)*); and the prohibition on commercial whaling in the Southern Ocean Sanctuary (para. 7 *(b)*).

The Court observes that the precise formulations of the three Schedule provisions invoked by Australia differ from each other. The "factory ship moratorium" makes no explicit reference to commercial whaling, whereas the requirement to observe zero catch limits and the provision establishing the Southern Ocean Sanctuary express their prohibitions with

reference to "commercial" whaling. In the view of the Court, despite these differences in wording, the three Schedule provisions are clearly intended to cover all killing, taking and treating of whales that is neither "for purposes of scientific research" under Article VIII, paragraph 1, of the Convention, nor aboriginal subsistence whaling under paragraph 13 of the Schedule, which is not germane to this case. The reference to "commercial" whaling in paragraphs 7 *(b)* and 10 *(e)* of the Schedule can be explained by the fact that in nearly all cases this would be the most appropriate characterization of the whaling activity concerned. The language of the two provisions cannot be taken as implying that there exist categories of whaling which do not come within the provisions of either Article VIII, paragraph 1, of the Convention or paragraph 13 of the Schedule but which nevertheless fall outside the scope of the prohibitions in paragraphs 7 *(b)* and 10 *(e)* of the Schedule. Any such interpretation would leave certain undefined categories of whaling activity beyond the scope of the Convention and thus would undermine its object and purpose. It may also be observed that at no point in the present proceedings did the Parties and the intervening State suggest that such additional categories exist.

Proceeding therefore on the basis that whaling that falls outside Article VIII, paragraph 1, other than aboriginal subsistence whaling, is subject to the three Schedule provisions invoked by Australia, the Court reaches the following conclusions.

(i) Concerning the moratorium on commercial whaling contained in paragraph 10 *(e)* of the Schedule, the Court observes that, from 2005 to the present, Japan, through the issuance of JARPA II permits, has set catch limits above zero for three species 850 for minke whales, 50 for fin whales and 50 for humpback whales. The Court concludes therefore that Japan has not acted in conformity with its obligations under paragraph 10 *(e)* in each of the years in which it has granted permits for JARPA II (2005 to the present) because those permits have set catch limits higher than zero.

(ii) Regarding the factory ship moratorium contained in paragraph 10 *(d)* of the Schedule, the Court considers that by using the factory ship *Nisshin Maru*, as well as other vessels which have served as whale catchers, for the purpose of hunting, taking, towing, holding on to, or scouting for whales, Japan has not acted in conformity with its obligations under paragraph 10 *(d)* in each of the seasons during which fin whales were taken, killed and treated in JARPA II.

(iii) With respect to the Southern Ocean Sanctuary established by paragraph 7 *(b)* of the Schedule, the Court observes that this provision does not apply to minke whales in relation to Japan (as a consequence of Japan's objection to the paragraph). It further observes that JARPA II operates within the Southern Ocean Sanctuary and concludes that Japan has not acted in conformity with its obligations under paragraph 7 *(b)* in each of the seasons of JARPA II during which fin whales have been taken.

5. Alleged non-compliance by Japan with its obligations under paragraph 30 of the Schedule (paras. 234–242)

The Court recalls that Australia further asks it to adjudge and declare that Japan violated its obligation to comply with paragraph 30 of the Schedule. This provision requires Contracting Governments to make proposed permits available to the IWC Secretary before they are issued, in sufficient time to permit review and comment by the Scientific Committee, and sets out a list of items that is to be included in proposed permits.

As regards the question of timing, the Court observes that Japan submitted the JARPA II Research Plan for review by the Scientific Committee in advance of granting the first permit for the programme, and that subsequent permits that have been granted on the basis of that proposal must be submitted to the Commission pursuant to Article VIII, paragraph 1, of the Convention. The Court notes that Australia does not contest that Japan has done so with regard to each permit that has been granted for JARPA II. As regards the substantive requirements of paragraph 30, the Court finds that the JARPA II Research Plan, which constitutes the proposal for the grant of special permits, sets forth the information specified by that provision, as was recognized by the Scientific Committee in 2005 in its review of the JARPA II Research Plan. The Court is of the view that the lack of detail in the permits themselves is consistent with the fact that the programme is a multi-year programme, as described in the JARPA II Research Plan. Japan's approach thus accords with the practice of the Scientific Committee, and the Court concludes that Japan has met the requirements of paragraph 30 as far as JARPA II is concerned.

III. Remedies (paras. 244–246)

In addition to requesting the Court to find that the killing, taking and treating of whales under special permits granted for JARPA II is not for purposes of scientific research within the meaning of Article VIII and that Japan thus has violated three paragraphs of the Schedule, Australia asks the Court to adjudge and declare that Japan shall: "*(a)* refrain from authorizing or implementing any special permit whaling which is not for purposes of scientific research within the meaning of Article VIII; *(b)* cease with immediate effect the implementation of JARPA II; and *(c)* revoke any authorization, permit or licence that allows the implementation of JARPA II." The Court observes that, because JARPA II is an ongoing programme, measures that go beyond declaratory relief are warranted. The Court therefore orders that Japan shall revoke any extant authorization, permit or licence to kill, take or treat whales in relation to JARPA II, and refrain from granting any further permits under Article VIII, paragraph 1, of the Convention, in pursuance of that programme.

The Court sees no need to order the additional remedy requested by Australia, which would require Japan to refrain from authorizing or implementing any special permit whaling which is not for purposes of scientific research within the meaning of Article VIII. In the view of the Court, as that obligation already applies to all States parties, it is to be expected that Japan will take account of the reasoning and conclusions

contained in this Judgment as it evaluates the possibility of granting any future permits under Article VIII, paragraph 1, of the Convention.

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Dissenting opinion of Judge Owada

In his dissenting opinion, Judge Owada states that, to his greatest regret, he cannot associate himself with the Judgment in terms of the conclusions stated in paragraphs 2, 3, 5 and 7 of its operative part, as well as the reasoning stated in the reasoning part. Judge Owada writes that his disagreement lies with the understanding of the Judgment on the basic character of the International Convention for the Regulation of Whaling ("the Convention"), with the methodology the Judgment employs for interpreting and applying the provisions of the Convention, and thus with a number of conclusions that it reaches.

I. Jurisdiction

Judge Owada begins his dissenting opinion by noting that, on the issue of the Court's jurisdiction, he retains certain reservations on some aspects of the reasoning of the Judgment, but concurs with the Judgment's conclusion that the Court has jurisdiction. He also places on record his reservation that under the somewhat unfortunate procedural circumstances, the Parties were not provided in the proceedings with ample opportunities to develop their respective arguments on the issue of jurisdiction.

II. The object and purpose of the Convention

Judge Owada next looks at the object and purpose of the Convention. He remarks that there are two opposing views regarding the Convention. According to the first view, there has been an evolution in the economic-social vista of the world surrounding whales and whaling over the years since 1946, and this is to be reflected in the interpretation and the application of the Convention. According to the second view, the juridico-institutional basis of the Convention has not changed since it was drafted, based as it was on the well-established principles of international law relating to the conservation and management of fishing resources, including whales, and this basic character of the Convention should essentially be maintained. This, according to Judge Owada, is the fundamental divide that separates the legal positions of Australia and New Zealand, on the one hand, and Japan, on the other.

In examining the object and purpose of the Convention, Judge Owada notes that it was created in the face of a history of unchecked whaling and weak regulation that came to threaten the sustainability of whale stocks and thus the viability of the whaling industry, and should be understood in the context of this situation. Judge Owada further observes that the object and purpose of the Convention is clearly enunciated in its Preamble. According to Judge Owada, it is clear that the object and purpose of the Convention is to pursue the goal of achieving the twin purposes of the sustainability of the maximum sustainable yield of the stocks in question and the viability of the whaling industry. Nowhere in the Convention is to be found the idea of a total permanent ban on the catch of whales. Judge Owada also points out that this is confirmed by the Verbatim Record of the International Whaling Commission which voted for the moratorium on whaling.

According to Judge Owada, it is of cardinal importance that the Court understands this object and purpose of the Convention in its proper perspective, which defines the essential characteristics of the régime established under the Convention. In Judge Owada's view, the Judgment has failed to engage in analysing the essential characteristics of the régime of the Convention. The Judgment's laconic statement that "[t]he functions conferred on the [International Whaling] Commission have made the Convention an evolving instrument" does not specify what this implies. Judge Owada finds that the Convention is not malleable as such in the legal sense, according to the changes in the surrounding socio-economic environments.

III. The essential characteristics of the regulatory régime under the Convention

Judge Owada states that, for the purpose of understanding the essential characteristics of the régime established under the Convention, the structure of the Convention has to be analysed in some detail. In this vein, Judge Owada observes that (1) the Contracting Governments have created an International Whaling Commission ("IWC") as executive organ, which can take a decision by a three-fourths majority, if action is required in pursuance of Article V; (2) under Article V, the IWC may amend provisions of the Schedule, which forms an integral part of the Convention, by adopting regulations with respect to the conservation and utilization of whale resources, subject to certain conditions; (3) the IWC may also make recommendations to any or all Contracting Governments on any matters which relate to whales or whaling and to the objectives and purposes of the Convention; and (4) notwithstanding anything contained in the Convention, a Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research, subject to such restrictions as to number, and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking and treating of whales in accordance with the provisions of Article VIII shall be exempt from the operation of the Convention.

Judge Owada states that, based on what has been summarized above, it seems fair to conclude that the Convention has created a kind of self-contained regulatory régime on whales and whaling, although it goes without saying that such a system providing for the autonomy of the Parties is not free from the process of judicial review by the Court. Judge Owada further notes that, within this self-contained regulatory régime, no power of decision-making by a majority is given to the IWC automatically to bind the Contracting Parties, and no amendments to the Schedule will become effective in relation to a Contracting Party who objects to the amendments in question. Judge Owada recalls that, following the amendment

to the Schedule to ban commercial whaling of all species beginning in the 1985/86 season, Japan did eventually exercise its right to raise objection under Article V, which it later withdrew under pressure from the United States.

According to Judge Owada, the argument advanced with regard to this situation by the Applicant, and developed further by the Intervener, that the Convention has gone through an evolution during these 60 years in accordance with the change in the environment surrounding whales and whaling, would seem to be an argument that would be tantamount to an attempt to change the rules of the game as provided for in the Convention and accepted by the Contracting Parties in 1946. Judge Owada observes that, according to the Respondent, faced with this new situation of the adoption of a moratorium on whaling for commercial purposes, it became necessary for the Respondent to advance a programme of activities for purposes of scientific research so that scientific evidence could be collected for the consideration of the IWC (or its Scientific Committee), with a view to enabling the IWC to lift or review the moratorium, which professedly was a measure adopted to be of not unlimited duration and subject to future review. According to Judge Owada, it would seem difficult to see anything wrong in the Respondent's course of action.

Judge Owada remarks that, given the language of Article V, paragraph 2, and Article VIII, paragraph 1, of the Convention, what the Respondent embarked upon under JARPA and JARPA II is *prima facie* to be regarded as being in conformity with the Convention and its revised Schedule. Thus, according to Judge Owada, the whole question of the legality of the whaling activities of Japan under JARPA, and JARPA II as its continuation, has come to hinge upon the question of whether these activities of the Respondent could fall under the heading of activities "for purposes of scientific research" within the meaning of Article VIII of the Convention.

IV. The interpretation of Article VIII

According to Judge Owada, the essential character of the Convention as examined above lies in the fact that the Contracting Parties have created a self-contained regulatory régime for the regulation of whales and whaling. The prescription contained in Article VIII of the Convention, in Judge Owada's view, is one important component of this regulatory régime. Judge Owada states that it would be wrong in this sense to characterize the power recognized to a Contracting Party to grant to its nationals special permits "to kill, take and treat whales for purposes of scientific research" (Convention, Art. VIII, para. 1) as nothing else than an exception to the regulatory régime established by the Convention. Judge Owada states that the Contracting Party which is granted this prerogative under Article VIII is in effect carrying out an important function within this regulatory régime by collecting scientific materials and data required for the promotion of the objectives and purposes of the Convention. Judge Owada further notes that under this regulatory régime of the Convention the power to determine such questions as what should be the components of the scientific research, or how the scientific research should be designed and implemented in a given situation, is primarily left to the discretionary decision of the granting Government. According to Judge Owada, the Contracting Government is obligated to exercise this discretionary power only for purposes of scientific research in good faith and to be eventually accountable for its activities of scientific research before the executive organs of the Convention, the IWC and the Scientific Committee.

Judge Owada emphasizes that this does not mean that the Court, as the judicial institution entrusted with the task of interpreting and applying the provisions of the Convention, has no role to play in this process. Given the nature and the specific characteristics of the regulatory framework created by the Convention, however, this power of the Court has to be exercised with a certain degree of restraint, to the extent that what is involved is *(a)* related to the application of the regulatory framework of the Convention, and *(b)* concerned with the techno-scientific task of assessing the merits of scientific research assigned by the Convention to the Scientific Committee.

Regarding the problem relating to the application of the regulatory framework of the Convention (point *(a)* above), Judge Owada asserts that good faith on the part of the Contracting State has necessarily to be presumed. According to Judge Owada, the function of the Court in this respect is to see to it that the State in question is pursuing its activities in good faith and in accordance with the requirements of the regulatory régime for the purposes of scientific research that is conducive to scientific outcomes which would help promote the object and purpose of the Convention. Judge Owada states, however, that the programme's design and implementation should by its nature not be the proper subject of review by the Court. Judge Owada notes that Article VIII expressly grants to the Contracting Government the primary power to decide on this.

Judge Owada states that allegations made by the Applicant that the activities were designed and implemented for purposes other than scientific research under the cover of scientific research thus cannot be presumed, and will have to be established by hard conclusive evidence that could point to the existence of bad faith attributable to the State in question.

On the second aspect of the problem relating to the determination of what constitutes activities "for purposes of scientific research" (point *(b)* above), Judge Owada does not agree with the approach of the Judgment that distinguishes between "scientific research" as such and "[activities] for purposes of scientific research". To Judge Owada, such a distinction is so artificial that it loses any sense of reality when applied to a concrete situation. Instead, Judge Owada states that the Court should focus purely and simply on the issue of the scope of what constitutes activities "for purposes of scientific research" according to the plain and ordinary meaning of the phrase.

Judge Owada further remarks that, on the question of what constitutes activities "for purposes of scientific research", this Court, as a court of law, is not professionally qualified to give a scientifically meaningful answer, and should not try to pretend that it can. Judge Owada argues that what is "scientific research" is a question on which qualified scientists often have a divergence of opinion and are not able to come to a consensus view. Nonetheless, Judge Owada observes that the

Judgment *does* get into a "scientific assessment" on various substantive aspects of JARPA/JARPA II activities, in order to come to the conclusion that these activities cannot qualify as activities conducted "for purposes of scientific research" because they cannot be regarded as objectively reasonable, according to the Court's own scientific assessment. According to Judge Owada, the question that immediately arises is "in what context is this reasonableness to be judged?" If the Court is speaking of the legal context, Judge Owada argues that the answer is clear, as the Convention leaves this point primarily to the good faith appreciation of the party which undertakes the research in question. If we are speaking of the scientific context, it would be impossible for the Court to establish that certain activities are objectively reasonable or not without getting into a techno-scientific examination and assessment of the design and implementation of JARPA/JARPA II, a task which this Court could not and should not attempt to do.

V. The scope of review by the Court

Judge Owada writes that the Contracting Parties to the Convention expressly recognize the need and the importance of scientific research for the purpose of supporting the "system of international regulation for the whale fisheries to ensure proper and effective conservation and development of whale stocks" (Preamble, para. 7). Judge Owada points out that the Conference which was convened for the conclusion of the Convention in 1946 stressed the critical importance of scientific research by scientific organizations engaged in research on whales. According to Judge Owada, the intention of the Contracting Parties, in agreeing on the language of Article VIII, was to provide for the right of a Contracting Government to grant to its nationals special permits to take whales for purposes of scientific research. Judge Owada argues that the Contracting Government may take this action without prior consultations with, or the approval of, the IWC or its Scientific Committee.

Judge Owada remarks that this is not to say that a Contracting Government has unlimited discretion in granting a special permit. According to Judge Owada, it is the role of the Court to examine from a legal point of view whether the procedures expressly prescribed by the regulatory régime of the Convention, including those in Article VIII, are scrupulously observed. Judge Owada notes that the Court can also review whether the activities in question can be regarded as meeting the generally accepted notion of "scientific research" (the substantive requirement for the Contracting Party under Article VIII). This process involves the determination of the standard of review to be applied by the Court.

VI. The standard of review by the Court

Judge Owada notes that, in determining the standard of review, the Judgment concludes as follows:

> "When reviewing the grant of a special permit authorizing the killing, taking and treating of whales, the Court will assess, first, whether the programme under which these activities occur involves scientific research. Secondly, the Court will consider if the killing, taking and treating of whales is 'for purposes of' scientific research by examining whether, in the use of lethal methods, the programme's design and implementation are reasonable in relation to achieving its stated objectives. This standard of review is an objective one." (Judgment, paragraph 67.)

In Judge Owada's view, the Judgment, in establishing this standard of review, ignores the difference in the positions taken by the Parties on this question and, without further explanation, seems to endorse the position of one of the Parties, namely that of the Applicant. According to Judge Owada, the language used by the Judgment suggests that the application of this standard of objective reasonableness had been accepted as the common ground among the Parties in relation to the overall scope of the review, whereas, in reality, there was a wide difference of position between the Parties, especially in relation to the scope of the review. Further, according to Judge Owada, the Judgment provides no explanation as to why it is legitimate or appropriate for the Court to expand the scope of the review by engaging in an examination of the "design and implementation" of the JARPA II programme.

Judge Owada observes that a careful examination of the arguments of the Parties reveals that the genesis of this standard of review would appear to derive its origin from the jurisprudence of the Appellate Body of the World Trade Organization ("WTO") in the *United States—Continued Suspension of Obligations in the EC-Hormones Dispute* case (hereinafter "*EC-Hormones*"). In Judge Owada's view, the Judgment takes this magic formula of objective reasonableness out of the context in which this standard was employed and applies it somewhat mechanically for our purposes, without giving proper consideration to the context in which this standard of review was applied.

Judge Owada notes that the Respondent stated the following with regard to the standard of review:

> "Japan agrees with Australia and New Zealand in regarding the test as being whether a State's *decision is objectively reasonable, or 'supported by coherent reasoning and respectable scientific evidence and …, in this sense, objectively justifiable'*." (Emphasis added).

According to Judge Owada, the Respondent is relying on a quotation, word-for-word, from the *EC-Hormones* case. It is for this reason important to examine the precise context in which this quoted passage appears, which is as follows:

> "[S]o far as fact-finding by [the WTO] panels is concerned, the applicable standard is 'neither *de novo* review as such, nor 'total deference', but rather the 'objective assessment of facts' …
>
> It is the WTO Member's task to perform the risk assessment. The panel's task is to review that risk assessment. Where a panel goes beyond this limited mandate and *acts as a risk assessor*, it would be substituting its own scientific judgment for that of the risk assessor and making a *de novo* review and, consequently, would exceed its functions under Article 11 of the [Dispute Settlement Understanding of the WTO]. Therefore, *the review power of a panel is not to determine whether the risk assessment undertaken by a WTO Member is correct, but rather to determine whether that risk assessment is supported by coherent reasoning and respectable scientific evidence* and is, in this sense, objectively justifiable." (Emphasis added.)

Judge Owada emphasizes that the WTO Appellate Body's decision states that the body would exceed its functions were it to act as a risk assessor and make a *de novo* review. In Judge Owada's view, therefore, the Judgment erred by taking this standard of objective reasonableness out of its context, and by mechanically applying it for the opposite purpose, that is, for the purpose of engaging the Court in making a *de novo* assessment of the activities of the Respondent, when that State is given the primary power under the Convention to grant special permits for purposes of scientific research.

Judge Owada also points out that in the *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)*, the Court referred to the contention of the Applicant (Costa Rica) which argued that the way the Respondent (Nicaragua) restricted Costa Rica's navigational rights on the San Juan river was "not reasonable". The Court stated that

> "the regulator, in this case the State with sovereignty over the river, has the primary responsibility for assessing the need for regulation and for choosing, on the basis of its knowledge of the situation, the measure that it deems most appropriate to meet that need. It will not be enough in a challenge to a regulation simply to assert in a general way that it is unreasonable."

Judge Owada states that the position of the Respondent in the present case is analogous in law to that of the Respondent in the above-mentioned case. According to Judge Owada, the dictum of this Court in the latter case should be applicable to the situation in the present case.

VII. Application of the standard of review in the present case

Judge Owada states that he will refrain from engaging in the exercise of refuting the conclusions of the Judgment resulting from its substantive assessment of each of the concrete aspects of the design and implementation of the JARPA II programme, because to engage in this exercise would be doing precisely what the Court should not have done under the Convention. Judge Owada wishes, however, to critique the methodology that the Judgment employs in applying the standard of objective reasonableness when assessing the concrete activities of JARPA II. In Judge Owada's view, there is a strong, though rebuttable, presumption that the granting Government, in granting permits under Article VIII, has made this determination not only in good faith, but also in light of a careful consideration that the activities carried out are for purposes of scientific research. Judge Owada states that the function of the Court is to assess whether this determination of the Contracting Government is objectively reasonable, in the sense that the programme of research is based upon a coherent reasoning and supported by respectable opinions within the scientific community of specialists on whales, even if the programme of research may not necessarily command the support of a majority view within the scientific community involved.

In Judge Owada's view, the Judgment appears to be applying the standard of objective reasonableness in such a way that it is the granting Party that bears the burden of establishing that the scale and the size of the lethal take envisaged under the programme is reasonable in order for the programme to be qualified as a genuine programme "for purposes of scientific research". Judge Owada states that it should be the Applicant, rather than the Respondent, who has to establish by credible evidence that the activities of the Respondent under JARPA II cannot be regarded as "reasonable" scientific research activities for the purposes of Article VIII of the Convention. In Judge Owada's view, the Applicant has failed to make such a showing in this case.

Judge Owada states that, in his view, the activities carried out pursuant to JARPA II can be characterized as "reasonable" activities for purposes of scientific research. Judge Owada notes that evidence, including a statement of the Chair of the Scientific Committee, has clearly shown that JARPA II provides some useful scientific information with respect to minke whales that has been of substantial value to the Scientific Committee. Judge Owada further recalls that the IWC Intersessional Workshop Report expressed the view that the JARPA programme, which is in many respects substantively similar to JARPA II, can provide valuable statistical data which could result in a reconsideration of the allowed catch of minke whales under the Revised Management Procedure. Judge Owada states that what is referred to in this report is precisely the type of data that was envisioned as useful by the Convention, as evidenced by the language of Article VIII stating that "continuous collection and analysis of biological data in connection with the operations of factory ships and land stations are indispensable to sound and constructive management of the whale fisheries". Judge Owada argues that, in light of this evidence, it is difficult to see how the activities of JARPA and its successor, JARPA II, could be considered "unreasonable".

VIII. Conclusion

By way of conclusion, Judge Owada emphasizes that the sole and crucial issue at the centre of the present dispute is whether the activities under the programme of JARPA II are "for purposes of scientific research", and not whether JARPA II has attained a level of excellence as a project for scientific research for achieving the object and purpose of the Convention. Judge Owada states that it may be true that JARPA II is far from being perfect for attaining such objective. Even if JARPA II contains some defects, however, that fact in itself would not turn these activities into activities for commercial whaling. Judge Owada concludes that this certainly could not be the reason for this Court to rule that "Japan shall revoke any extant authorization, permit or licence granted in relation to JARPA II" (Judgment, paragraph 247 (7)).

Dissenting opinion of Judge Abraham

In his dissenting opinion, Judge Abraham states that, while he voted in favour of the point in the operative paragraph whereby the Court dismisses the objection to jurisdiction raised by Japan, he nonetheless disagrees with the reasoning followed by the Court in order to reach that conclusion. Indeed, while the Court was correct in rejecting Japan's literal interpretation of the second limb of the Australian reservation, which excludes from the Court's jurisdiction

any dispute "arising out of, concerning, or relating to the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation", its own interpretation of that limb of the reservation is highly debatable and unnecessarily restrictive.

In Judge Abraham's view, this second limb should be understood as intended to exclude from the jurisdiction of the Court disputes which, without being directly related to maritime delimitation, would require the Court to take a position—incidentally—on the nature and extent of Australia's maritime zones, since the subject-matter of such disputes would be the exploitation of a maritime area in respect of which there was a pending dispute as to whether it formed part of such a zone. When those conditions are satisfied, the reservation must therefore apply, even when the Parties do not have overlapping claims to the maritime areas concerned.

*

On the merits of the case, Judge Abraham fundamentally disagrees with the approach adopted by the Court.

He disagrees, first, with the interpretation of the concept of a programme "for purposes of scientific research" in the sense of paragraph 1 of Article VIII of the International Convention for the Regulation of Whaling. In this regard, Judge Abraham accepts the proposition that Article VIII of the Convention should be interpreted neither restrictively nor expansively, and he agrees with the way in which the Court has addressed the notion of "scientific research", in particular by rejecting the definition proposed by an expert called by Australia. On the other hand, he criticizes the Court's choice of an "objective" test in seeking to determine whether a programme is "for purposes of" scientific research. In fact, the phrase "for purposes of" necessarily involves an examination of the aims pursued by the State responsible for the programme in question. In seeking to determine whether the design and implementation of a scientific research programme reasonably correspond with its stated aims, the Court is assuming the status of a scientific committee rather than carrying out its function of ascertaining the nature of the activities in question. Judge Abraham further considers that, in a situation where a State relies on Article VIII to justify authorization of a whaling programme which includes scientific research activities, to find that the programme falls outside the terms of that Article necessarily implies that the good faith of the State concerned is being called into question; however, good faith must be presumed.

Judge Abraham also disagrees with the Court's assessment of the facts of the case, and with the unfavourable presumption which he considers that it has raised against Japan. The Court constantly requires Japan to provide explanations, demonstrations, justifications, regarding various aspects of the design and implementation of the JARPA II programme. It concludes, wrongly, from a combined examination of certain of these aspects, that the design and implementation of JARPA II are unreasonable in light of its stated aims. However, the examination conducted by the Court has merely raised what it admits are doubts, which cannot suffice to deny JARPA II the character of a programme conducted for purposes of scientific research. The Court should have found that there was no manifest mismatch between JARPA II's stated aims and the means used to achieve them, and that the sample sizes had not been set at a manifestly excessive level; and the Court should accordingly have accepted that JARPA II does have the character of a programme conducted for purposes of scientific research.

Judge Abraham thus voted against point 2 of the operative paragraph, which finds that the special permits granted by Japan in connection with JARPA II do not fall within the provisions of Article VIII, paragraph 1, of the Convention; and, in consequence, against points 3, 4, 5, and 7.

Declaration of Judge Keith

1. In his declaration, Judge Keith addresses three matters in support of the conclusion the Court has reached and its reasons. The first is the broader context in which the case is to be seen. Over the 65 years the Convention has been in force there have been massive changes in the whaling industry and in attitudes and policies towards whaling. At the outset, the Schedule to the International Whaling Convention allowed a take in southern waters of the equivalent of 16,000 blue whales. By 1965 there was a prohibition on their taking and by 1972, the year in which the Stockholm Conference on the Human Environment called for a ten-year moratorium on commercial whaling, the limit for Antarctic minke whales was set at 5,000. The Schedule now includes many zero catch limits. Has a system established to regulate an industry been used virtually to prohibit it? Judge Keith points out that Contracting Governments had a number of options open to them if they wished to avoid those constraints or that outcome. He concludes by recalling that an attempt, through *The Future of the IWC Process*, running from 2007 to 2010 to resolve through negotiation a range of matters, including the dispute before the Court, had failed.

2. The second matter Judge Keith considers is the essential interrelatedness of the power to grant a special permit under Article VIII (I) of the Convention and the extent of the power of the Court to review the grant. He identifies three features of the power to grant a special permit which indicate real limits on the power of a Contracting Government. He also sees as significant the extensive body of information in the record before the Court about the process which led to the decisions to establish the JARPA II programme and about its implementation. He states the standard of review in this way: is the Contracting Government's decision to award a special permit objectively justifiable in the sense that the decision is supported by coherent scientific reasoning? The test does not require that the programme be "justified", rather, that on the record, it is justifiable. Nor is it for the Court to decide on the scientific merit of the programme's objectives nor whether its design and implementation are the best possible means of achieving those objectives. But the Court does have the role of determining, in the light of the identified features of the power mentioned earlier, whether the evidence before it demonstrates coherent scientific reasoning supporting central features of the programme.

3. In the third part of his declaration, Judge Keith emphasizes, by reference to that evidence, the failure of the Japanese authorities, in planning and implementing the programme, to give any real consideration or indeed any consideration at all to the central elements of the programme discussed in this declaration and more fully in the Judgment: the decisions regarding the use of lethal methods as opposed to non-lethal ones and the determination of the sample sizes; and the comparison of the sample size to the actual take. As indicated in the declaration, those decisions, including those relating to the implementation of the programme, were not supported by evidence of relevant studies, or by coherent scientific reasoning, or by relevant reporting and explanations to the International Whaling Commission or its Scientific Committee.

4. For those reasons and those given by the Court, Judge Keith concludes that the programme does not fall within Article VIII (I) of the Convention and, as a result, the actions taken under it for the killing, taking and treating of the whales, breach particular provisions of the Convention.

Dissenting opinion of Judge Bennouna

Judge Bennouna has voted against points 2, 3, 4, 5 and 7 of the operative paragraph.

Judge Bennouna does not agree with the majority's interpretation of the relevant provisions of the International Convention for the Regulation of Whaling (hereinafter the "Convention").

Judge Bennouna notes that the issue of whaling carries a heavy emotional and cultural charge. He points out, however, that this must not interfere with the task of the Court, which is to do justice by applying international law, in accordance with its Statute.

Judge Bennouna considers that there is nothing to suggest that JARPA, the predecessor to JARPA II, which was launched in parallel with Japan's acceptance of the moratorium on commercial whaling, was a way of continuing commercial whaling under a different legal guise. On the contrary, Judge Bennouna emphasizes that the launch of JARPA was a means of making good the lack of scientific data, particularly as regards whales' diet, previously obtained under the commercial whaling programme.

Judge Bennouna deplores the fact that the Court undertook a detailed analysis of sample sizes, illustrated with tables and graphics, which ultimately resulted simply in a finding of concern as to the reasonableness of the design of JARPA II in light of its stated aims. In Judge Bennouna's view a comparison of sample sizes with actual catches was likewise irrelevant.

Judge Bennouna thus asks himself whether a series of concerns and queries is sufficient to justify a finding that JARPA II was not designed and implemented "for purposes of scientific research".

Judge Bennouna notes that the Court declined to consider the evidence relating to the issue of JARPA II's commercial character. However, in Judge Bennouna's view, the Court was not entitled to forego showing that JARPA II was a commercial operation, since the provisions of the Schedule whose breach had been alleged by Australia apply only to commercial whaling.

Judge Bennouna considers that JARPA II could not be described as a commercial whaling programme, since it is not conducted with a view to profit.

Judge Bennouna considers that the position adopted by the majority of the Court has failed to take account of the spirit of the Convention, which is founded on co-operation between States parties, under the institutional framework established by the Convention. He considers that the Court, in engaging in an evaluation of JARPA II, has, in certain respects, substituted itself for the bodies created by the Convention, namely the International Whaling Commission and the Scientific Committee. In Judge Bennouna's view, it is preferable to rely on the institutional framework established by the Convention, since that is the best way of strengthening multilateral co-operation between States parties and of arriving at an authentic interpretation of the Convention.

Separate opinion of Judge Cançado Trindade

1. Judge Cançado Trindade begins his separate opinion, composed of eleven parts, observing that, although he has voted in favour of the adoption of the present Judgment in the case concerning *Whaling in the Antarctic*, he would have wished certain points to be further developed by the Court. He feels thus obliged to leave on the records, in the present separate opinion, the foundations of his personal position thereon. The first point he identifies pertains to the object and purpose of the International Convention on the Regulation of Whaling (ICRW Convention—Part I). The adoption of a Convention like the ICRW, endowed with a supervisory organ of its own, encompassing member States that do not practice whaling, speaks to the understanding that the ICRW Convention's object and purpose cannot be limited to the development of the whaling industry.

2. The goal of conservation integrates its object and purpose, certainly not limited to the development of the whaling industry. If the main goal of the ICRW Convention were only to protect and develop the whaling industry, the entire framework of the ICRW Convention would have been structured differently. Furthermore, the adoption of a moratorium on commercial whaling within the framework of the ICRW Convention also seems to indicate that the conservation of whale stocks is an important component of the object and purpose of the ICRW Convention (paras. 2–3). This is also reflected in the preamble of the Convention.

3. Pursuant to a teleological approach, the practice of the International Whaling Commission (IWC), conformed by its successive resolutions, seems to indicate that conservation of whale stocks is an important objective of the ICRW Convention (para. 5). The Schedule of regulations annexed to the ICRW Convention is an integral part of it, with equal legal force; amendments have regularly been made to the Schedule, so as to cope with international environmental developments. It has become a multilateral scheme, seeking to avoid unilateral action so as to foster conservation (para. 6).

4. Judge Cançado Trindade recalls that, in the response to a question he deemed it fit to put to it, the intervenor (New Zealand) recalled that, distinctly from the 1937 International Agreement for the Regulation of Whaling, the 1946 ICRW Convention counts on a permanent Commission (the IWC) endowed with a supervisory role, evidencing a "collective enterprise", and acknowledging that whale conservation "must be an international endeavour". In sum, in New Zealand's view, the object and purpose of the ICRW Convention ought to be approached in the light of the *collective interest* of States Parties in the conservation and management of whale stocks. This role of collective regulation of the IWC, was in the line of the United Nations Convention on the Law of the Sea, which requires States (Article 65) to cooperate with a view to the conservation of marine mammals and to work through the appropriate international organs. Such endeavours of conservation have become a "collective responsibility" (para. 9).

5. In Judge Cançado Trindade's understanding, the collective system established by the ICRW Convention (Part II) aims at replacing a system of unilateral unregulated whaling, with a system of *collective guarantee and regulation*, so as to provide for the interests of the States Parties in the proper conservation and management of whales. This collective regulation is achieved through a process of collective decision-making by the IWC, which adopts regulations and resolutions (paras. 10–11). Thus, the nature and structure of the ICRW Convention, the fact that it is a multilateral Convention (comprising both whaling and non-whaling States) with a supervisory organ of its own, which adopts resolutions and recommendations, highlights the collective decision-making process under the Convention and the collective guarantee (pursuant to collective regulation) provided thereunder (para. 12).

6. In fact, in numerous resolutions, the IWC has provided guidance to the Scientific Committee for its review of Special Permits under paragraph 30 of the Schedule. This is aimed at amending proposed special permit programmes that do not meet the conditions. The expectation ensues therefrom that, e.g., non-lethal methods will be used whenever possible, on the basis of successive resolutions of the IWC stressing the relevance of obtaining scientific information without needing to kill whales for "scientific research". In accordance with the IWC resolutions, the Scientific Committee has, for its part, elaborated a series of *Guidelines* to enable it to undertake its function of review of Special Permits (para. 13).

7. Successive IWC resolutions have consistently requested the States Parties concerned not to continue their activities whenever they do not satisfy the Scientific Committee's criteria (para. 14). Bearing the IWC resolutions in mind, the Scientific Committee's Guidelines have endeavoured to assist it in undertaking adequately its function of review of special permit proposals and of research results from existing and completed special permits. In recent years, the Guidelines have insisted on the use of non-lethal research methods. It is clear that there is here not much room for State unilateral action and free-will (para. 15).

8. It clearly appears, from paragraph 30 of the Schedule, that a State Party issuing a Special Permit is under the obligation to provide the IWC Secretary with proposed scientific permits before they are issued, and in sufficient time so as to allow the Scientific Committee to review and comment on them. States granting Special Permits do not have an unfettered freedom to issue such permits (paras. 16–17). There is thus a *positive* (procedural) obligation of the State willing to issue a special permit to cooperate with the IWC and the Scientific Committee (paras. 18–19). In the framework of the system of collective guarantee and collective regulation under the ICRW Convention, the Court has determined, on distinct points, that the respondent State has not acted in conformity with paragraph 10 *(d)* and *(e)*, and paragraph 7 *(b)*, of the Schedule to the ICRW Convention (resolutory points 3–5).

9. Judge Cançado Trindade then moves to what he identifies as the limited scope of Article VIII (1) of the ICRW Convention (Part III). Article VIII (1) appears as an *exception* to the normative framework of the ICRW Convention, to be thus interpreted restrictively. A State issuing a permit does not have *carte blanche* to dictate that a given programme is "for purposes of scientific research". It is not sufficient for a State Party to describe its whaling programme as "for purposes of scientific research", without demonstrating it (paras. 21–22). The Court has determined that the Special Permits granted by Japan in connection with JARPA II "do not fall within the provisions of Article VIII (1)" of the ICRW Convention (resolutory point 2). In his perception,

> "such an unfettered discretion would not be in line with the object and purpose of the ICRW Convention, nor with the idea of multilateral regulation. The State issuing a Special Permit should take into consideration the resolutions of the IWC which provide the views of other States Parties as to what constitutes 'scientific research'. There is no point in seeking to define 'scientific research' for all purposes. When deciding whether a programme is 'for purposes of scientific research' so as to issue a special permit under Article VIII (1), the State Party concerned has, in my understanding, a duty to abide by the principle of prevention and the precautionary principle" (para. 23).

10. Judge Cançado Trindade adds that Article VIII, part and parcel of the ICRW Convention as a whole, is to be interpreted taking into account its object and purpose, which "discards any pretence of devising in it a so-called 'self-contained' regime or system" (para. 24). He then concludes, on this particular point, that

> "a State Party does not have an unfettered discretion to decide the meaning of 'scientific research' and whether a given whaling programme is 'for purposes of scientific research'. The interpretation and application of the ICRW Convention in recent decades bear witness of a gradual move away from unilateralism and towards multilateral conservation of living marine resources, thus clarifying the limited scope of Article VIII (1) of the ICRW Convention" (para. 24).

11. Judge Cançado Trindade then turns to the interactions between systems, in the evolving law relating to conservation (Part IV). He observes that, with the growth in recent decades of international instruments related to conservation,

not one single of them is approached in isolation from the others: not surprisingly, the co-existence of international treaties of the kind has called for a *systemic outlook*, which has been pursued in recent years. Reference can here be made, e.g., to the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES Convention), the 1979 Convention on Migratory Species of Wild Animals, the 1980 Convention on the Conservation of Antarctic Marine Living Resources, the 1982 United Nations Convention on the Law of the Sea, the 1992 United Nations Convention on Biological Diversity (CBD Convention) (paras. 25–26).

12. He adds that the interpretation and application of the aforementioned treaties, in the light of the systemic outlook, have been contributing to the gradual formation of *an opinio juris communis* in the present domain of contemporary international law (Part V). As the Court itself has put it (para. 45), the functions conferred upon the IWC have made the Convention an "evolving instrument". This is not the first time that the Court acknowledges that international treaties and conventions are "living instruments". The Court did so, e.g., in its *célèbre* Advisory Opinion (of 21.06.1971) on *Namibia*, and, more recently, in its Judgment (of 25.09.1997) in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary* v. *Slovakia)* (paras. 27 and 29–30).

13. Judge Cançado Trindade further recalls that other contemporary international tribunals have pursued the same evolutionary interpretation, for example, the European Court of Human Rights, in its Judgment (of 25 April 1978) in the *Tyrer* v. *United Kingdom* case, and also in its Judgment (on preliminary objections, of 23 March 1995) in the case of *Loizidou* v. *Turkey*; and the Inter-American Court of Human Rights, in its Judgment (of 31 August 2001) in the case of the *Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua*, and also in its *célèbre* and ground-breaking Advisory Opinion (of 1 October 1999) on *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (paras. 31–32). He then ponders that

> "The experience of supervisory organs of various international treaties and conventions points to this direction as well. Not seldom they have been faced with new challenges, requiring new responses from them, which could never have been anticipated, not even imagined, by the draftsmen of the respective treaties and conventions. In sum, international treaties and conventions are a product of their time, being also *living instruments*. They evolve with time; otherwise, they fall into *desuetude*. The ICRW Convention is no exception to that. Those treaties endowed with supervisory organs of their own (like the ICRW Convention) disclose more aptitude to face changing circumstances.
>
> Moreover, in distinct domains of international law, treaties endowed with a supervisory mechanism of their own have pursued a hermeneutics of their own, facing the corresponding treaties and conventions as *living instruments*. International treaties and conventions are products of their time, and their interpretation and application *in time*, with a temporal dimension, bears witness that they are indeed living instruments. This happens not only in the present domain of conservation and management of living marine resources, but likewise in other areas of international law" (paras. 33–34).

14. By the time of the adoption of the 1946 ICRW Convention, in the mid-twentieth century, there did not yet exist an awareness that the living marine resources were not inexhaustible. Three and a half decades later, the adoption of the 1982 United Nations Convention on the Law of the Sea (UNCLOS)—a major international law achievement in the twentieth century—contributed to the public order of the oceans, and to the growing awareness that their living resources were not inexhaustible. Unilateralism gradually yielded to collective regulation towards conservation, as illustrated by the 1982 general moratorium on commercial whaling under the 1946 ICRW Convention (para. 35).

15. Another example can be found in the establishment by the IWC of whale sanctuaries (under Article V (1) of the ICRW Convention). Judge Cançado Trindade recalls that the IWC has so far adopted three whale sanctuaries: first, the Southern Ocean Sanctuary (1948–1955); secondly, the Indian Ocean Sanctuary (1979, renewed in 1989, and indefinitely as from 1992); and thirdly, the new Southern Ocean Sanctuary (from 1994 onwards). Moreover, in its meetings of 2001–2004, the IWC was lodged with a proposal (revised in 2005) of a new sanctuary, the South Atlantic Sanctuary, so as to reassert the need of conservation of whales (para. 36).

16. Parallel to this, multilateral Conventions (such as UNCLOS and CBD) have established a framework for the conservation and management of living marine resources. The UNCLOS Convention contains a series of provisions to that effect; as to the CBD Convention, the Conference of the Parties held in Jakarta in 1995, for example, adopted the *Jakarta Mandate on Coastal and Marine Biodiversity*, reasserting the relevance of conservation and ecologically sustainable use of coastal and marine biodiversity, and, in particular, linking conservation, sustainable use of biodiversity, and fishing activities. Furthermore, in its meeting of 2002, the States Parties to the Convention on Migratory Species (CMS) pointed out the need to give greater protection to six species of whales (including the Antarctic minke whales) and their habitats, breeding grounds and migratory routes (paras. 38–39).

17. These are,—Judge CançadoTrindade proceeds,—clear illustrations of the evolving *opinio juris communis* on the matter. In its 2010 meeting, held in Agadir, Morocco, the "Buenos Aires Group" reiterated support for the creation of a new South Atlantic Sanctuary for whales, and positioned itself in favour of conservation and non-lethal use of whales, and against so-called "scientific whaling" (in particular in case of endangered or severely depleted species). The "Buenos Aires Group" expressed its "strongest rejection" of the ongoing whale hunting (including species classified as endangered) in the Southern Ocean Sanctuary, called for non-lethal methods and the maintenance of the commercial moratorium in place since 1986, and stated that the ongoing whale hunting was in breach of "the spirit and the text" of the 1946 ICRW Convention, and failed to respect the "integrity of the whale sanctuaries" recognized by the IWC (paras. 39–40).

18. The next point examined by Judge Cançado Trindade is that of inter-generational equity (Part VI). He begins by pointing out that the 1946 ICRW Convention was "indeed pioneering", in acknowledging, in its preamble, "the

interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks". At that time, shortly after the Second World War, its draftsmen could hardly have anticipated that this concern would achieve the dimension it did, in the international agenda and in international law-making (in particular in the domain of international environmental law) in the decades that followed. The conceptual construction of *inter-generational equity* (in the process of which he took part) was to take place, in international legal doctrine, four decades later, from the mid-eighties onwards (para. 41).

19. He then recalls (para. 42) his own considerations on the long-term temporal dimension, in relation to inter-generational equity, expressed in his separate opinion appended to the Judgment of 20 April 2010 in case concerning *Pulp Mills on the River Uruguay* (*Argentina* v. *Uruguay*). Although the factual context of the *cas d'espèce* is quite distinct from that of the *Pulp Mills* case, it cannot pass unnoticed that, significantly, in one and the other, inter-generational equity marks its presence in distinct international instruments of international environmental law, and in its domain as a whole (para. 43). He examines the point in the 1973 CITES Convention, in the 1979 Convention on the Conservation of Migratory Species of Wild Animals, in the 1992 CBD Convention (paras. 44–45), among others (paras. 46–47).

20. Turning to the conservation of living species, he then reviews the tension between conservation and exploitation in the arguments of the contending Parties in the course of the proceedings of the present case (Part VII), in both the written phase (paras. 48–51) and the oral phase. In respect of this latter, he reviews the responses of the contending Parties and the intervenor to the questions he put to them in the public sitting of the Court of 8 July 2013 (paras. 52–56). He then concludes that it

> "has been made clear, in recent decades, that the international community has adopted a conservation-oriented approach in treaty regimes, including treaties covering marine mammals. The ICRW Convention is to be properly interpreted in this context (…). [T]he ICRW Convention should be read in the light of other international instruments that follow a conservation-oriented approach and the precautionary principle. The existence of the ICRW Convention in relation to Conventions aimed at conservation of living resources supports a narrow interpretation of Article VIII of the ICRW Convention" (paras. 57–58).

21. Judge Cançado Trindade dedicates Part VIII of his separate opinion to the principle of prevention and the precautionary principle, as from the arguments of the contending Parties and the intervenor. He begins by pointing out that, although the Court does not dwell upon the precautionary principle in the present Judgment in the case concerning *Whaling in the Antarctic*, in the course of the proceedings in the present case, the two contending Parties (Australia and Japan) as well as the intervenor (New Zealand) addressed the principle of prevention and the precautionary principle as related to the *cas d'espèce* (para. 60). After reviewing their arguments, he comments that those two principles, interrelated in the present case, "are to inform and conform any programmes under Special Permits within the limited scope of Article VIII of the ICRW Convention" (para. 70). And he concludes, on this point, that, in the domain of international environmental law in general, and in respect of the ICRW Convention in particular, "there has occurred, with the passing of time, a move towards conservation of living marine resources as a common interest, prevailing over State unilateral action in search of commercial profitability" (para. 71).

22. Judge Cançado Trindade then moves on to a review of the responses from the experts (of Australia and Japan) to the several questions he put to them during the public sittings of the Court (Part IX). Despite their responses, there remained, in his perception, the impression of a lack of general criteria for the determination of the total whales to be killed, and for how long, for the purposes of so-called "scientific research" (para. 73). "Scientific research",—he continues,—is surrounded by uncertainties, and is undertaken on the basis of uncertainties. Suffice it here to recall,—he adds,—the legacy of Karl Popper (mainly his *Conjectures and Refutations*), who used to ponder wisely that

> "scientific knowledge can only be uncertain or conjectural, while ignorance is infinite. Scientific research is a search for truth, amidst conjectures, and, given one's fallibility, one has to learn with mistakes incurred into. One can hope to be coming closer to truth, but without knowing for sure whether one is distant from, or near it. Without the ineluctable refutations, science would fall into stagnation, losing its empirical character. Conjectures and refutations are needed, for science to keep on advancing in its empirical path. As to the *cas d'espèce*, would this mean that whales could keep on being killed, and increasingly so, for 'scientific purposes' and amidst scientific uncertainty? I do not think so; there are also non-lethal methods, and, after all, living marine resources are not inexhaustible" (para. 74).

23. Judge Cançado Trindade then reviews the reiterated calls under the ICRW Convention for non-lethal use of cetaceans (Part X), on the part of the IWC in its resolutions (paras. 75–79). The way is then paved for the presentation of his concluding observations, on JARPA II programme and the requirements of the ICRW Convention and its Schedule (Part XI). There are a few characteristics of JARPA II which do not allow it to qualify under the exception of Article VIII, to be restrictively interpreted; in effect, the programme at issue does not seem to be genuinely and solely motivated by the purpose of conducting scientific research (para. 80).

24. In practice, the use of lethal methods by JARPA II in relation to what seems to be a large number of whales does not appear justifiable as "scientific research"; furthermore, the fact that JARPA II runs for an indefinite duration also militates against its professed purpose of "scientific research" (paras. 81–82). JARPA II, in the manner it is being currently conducted, can have adverse effects on whale stocks; commercial whaling, pure and simple, is not permissible under Article VIII (2) of the ICRW Convention (paras. 83–84). The Court has found, in the present Judgment in the *Whaling in the Antarctic* case, that Japan has not acted in conformity with paragraph 10 *(d)* and *(e)* (whaling moratorium, and assessment of effects of whale catches on stocks), and paragraph 7 *(b)* (prohibition of commercial whaling in the Southern Ocean Sanctuary), of the Schedule (resolutory points 3–5).

The respondent State does not appear to have fulfilled this obligation to take into account comments, resolutions and recommendations of the IWC and the Scientific Committee (para. 85).

25. Judge Cançado Trindade then observes that the present case has provided "a unique occasion for the Court to pronounce upon a system of collective regulation of the environment for the benefit of future generations". The Court's present Judgment in the *Whaling in the Antarctic* case "may have wider implications than solely the peaceful settlement of the present dispute between the contending Parties, to the benefit of all" (para. 87). Although international treaties and conventions are a product of their time, they have an aptitude to face changing conditions, and their interpretation and application in time bear witness that they are *living* instruments; the 1946 ICRW Convention is no exception to that, and, endowed with a mechanism of supervision of its own, it has proven to be a *living* instrument.

26. Moreover, in distinct domains of international law, treaties and conventions—especially those setting forth a mechanism of protection—"have required the pursuance of a hermeneutics of their own, as *living* instruments. This happens not only in the present domain of conservation and sustainable use of living marine resources, but likewise in other areas of international law" (para. 88). Judge Cançado Trindade then concludes that

> "The present case on *Whaling in the Antarctic* has brought to the fore the evolving law on the conservation and sustainable use of living marine resources, which, in turn, has disclosed what I perceive as its contribution to the gradual formation of an *opinio juris communis* in the present domain of contemporary international law. *Opinio juris*, in my conception, becomes a key factor in the formation itself of international law (here, conservation and sustainable use of living marine resources); its incidence is no longer that of only one of the constitutive elements of one of its 'formal' sources. The formation of international law in domains of public or common interest, such as that of conservation and sustainable use of living marine resources, is a much wider process than the formulation of its 'formal sources', above all in seeking the legitimacy of norms to govern international life.
>
> *Opinio juris communis*, in this way, comes to assume a considerably broader dimension than that of the subjective element constitutive of custom, and to exert a key role in the emergence and gradual evolution of international legal norms. After all, juridical conscience of what is necessary (*jus necessarium*) stands above the 'free-will' of individual States (*jus voluntarium*), rendering possible the evolution of international law governing conservation and sustainable use of living marine resources. In this domain, State voluntarism yields to the *jus necessarium*, and notably so in the present era of international tribunals, amidst increasing endeavours to secure the long-awaited primacy of the *jus necessarium* over the *jus voluntarium*. Ultimately, this becomes of key importance to the realization of the pursued common good" (paras. 89–90).

Dissenting opinion of Judge Yusuf

1. Judge Yusuf appends a dissenting opinion to the Judgment of the Court in which he expresses serious doubts as to the legal correctness of the Court's reasoning and its conclusions regarding the conformity to the ICRW of Japan's decision to authorize JARPA II, and the legal standards to be applied to assess such conformity.

2. According to Judge Yusuf, the dispute between the Parties concerns the interpretation and application of Article VIII of the ICRW. The issue before the Court is whether Japan lawfully employed the discretionary power granted to any Contracting Government to issue special permits to its nationals to kill whales for purposes of scientific research. It is not about the fit between the design and implementation of JARPA II and its stated objectives, as the analysis in the Judgment may suggest.

3. Judge Yusuf observes that the most relevant legal criteria to be considered in the assessment of the legality of Japan's actions in connection with JARPA II are those of Article VIII of the Convention, together with paragraph 30 of the Schedule and the guidelines for the application of Article VIII contained in "Annex P", which was adopted by consensus at the International Whaling Commission (IWC). For Judge Yusuf, this is the law applicable to the present case, on the basis of which the Court should have tried to resolve the dispute before it. The Court instead came up with a standard of review that is extraneous to the Convention (Judgment, paragraph 67) and then applied it directly to "the design and implementation of JARPA II" rather than to the legality of the conduct of Japan in issuing special permits for JARPA II. Thus, Judge Yusuf considers that the law applicable to the dispute between the Parties was set aside by the Court in favour of an obscure and debatable standard which cannot be found anywhere in the Convention, and which is based on the "reasonableness of the design and implementation of JARPA II in relation to the stated objectives of the programme". This, in the judge's view, is neither grounded in law nor in the practice of this Court.

4. Judge Yusuf notes that while the Court recognizes the centrality of the interpretation and application of the applicable law in paragraph 50 of the Judgment, it quickly skates over their analysis to embark in an extremely detailed assessment of the fit between design and implementation of JARPA II and its stated objectives. According to Judge Yusuf, reviewing the design and implementation of a scientific research programme is more properly the task of the Scientific Committee of the IWC, not of the Court. In any case, the reasonableness of the design and implementation of JARPA II in relation to its objectives is an arguable matter on which scientists may have genuine differences of opinion.

5. According to Judge Yusuf, Article VIII constitutes an exception to the regulatory régime established by the Convention for commercial whaling, but it is not outside the scope of the ICRW. Nor is the discretionary power granted to States parties to issue a special permit for purposes of scientific research *unrestricted. It is to be lawfully used only for the achievement of the purposes laid down in the Convention*.

6. Judge Yusuf is however of the view that the evidence before the Court does not support the conclusion that the special permits for JARPA II have been issued by Japan for a purpose other than scientific research. Nor does such evidence establish that the special permits for JARPA II do not comply with the requirements and conditions laid down in the Convention. According to Judge Yusuf, the JARPA II programme was duly reviewed and commented by the Scientific Committee of the IWC in 2005 in accordance with Article VIII, paragraph 30, of the Schedule and the applicable guidelines (now Annex P) with regard to its methodology, design, and the effect of catches on the population concerned. In other instances, where the committee was of the view that a permit proposal did not meet its criteria, it specifically recommended that the permit should not be issued. This was not the case with regard to JARPA II.

7. Judge Yusuf also points to the fact that the Scientific Committee of the IWC in its Report of 2012 specifically recommended the use of data arising from both JARPA and JARPA II for catch-at-age based analysis for the minke whale dynamics model the committee is investigating; and in its 2013 Report the Committee referred to non-lethal sampling of humpback whales occurring within JARPA/JARPA II programmes as useful in the assessment of certain breeding stocks of humpback whales. In light of these reports by the Scientific Committee of the IWC on the generation by JARPA II of data which is useful to the work of the Scientific Committee, Judge Yusuf finds unpersuasive the majority's conclusion that JARPA II is not for purposes of scientific research.

8. Judge Yusuf is also not persuaded that there is any legal basis for the Court's conclusion that JARPA II is in breach of the moratorium established in paragraph 10 *(e)* of the Schedule, the prohibition on whaling in the Southern Ocean Sanctuary (para. 7 *(b)* of the Schedule), or of the factory ship moratorium (para. 7 *(b)*). All of these provisions apply to commercial whaling, not to research whaling. In the judge's view, this conclusion by the Court is especially unwarranted in the absence of clear evidence that JARPA II is commercial whaling in disguise. The Court has not established that the preponderant purpose of the programme was commercial whaling. In effect, the Judgment entails a finding of bad faith by Japan which is not explicitly expressed.

9. In the view of Judge Yusuf, the Court should have assessed, on account of the developments that have taken place both in the ICRW and in international environmental law in general, whether the continued conduct of JARPA II, as a programme that uses lethal methods under Article VIII, constitutes an anomaly which may frustrate the object and purpose of the Convention in light of the recent amendments thereto, as well as the extent to which such amendments may have restricted the right to issue special permits.

10. For Judge Yusuf, the amendments made to the Schedule with respect to the regulatory framework for commercial whaling, and in particular the moratorium adopted in 1982, which is still in place, and the Schedule on the prohibition on commercial whaling in the Southern Ocean Sanctuary, cannot be considered to be devoid of influence on the interpretation and implementation of Article VIII of the Convention in so far as they reflect a shift in attitudes and societal values towards the use of lethal methods for whaling in general. Thus, the application of Article VIII in the context of JARPA II should have been interpreted through the prism of all these developments, and in light of their effect on the object and purpose of the Convention.

11. In the judge's view, an interpretation of Article VIII in light of the evolving regulatory framework of the Convention, in addition to anchoring the reasoning and conclusions of the Court on the law applicable to the dispute between the Parties, would have been of great value to the States parties to the Convention in view of the growing disconnect between Article VIII and the recent amendments to the Convention, and might have provided them with the tools necessary to restore an appropriate balance within the Convention.

Separate opinion of Judge Greenwood

The Court is not concerned with the moral, ethical or environmental issues relating to Japan's whaling programmes in the present case but only with whether JARPA II is compatible with Japan's international legal obligations under the International Convention for the Regulation of Whaling ("the Convention"). The answer to that question turns on the interpretation of Article VIII of the Convention, which grants each State the power to issue special permits authorizing whaling for purposes of scientific research. There is no presumption that Article VIII should be interpreted either in a restrictive or an expansive way. While recommendations by the International Whaling Commission ("the Commission") constitute part of the subsequent practice of the parties to the Convention, they are not legally binding and offer guidance on the interpretation of the Convention only to the extent that they reflect agreement among the parties. Most of the recommendations which have been invoked in support of a narrow reading of Article VIII were adopted only by very narrow majorities and do not reflect such agreement.

If the killing, taking and treating of whales in the course of JARPA II is within Article VIII, then the effect is that this conduct cannot be contrary to the other provisions of the Convention and its Schedule. However, if they fall outside Article VIII, then they are contrary to the Schedule, specifically to paragraphs 7 *(b)* (prohibiting the taking of fin whales in the Southern Ocean Sanctuary), 10 *(d)* (prohibiting the taking of fin whales by factory ship) and 10 *(e)* (prohibiting the setting of limits above zero in respect of any species of whale for commercial purposes).

Judge Greenwood agrees with the reasoning in the Judgment that JARPA II whaling does not meet the requirements of Article VIII, paragraph 1, of the Convention. In order to fall within the exemption contained in Article VIII, paragraph 1, it is necessary that the numbers of whales to be killed under JARPA II are sufficiently related to the achievement of the objectives of the programme. The much higher numbers of whales to be taken under JARPA II, compared with JARPA, is not justified on this basis. A key difference between JARPA and JARPA II is the latter's objective of "modelling competition among whale species and future management objectives". That

objective clearly requires research into more than one species of whale. Yet, from the outset Japan has taken no humpback whales, and the number of fin whales taken has been very small. Japan's independent expert stated that the fin whale sample size was unjustifiable and would not have yielded any useful data. While Japan is not to be criticized for not having killed more fin whales or for acceding to the request by the Chair of the Commission not to take humpback whales, there is no sign that Japan attempted to adapt the JARPA II sample size as a result of the changed circumstances. Japan has also not provided the Court with any answer as to why, since data in respect of other species could be obtained by the use of non-lethal methods, such methods were not employed in respect of minke whales. Further, if the objective of modelling competition between whale species is set aside, the dramatic increase in the number of minke whales to be taken under JARPA II as compared to those taken under JARPA Is difficult to justify.

Japan has not breached its obligations under paragraph 30 of the Schedule, since it has provided the required information to the IWC Scientific Committee but Judge Greenwood questions whether Japan has fully complied with the duty of co-operation under the Convention.

The Court had been right not to order a second round of written argument in the present case.

Separate opinion of Judge Xue

Although Judge Xue concurs with the Court's finding that special permits granted under JARPA II do not fall within the meaning of Article VIII, paragraph 1, of the International Convention for the Regulation of Whaling (the Convention), she does not agree with certain reasonings of the majority decision.

I. Interpretation of Article VIII, paragraph 1, of the Convention

Judge Xue takes the view that Article VIII, in setting up the special category of scientific whaling, allows a contracting party to specify the number of killings and other conditions as it "thinks fit", and exempts the killing, taking and treating of whales under special permits from restrictions imposed on commercial whaling under the Convention régime. By these terms the Convention thus confers a discretionary power on the contracting parties with regard to scientific whaling. What remains unclear is to what extent a contracting party may exercise such discretion. Judge Xue observed that first, a contracting party must avoid any adverse effect on the stocks with a view to maintaining sustainable utilization and conservation of the resources. Secondly, attention must be paid to the situation of commercial whaling, as there is an intrinsic link between commercial whaling and scientific whaling, particularly when scientific whaling is purportedly to be carried out on a large scale and on a continuous basis. She adds that prior to the moratorium on commercial whaling, such dispute as the current one with JARPA II programme would not arise; lethal sampling did not pose an issue. Thirdly, discretion under Article VIII, paragraph 1, also means a duty on every authorizing party to exercise the power properly and reasonably by virtue of the principle of good faith under the law of treaties. She concludes that for these reasons, Article VIII has not bestowed a self-defined right on the contracting parties.

The Court should, according to Judge Xue, first address the issue whether the authorizing party can freely determine, as it "thinks fit", the number of killing, taking and treating of whales for purposes of scientific research, an issue that bears on the relationship between Article VIII and the other provisions of the Convention. She emphasizes that although the terms of Article VIII remain intact, various restrictions on commercial whaling for purposes of conservation in the course of the past 68 years have exerted a creeping effect on the way in which scientific research may be conducted, particularly with respect to methodology and scale of sample size. Revisions of guidelines and reviews of special permits by the Scientific Committee also move in the direction of conservation. With these developments, it is hard to claim that scientific whaling is totally detached, free-standing, from the operation of the Convention and that the "margin of appreciation", if any, for the contracting parties in granting special permits stays the same as before. Judge Xue thus observes that the authorizing party is obliged to use its best knowledge to determine, as it perceives proper, whether or not to grant special permits for proposed scientific research programmes. Once adopted, that decision nevertheless is subject to review, scientific or judicial. The assessment of the decision of course cannot simply rely on the perception of the authorizing party, but must be conducted on an objective basis. The authorizing party should justify its decision with scientific evidence and sound reasoning.

II. The standard of review

On the standard of review, Judge Xue stresses that the review by the Court should focus on legal issues. First, in assessing Japan's exercise of its right under Article VIII, paragraph 1, judicial review of the Court should link with treaty interpretation. In her opinion, the question whether activities under JARPA II involve scientific research is a matter of fact rather than a matter of law, therefore it should be subject to scientific review. In accordance with the well-established principle *onus probandi incumbit actori*, it is up to Australia to prove with convincing evidence to the Court that JARPA II does not involve scientific research.

Judge Xue also finds problematic the distinction between the term "scientific research" and the phrase "for purposes of" in Article VIII, paragraph 1, of the Convention in the Judgment. In her view, this interpretation unduly complicates the meaning of the phrase "for purposes of scientific research" in Article VIII, paragraph 1, rendering the Court's role beyond its judicial purview. As stated above, determination of scientific research is primarily a matter of fact subject to scientific scrutiny. When the Court is tasked to determine whether or not, in the use of lethal sampling, the elements of JARPA II's design and implementation are reasonable in relation to its stated scientific objectives, it will inevitably be set to assess the scientific merit of the programme.

III. JARPA II programme in light of Article VIII, paragraph 1, of the Convention

While Judge Xue agrees with some of the findings reached by the Court, she believes that the Court should have given further consideration to the question of funding, as it bears directly on the pivotal issue of the case: the size of lethal sampling.

She observes that Japan does not deny funding consideration is involved in the determination of granting special permits, claiming that such practice is normal in fishery research. In regard to the scale of lethal sampling of JARPA II, she thinks that Japan fails to explain to the satisfaction of the Court how the sample sizes are calculated and determined with the aim of achieving the objectives of the programme; technical complexity of the matter does not release the Party of the burden of proof.

Moreover, in response to Australia's claim that Japan's real intention in conducting JARPA II is to maintain its whaling operation and that the programme is commercial whaling in disguise, Japan's rebuttal is weak and unpersuasive. Even if fund-raising through commercial means may not necessarily render the programme as commercial whaling, or commercial whaling in disguise, given the scale of lethal sampling and the unlimited duration of JARPA II, the cumulative effect of its lethal take on the conservation of whale resources is not insignificant and negligible, which gives all the more reason for requiring Japan to justify its decision on special permits. For these reasons, Judge Xue is of the opinion that at the time when the moratorium on commercial whaling is imposed, the term "for purposes of scientific research" under Article VIII, paragraph 1, should be strictly interpreted; sample sizes that are dictated by fund-raising consideration, therefore, cannot be considered as "objectively reasonable", or "for purposes of scientific research".

IV. Relationship between Article VIII, paragraph 1, and the Schedule

On the question of the alleged breach of the three provisions of the Schedule (commercial whaling moratorium, factory ship moratorium, and Southern Ocean Sanctuary moratorium), Judge Xue does not agree with the Court's reasoning that since JARPA II does not fall within the meaning of Article VIII, paragraph 1, of the Convention, it should be subject to the above-mentioned three provisions. She is of the view that the shortcomings in JARPA II as analysed by the Court are, by and large, technical flaws associated with the design and implementation of the programme, which do not by themselves transform JARPA II into a commercial whaling operation. Fund-raising, albeit by market sale of whale meat, does not necessarily alter the scientific nature of the programme, unless the Court finds bad faith on the part of Japan. According to her view, scientific whaling, even if with flaws, remains scientific in nature.

Judge Xue finally underlines that consequences of breach of Article VIII and that of the Schedule paragraphs can be different. In the former case, the conditions and the number of special permits may be revised or revoked upon the review and comments by the Scientific Committee. In the latter situation, however, as Japan is deemed breaching its international obligation under the Schedule of the Convention by violating the moratorium on commercial whaling, it shall be obliged to revoke all the extant special permits and refrain from granting further for JARPA II, thus forestalling the Scientific Committee's future review. In her opinion, JARPA II remains a programme for scientific research, and Japan should be given the opportunity to address the shortcomings in the design and implementation of the programme in the Scientific Committee during the upcoming periodical review.

Separate opinion of Judge Sebutinde

Judge Sebutinde concurs with the Court's findings in points 1, 2, 3, 4, 5 and 7 of the Judgment but considers that the Court should have clarified more precisely the limits of discretion of a Contracting Government under Article VIII of the International Convention for the Regulation of Whaling (ICRW) as well as the scope of the Court's power to review the exercise of that discretion.

In particular, Judge Sebutinde is of the view that the Court should have specified the criteria that have guided and informed its determination of whether the special permits issued under JARPA II were "for purposes of scientific research", taking account of the parameters that the States parties to the ICRW consider relevant in this regard. These parameters are reflected in paragraph 30 to the Schedule and elaborated further in the binding resolutions and guidelines of the IWC. Among the latter, the Annex P guidelines should be given a particular weight, since they are the most recent set of guidelines adopted by consensus and on the basis of which JARPA II will be assessed by the Scientific Committee in 2014. On this basis, Judge Sebutinde considers that the Court should have taken into account the following parameters.

First, the whaling programme for which the special permit is sought must include defined research objectives and must be based on appropriate scientific methodology. Secondly, the Contracting Government issuing a special permit for scientific research whaling must set limits on the number of whales to be killed, in addition to any other conditions it sees fit, and must specify the number, sex, size and stock of the animals to be taken. While the Contracting Government enjoys considerable discretion in determining the catch limits, it must exercise that discretion consistent with the object and purpose of the ICRW, in that whales may be killed only to the extent necessary for achieving the stated goals of the scientific research programme. Thirdly, the issuing State must ensure that the proposed scientific research programme is designed and implemented so as not to endanger the target whale stocks, and must specify the possible effect of the research programme on conservation of whale stocks. Lastly, the Contracting Government must submit the proposed special permits to the Scientific Committee for prior review and comments. This procedural requirement enables the IWC and its Scientific Committee to play a monitoring role in respect of special permit whaling, while obligating the issuing State to co-operate with the IWC.

In addition, Judge Sebutinde disagrees with the reasoning and findings of the Court regarding Japan's compliance with its

obligations under paragraph 30 of the Schedule to the ICRW. In her view, Japan has failed to fulfil its obligation of meaningful co-operation with the IWC and the Scientific Committee.

In particular, against the recommendation of the IWC that no additional Japanese special permit programmes be conducted in the Antarctic until the Scientific Committee had completed an in-depth review of the results of JARPA, Japan launched JARPA II before the Scientific Committee had completed such review. Secondly, there is no indication that Japan has duly considered the IWC comments and recommendations in respect of certain controversial aspects of JARPA II such as its resort to lethal methods. Thirdly, although the JARPA II Plan provided the essential information required under paragraph 30 of the Schedule, much of the information is not detailed enough to be considered compliant with the relevant IWC guidelines, a shortcoming likely to hamper the Scientific Committee's upcoming review of JARPA II. Fourthly, Japan has failed to submit the specific special permits issued in respect of JARPA II to the Scientific Committee for prior review, as required by paragraph 30. Given that these permits are virtual replicas of the permits issued under JARPA and that JARPA II differs in implementation at least, from its predecessor, it is imperative that the Scientific Committee ought to have had prior opportunity to review and comment on them. Fifthly, as noted in the Judgment (paragraph 222), apart from reference to collaboration with Japanese research institutes in relation to JARPA I, there is no evidence of co-operation between JARPA II and other domestic and international research institutions other than an undertaking, in the JARPA II Plan, that "[p]articipation of foreign scientists will be welcomed, so long as they meet the qualifications established by the Government of Japan".

In view of these shortcomings Judge Sebutinde was unable to join the majority in finding that "Japan has complied with its obligations under paragraph 30 of the Schedule to the [ICRW] with regard to JARPA II".

Separate opinion of Judge Bhandari

In his separate opinion, Judge Bhandari explains the reasons for his vote against operative subparagraph (6) of the Judgment. While noting the existence of a duty to co-operate arising from paragraph 30 of the Schedule to the International Convention for the Regulation of Whaling when States parties interact with the International Whaling Commission and its Scientific Committee regarding the issuance of special permits for purposes of scientific research, Judge Bhandari rejects the Court's conclusion that the Government of Japan has complied with paragraph 30. In his view, while Japan has demonstrated formal compliance with the dictates of paragraph 30, its actions have not demonstrated substantive compliance with the broad and purposive scope of the duty to co-operate. Moreover, Judge Bhandari believes that in addition to finding that JARPA II is not a programme for purposes of scientific research under Article VIII, paragraph 1, of the Convention, the Court ought to have made a further pronouncement that JARPA II is a commercial whaling programme. In his view, this conclusion is inescapable given the mutually exclusive categories of whaling envisaged under the Convention, as well as the abundant evidentiary record chronicling the history surrounding JARPA II, its indefinite duration, and certain unmistakably commercial qualities of the programme.

Separate opinion of Judge *ad hoc* Charlesworth

In her separate opinion, Judge *ad hoc* Charlesworth addresses two specific areas in which her views differ from those of the majority, namely, the nature of the restrictions on the use of lethal methods "for purposes of scientific research" under Article VIII of the International Convention for the Regulation of Whaling 1946 (ICRW), and Japan's compliance with paragraph 30 of the Schedule.

Judge *ad hoc* Charlesworth is of the view that Article VIII of the ICRW should be read in light of resolutions on research methods adopted by consensus by the International Whaling Commission (IWC). In this regard, she argues that applicable resolutions support an interpretation of Article VIII that the use of lethal methods should be essential to the objectives of the scientific research programme. According to Judge *ad hoc* Charlesworth, the precautionary approach—which is also relevant to the interpretation of the ICRW—reinforces the conclusion that lethal methods should be of last resort in scientific research programmes under Article VIII.

Judge *ad hoc* Charlesworth concludes that Japan has breached paragraph 30 of the Schedule in that it has failed to comply with States parties' duty of co-operation with the Scientific Committee, which she considers a critical element of the fabric of the ICRW. While the Scientific Committee's views on special permit proposals are not legally binding on States parties under the terms of paragraph 30, the IWC has empowered the Committee to review and comment on such proposals, thereby creating an obligation on the proposing State to co-operate with the Committee. Such an obligation requires States parties to show genuine willingness to reconsider their positions in light of the Committee's views.

According to Judge *ad hoc* Charlesworth, Japan has failed to comply with its duty of co-operation, *inter alia*, by (i) launching JARPA II before a review of JARPA by the Scientific Committee had taken place; (ii) failing to give meaningful consideration to the feasibility of non-lethal methods in the design of JARPA II; and (iii) continuing to rely on JARPA II's original Research Plan as a basis for subsequent annual permits in circumstances where the conduct of JARPA II has differed in substantial ways from the scheme set out in the Research Plan.

209. APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE (CROATIA *v.* SERBIA)

Judgment of 3 February 2015

On 3 February 2015, the International Court of Justice delivered its Judgment in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*.

The Court was composed as follows: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari; Judge *ad hoc* Vukas and Kreća; Registrar Couvreur.

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* *

The operative paragraph of the Judgment (para. 524) reads as follows:

"…

The Court,

(1) By eleven votes to six,

Rejects the second jurisdictional objection raised by Serbia and *finds* that its jurisdiction to entertain Croatia's claim extends to acts prior to 27 April 1992;

In favour: Vice-President Sepúlveda-Amor; Judges Abraham, Keith, Bennouna, Cançado Trindade, Yusuf, Greenwood, Donoghue, Gaja, Bhandari; Judge *ad hoc* Vukas;

Against: President Tomka; Judges Owada, Skotnikov, Xue, Sebutinde; Judge *ad hoc* Kreća;

(2) By fifteen votes to two,

Rejects Croatia's claim;

In favour: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari; Judge *ad hoc* Kreća;

Against: Judge Cançado Trindade; Judge *ad hoc* Vukas;

(3) Unanimously,

Rejects Serbia's counter-claim."

*

* *

President Tomka appended a separate opinion to the Judgment; Judges Owada, Keith and Skotnikov appended separate opinions to the Judgment; Judge Cançado Trindade appended a dissenting opinion to the Judgment; Judges Xue and Donoghue appended declarations to the Judgment; Judges Gaja, Sebutinde and Bandhari appended separate opinions to the Judgment; Judge *ad hoc* Vukas appended a dissenting opinion to the Judgment; Judge *ad hoc* Kreća appended a separate opinion to the Judgment.

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* *

Procedural history (paras. 1–51)

The Court recalls that, on 2 July 1999, the Government of the Republic of Croatia (hereinafter "Croatia") filed an Application against the Federal Republic of Yugoslavia (hereinafter "the FRY") in respect of a dispute concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the "Genocide Convention" or the "Convention"). The Convention was approved by the General Assembly of the United Nations on 9 December 1948 and entered into force on 12 January 1951. The Application invoked Article IX of the Genocide Convention as the basis of the jurisdiction of the Court.

On 11 September 2002, the Respondent raised preliminary objections relating to the Court's jurisdiction to entertain the case and to the admissibility of Croatia's Application.

By a letter dated 5 February 2003, the FRY informed the Court that its name had changed to "Serbia and Montenegro". Following the Republic of Montenegro's declaration of independence on 3 June 2006, the "Republic of Serbia" (hereinafter "Serbia") remained the sole Respondent in the case, as indicated by the Court in its Judgment of 18 November 2008 (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 412, hereinafter the "2008 Judgment"). In that Judgment, the Court rejected the first and third preliminary objections raised by Serbia. It found, however, that the second objection—that claims based on acts or omissions which took place before 27 April 1992, i.e., the date on which the FRY came into existence as a separate State, lay beyond its jurisdiction and were inadmissible—did not, in the circumstances of the case, possess an exclusively preliminary character and should therefore be considered in the merits phase. Subject to that conclusion, the Court found that it had jurisdiction to entertain Croatia's Application.

On 4 January 2010, Serbia filed a counter-claim.

Public hearings on the objection found in 2008 not to be of an exclusively preliminary character, as well as on the merits of Croatia's claim and Serbia's counter-claim, were held from 3 March to 1 April 2014.

I. Background (paras. 52–73)

Before briefly setting out the factual and historical background to the present proceedings, the Court notes that, in these proceedings, Croatia contends that Serbia is responsible for breaches of the Genocide Convention committed in Croatia between 1991 and 1995, whereas, in its counter-claim, Serbia contends that Croatia is itself responsible for breaches of the Convention committed in 1995 in the "Republika Srpska Krajina" ("RSK"), an entity established in late 1991.

A. The break-up of the Socialist Federal Republic of Yugoslavia and the emergence of new States (paras. 53–59)

While recounting the break-up of the Socialist Federal Republic of Yugoslavia ("SFRY"), the Court recalls that, until the start of the 1990s, that entity consisted of the republics of Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia. Following the death of President Tito, which occurred on 4 May 1980, the SFRY was confronted with an economic crisis lasting almost ten years and growing tensions between its different ethnic and national groups. Towards the end of the 1980s and at the start of the 1990s, certain republics sought greater powers within the federation, and, subsequently, independence.

Croatia and Slovenia declared themselves independent from the SFRY on 25 June 1991, although their declarations did not take effect until 8 October 1991. For its part, Macedonia proclaimed its independence on 17 September 1991, and Bosnia and Herzegovina followed suit on 6 March 1992. On 22 May 1992, Croatia, Slovenia, and Bosnia and Herzegovina were admitted as Members of the United Nations, as was the former Yugoslav Republic of Macedonia on 8 April 1993.

On 27 April 1992, "the participants of the Joint Session of the SFRY Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro" adopted a declaration stating in particular:

> "The Federal Republic of Yugoslavia, continuing the state, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the SFR of Yugoslavia assumed internationally … Remaining bound by all obligations to international organizations and institutions whose member it is …"

On the same date, the Permanent Mission of Yugoslavia to the United Nations sent a Note to the Secretary-General, stating, *inter alia*, that

> "[s]trictly respecting the continuity of the international personality of Yugoslavia, the Federal Republic of Yugoslavia shall continue to fulfil all the rights conferred to, and obligations assumed by, the Socialist Federal Republic of Yugoslavia in international relations, including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia".

This claim by the FRY that it continued the legal personality of the SFRY was debated at length within the international community and rejected by the Security Council, the General Assembly and several States; the FRY nevertheless maintained it for several years. It was not until 27 October 2000 that the FRY sent a letter to the Secretary-General requesting that it be admitted to membership in the United Nations. On 1 November 2000, the General Assembly, by resolution 55/12, "*[h]aving received* the recommendation of the Security Council of 31 October 2000" and "*[h]aving considered* the application for membership of the Federal Republic of Yugoslavia", decided to "admit the Federal Republic of Yugoslavia to membership in the United Nations".

B. The situation in Croatia (paras. 60–73)

Having pointed out that the present case mainly concerns events which took place between 1991 and 1995 in the territory of the Republic of Croatia as it had existed within the SFRY, the Court analyses the background to those events. It thus notes that, in population terms, although the majority of the inhabitants of Croatia (some 78 per cent) were, according to the official census conducted in March 1991, of Croat origin, a number of ethnic and national minorities were also represented. In particular, some 12 per cent of the population was of Serb origin, and a significant part of that Serb minority lived close to the republics of Bosnia and Herzegovina and Serbia.

The Court observes that, in political terms, tensions between the Government of the republic of Croatia and the Serbs living in Croatia increased at the start of the 1990s. Shortly after Croatia's declaration of independence on 25 June 1991, an armed conflict broke out between, on the one hand, Croatia's armed forces and, on the other, forces opposed to its independence (namely forces created by part of the Serb minority within Croatia and various paramilitary groups, to which the Court refers collectively as "Serb forces", irrespective of the issue of attribution of their conduct). At least from September 1991, the Yugoslav National Army ("JNA")—which, according to Croatia, was by then controlled by the Government of the republic of Serbia—intervened in the fighting against the Croatian Government forces. By late 1991, the JNA and Serb forces controlled around one-third of the territory of the former socialist republic of Croatia (in the regions of Eastern Slavonia, Western Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia).

The Court recalls that negotiations in late 1991 and early 1992, backed by the international community, resulted in the Vance plan (after Cyrus Vance, the United Nations Secretary-General's Special Envoy for Yugoslavia) and the deployment of the United Nations Protection Force ("UNPROFOR"). The Vance plan provided for a ceasefire, demilitarization of those parts of Croatia under the control of the Serb minority and SFRY forces, the return of refugees and the creation of conditions favourable to a permanent political settlement of the conflict. UNPROFOR—which was deployed in spring 1992 in three areas protected by the United Nations (the UNPAs of Eastern Slavonia, Western Slavonia and Krajina)—was divided into four operational sectors: East (Eastern Slavonia), West (Western Slavonia), North and South (these two latter sectors covered the Krajina UNPA).

The objectives of the Vance plan and of UNPROFOR were never fully achieved: between 1992 and the spring of 1995, the RSK was not demilitarized, certain military operations were conducted by both parties to the conflict, and attempts to achieve a peaceful settlement failed.

In the spring and summer of 1995, following a series of military operations, Croatia succeeded in re-establishing control over the greater part of the territory it had lost. Thus it recovered Western Slavonia in May through Operation "Flash", and the Krajina in August through Operation "Storm", during which the facts described in the counter-claim allegedly occurred. Following the conclusion of the Erdut Agreement on 12 November 1995, Eastern Slavonia was gradually reintegrated into Croatia between 1996 and 1998.

II. Jurisdiction and admissibility (paras. 74–123)

A. Croatia's claim (paras. 74–119)

(1) Issues of jurisdiction and admissibility which remain to be determined following the 2008 Judgment (paras. 74–78)

Referring to its 2008 Judgment on the preliminary objections raised by Serbia, the Court recalls that, while the jurisdiction of the Court, and the admissibility of Croatia's claim, have been settled so far as that claim relates to events alleged to have taken place as from 27 April 1992, both jurisdiction and admissibility remain to be determined in so far as the claim concerns events alleged to have occurred before that date.

(2) The positions of the Parties regarding jurisdiction and admissibility (paras. 79–83)

The Court sets out the Parties' positions on the issues of jurisdiction and admissibility.

(3) The scope of jurisdiction under Article IX of the Genocide Convention (paras. 84–89)

The Court recalls that the only basis for jurisdiction which has been advanced in the present case is Article IX of the Genocide Convention. That Article provides:

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

The Court states that the fact that its jurisdiction can be founded only upon that Article has important implications for the scope of that jurisdiction: it implies that the Court has no power to rule on alleged breaches of other obligations under international law, not amounting to genocide, particularly those protecting human rights in armed conflict. That is so even if the alleged breaches are of obligations under peremptory norms, or of obligations which protect essential humanitarian values, and which may be owed *erga omnes*.

The Court further notes that the jurisdiction provided by Article IX does not extend to allegations of violation of the customary international law on genocide, even though it is well established that the Convention enshrines principles that also form part of customary international law. Referring to statements contained in its jurisprudence, the Court recalls that the said Convention contains obligations *erga omnes* and that the prohibition of genocide has the character of a peremptory norm *(jus cogens)*.

The Court concludes that, in order to establish that it has jurisdiction with regard to the claim of Croatia relating to events alleged to have occurred prior to 27 April 1992, the Applicant must show that its dispute with Serbia concern obligations under the Convention itself.

(4) Serbia's objection to jurisdiction (paras. 90–117)

(i) Whether provisions of the Convention are retroactive (paras. 90–100)

The Court considers that the essential subject-matter of the dispute is whether Serbia is responsible for violations of the Genocide Convention and, if so, whether Croatia may invoke that responsibility. Thus stated, the dispute would appear to fall squarely within the terms of Article IX.

Serbia maintains however that, in so far as Croatia's claim concerns acts said to have occurred before the FRY became party to the Convention on 27 April 1992 (and the great majority of Croatia's allegations concern events before that date), the Convention was not capable of applying to the FRY (and, therefore, any breaches of it cannot be attributable to Serbia); Serbia deduces that the dispute regarding those allegations cannot be held to fall within the scope of Article IX. In response, Croatia refers to what it describes as a presumption in favour of the retroactive effect of compromissory clauses, and to the absence of any temporal limitation in Article IX of the Convention.

In its 2008 Judgment in the present case, the Court stated "that there is no express provision in the Genocide Convention limiting its jurisdiction *ratione temporis*". Although the absence of a temporal limitation in Article IX is not without significance, it is not, in itself, sufficient to establish jurisdiction over that part of Croatia's claim which relates to events said to have occurred before 27 April 1992. Article IX is not a general provision for the settlement of disputes. The jurisdiction for which it provides is limited to disputes between the Contracting Parties regarding the interpretation, application or fulfilment of the substantive provisions of the Genocide Convention, including those relating to the responsibility of a State for genocide or for any of the acts enumerated in Article III of the Convention. Accordingly, the temporal scope of Article IX is necessarily linked to the temporal scope of the other provisions of the Genocide Convention.

Croatia seeks to address that issue by arguing that some, at least, of the substantive provisions of the Convention are applicable to events occurring before it entered into force for the Respondent. Croatia maintains that the obligation to prevent and punish genocide is not limited to acts of genocide occurring after the Convention enters into force for a particular State but "is capable of encompassing genocide whenever occurring, rather than only genocide occurring in the future after the Convention enters into force for a particular State". Serbia, however, denies that these provisions were ever intended to impose upon a State obligations with regard to events which took place before that State became bound by the Convention.

The Court considers that a treaty obligation that requires a State to prevent something from happening cannot logically apply to events that occurred prior to the date on which that State became bound by that obligation; what has already happened cannot be prevented. Logic, as well as the presumption against retroactivity of treaty obligations enshrined in Article 28 of the Vienna Convention on the Law of Treaties, thus points clearly to the conclusion that the obligation to

prevent genocide can be applicable only to acts that might occur after the Convention has entered into force for the State in question. Nothing in the text of the Genocide Convention or the *travaux préparatoires* suggests a different conclusion. Nor does the fact that the Convention was intended to confirm obligations that already existed in customary international law. A State which is not yet party to the Convention when acts of genocide take place might well be in breach of its obligation under customary international law to prevent those acts from occurring but the fact that it subsequently becomes party to the Convention does not place it under an additional treaty obligation to have prevented those acts from taking place.

There is no similar logical barrier to a treaty imposing upon a State an obligation to punish acts which took place before that treaty came into force for that State and certain instruments contain such an obligation. The Court gives two examples: the first drawn from the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, and the second from the European Convention on the same subject. In both those cases, however, the applicability of the relevant Convention to acts which occurred before it entered into force is the subject of express provision. There is no comparable provision in the Genocide Convention. Moreover, the provisions requiring States to punish acts of genocide (Articles I and IV) are necessarily linked to the obligation (in Article V) for each State party to enact legislation for the purpose of giving effect to the provisions of the Convention. There is no indication that the Convention was intended to require States to enact retroactive legislation.

The negotiating history of the Convention also suggests that the duty to punish acts of genocide, like the other substantive provisions of the Convention, was intended to apply to acts taking place in the future and not to be applicable to those which had occurred during the Second World War or at other times in the past.

Finally, the Court recalls that in its recent Judgment in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, it held that the comparable provisions of the Convention against Torture, which require each State party to submit to their prosecuting authorities the cases of persons suspected of acts of torture, applied only to acts taking place after the Convention had entered into force for the State concerned, notwithstanding that such acts are considered crimes under customary international law.

The Court thus concludes that the substantive provisions of the Convention do not impose upon a State obligations in relation to acts said to have occurred before that State became bound by the Convention.

Having reached that conclusion, the Court turns to the question whether the dispute as to acts said to have occurred before 27 April 1992 nevertheless falls within the scope of jurisdiction under Article IX. Croatia advances two alternative grounds for concluding that it does so. It relies, first, upon Article 10 (2) of the ILC Articles on State Responsibility, and, secondly, upon the law of State succession.

(ii) Article 10 (2) of the ILC Articles on State Responsibility (paras. 102–105)

Article 10 (2) of the International Law Commission (ILC) Articles on Responsibility of States for Internationally Wrongful Acts reads as follows:

> "The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law."

Croatia asserts that that provision is part of customary international law. It maintains that, although the FRY was not proclaimed as a State until 27 April 1992, that proclamation merely formalized a situation that was already established in fact, since, during the course of 1991, the leadership of the republic of Serbia and other supporters of what Croatia describes as a "Greater Serbia" movement took control of the JNA and other institutions of the SFRY, while also controlling their own territorial armed forces and various militias and paramilitary groups. This movement was eventually successful in creating a separate State, the FRY. Croatia contends that its claim in relation to events prior to 27 April 1992 is based upon acts by the JNA and those other armed forces and groups, as well as the Serb political authorities, which were attributable to that movement and thus, by operation of the principle stated in Article 10 (2), to the FRY.

Serbia counters that Article 10 (2) represents progressive development of the law and did not form part of customary international law in 1991–1992. It is therefore inapplicable to the present case. Furthermore, even if Article 10 (2) had become part of customary law at that time, it is not applicable to the facts of the present case, since there was no "movement" that succeeded in creating a new State. Serbia also denies that the acts on which Croatia's claim is based were attributable to an entity that might be regarded as a Serbian State *in statu nascendi* during the period before 27 April 1992. Finally, Serbia contends that even if Article 10 (2) were applicable, it would not suffice to bring within the scope of Article IX that part of Croatia's claim which concerns events said to have occurred before 27 April 1992. According to Serbia, Article 10 (2) of the ILC Articles is no more than a principle of attribution; it has no bearing on the question of what obligations bind the new State or the earlier "movement", nor does it make treaty obligations accepted by the new State after its emergence retroactively applicable to acts of the pre-State "movement", even if it treats those acts as attributable to the new State. On that basis, Serbia argues that any "movement" which might have existed before 27 April 1992 was not a party to the Genocide Convention and could, therefore, only have been bound by the customary international law prohibition of genocide.

The Court considers that, even if Article 10 (2) of the ILC Articles on State Responsibility could be regarded as declaratory of customary international law at the relevant time, that Article is concerned only with the attribution of acts to a new State; it does not create obligations binding upon either the new State or the movement that succeeded in establishing that new State. Nor does it affect the principle stated in Article 13

of the said Articles that: "An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs."

After recalling that, in the present case, the FRY was not bound by the obligations contained in the Convention before 27 April 1992, the Court explains that, even if the acts prior to that date on which Croatia relies were attributable to a "movement", within the meaning of Article 10 (2) of the ILC Articles, and became attributable to the FRY by operation of the principle set out in that Article, they cannot have involved a violation of the provisions of the Genocide Convention but, at most, only of the customary international law prohibition of genocide. According to the Court, that conclusion makes it unnecessary for it to consider whether Article 10 (2) expresses a principle that formed part of customary international law in 1991–1992 (or, indeed, at any time thereafter), or whether, if it did so, the conditions for its application are satisfied in the present case.

(iii) Succession to responsibility (paras. 106–117)

The Court next turns to Croatia's alternative argument that the FRY succeeded to the responsibility of the SFRY. This argument is based upon the premise that the acts prior to 27 April 1992 on which Croatia bases its claim were attributable to the SFRY and in breach of the SFRY's obligations under the Genocide Convention to which it was, at the relevant time, a party. Croatia then argues that, when the FRY succeeded to the treaty obligations of the SFRY on 27 April 1992, it also succeeded to the responsibility already incurred by the latter for these alleged violations of the Genocide Convention.

The Court considers that, within the framework of the present dispute, it is possible to identify a number of contested points. Thus, on Croatia's alternative argument, in order to determine whether Serbia is responsible for violations of the Convention, the Court would need to decide: (*i*) whether the acts relied on by Croatia took place; and, if they did, whether they were contrary to the Convention; (*ii*) if so, whether those acts were attributable to the SFRY at the time that they occurred and engaged its responsibility; and (*iii*) if the responsibility of the SFRY had been engaged, whether the FRY succeeded to that responsibility. While there is no dispute that many (though not all) of the acts relied upon by Croatia took place, the Parties disagree over whether or not they constituted violations of the Genocide Convention. In addition, Serbia rejects Croatia's argument that Serbia has incurred responsibility, on whatever basis, for those acts.

The Court observes that what has to be decided in order to determine whether or not it possesses jurisdiction with regard to the claim concerning acts said to have taken place before 27 April 1992 is whether the dispute between the Parties on the three issues set out above falls within the scope of Article IX. In the Court's view, the issues in dispute concern the interpretation, application and fulfilment of the provisions of the Convention. There is no suggestion here of giving retroactive effect to the provisions of the Convention. Both Parties agree that the SFRY was bound by the Convention at the time when it is alleged that the relevant acts occurred. Whether those acts were contrary to the provisions of the Convention and, if so, whether they were attributable to and thus engaged the responsibility of the SFRY are matters falling squarely within the scope *ratione materiae* of the jurisdiction provided for in Article IX.

So far as the third issue in dispute is concerned, the question the Court is asked to decide is whether the FRY—and, therefore, Serbia—is responsible for acts of genocide and other acts enumerated in Article III of the Convention allegedly attributable to the SFRY. Article IX provides for the Court's jurisdiction in relation to "[d]isputes … relating to the interpretation, application or fulfilment of the … Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III". The Court notes that Article IX speaks generally of the responsibility of a State and contains no limitation regarding the manner in which that responsibility might be engaged.

The Court accepts that whether or not the Respondent State succeeds, as Croatia contends, to the responsibility of its predecessor State for violations of the Convention is governed not by the terms of the Convention but by rules of general international law. However, that does not take the dispute regarding the third issue outside the scope of Article IX. The fact that the application—or even the existence—of a rule on some aspect of State responsibility or State succession in connection with allegations of genocide may be vigorously contested between the parties to a case under Article IX does not mean that the dispute between them ceases to fall within the category of "disputes … relating to the interpretation, application or fulfilment of the [Genocide] Convention, including those relating to the responsibility of a State for genocide". The Court deduces from this that, since Croatia's alternative argument calls for a determination whether the SFRY was responsible for acts of genocide allegedly committed when the SFRY was a party to the Convention, its conclusion regarding the temporal scope of Article IX does not constitute a barrier to jurisdiction.

The Court goes on to explain that the principle it evoked in the *Monetary Gold* and *East Timor* cases does not apply in the present proceedings. In both of those cases, the Court declined to exercise its jurisdiction to adjudicate upon the application because it considered that to do so would have been contrary to the right of a State not party to the proceedings not to have the Court rule upon its conduct without its consent. That rationale has no application to a State which no longer exists, as is the case with the SFRY, since such a State no longer possesses any rights and is incapable of giving or withholding consent to the jurisdiction of the Court. So far as concerns the position of the other successor States to the SFRY, it is not necessary for the Court to rule on the legal situation of those States as a prerequisite for the determination of the present claim.

The Court thus concludes that, to the extent that the dispute concerns acts said to have occurred before 27 April 1992, it also falls within the scope of Article IX and the Court therefore has jurisdiction to rule upon the entirety of Croatia's claim. According to the Court, it is not necessary to decide whether the FRY, and therefore Serbia, actually succeeded to any responsibility that might have been incurred by the SFRY, any more than it is necessary to decide whether acts contrary

to the Genocide Convention took place before 27 April 1992 or, if they did, to whom those acts were attributable; those questions are matters for the merits.

(5) Admissibility (paras. 118–119)

The Court focuses on the two alternative arguments advanced by Serbia regarding the admissibility of the claim. The first such argument is that a claim based upon events said to have occurred before the FRY came into existence as a State on 27 April 1992 is inadmissible. The Court recalls that it has already, in its 2008 Judgment, held that this argument involves questions of attribution. The Court observes that it is not necessary to determine these matters before it has considered on the merits the acts alleged by Croatia.

The second argument is that, even if a claim might be admissible in relation to events said to have occurred before the FRY came into existence as a State, Croatia could not maintain a claim in relation to events alleged to have taken place before it became a party to the Genocide Convention on 8 October 1991. The Court observes that Croatia has not made discrete claims in respect of the events before and after 8 October 1991; rather, it has advanced a single claim alleging a pattern of conduct increasing in intensity throughout the course of 1991 and has referred, in the case of many towns and villages, to acts of violence taking place both immediately prior to, and immediately following, 8 October 1991. In this context, what happened prior to 8 October 1991 is, in any event, pertinent to an evaluation of whether what took place after that date involved violations of the Genocide Convention. In these circumstances, the Court considers that it is not necessary to rule upon Serbia's second alternative argument before it has examined and assessed the totality of the evidence advanced by Croatia.

B. Serbia's counter-claim (paras. 120–123)

The Court recalls that, in order to be admissible, a counter-claim must fulfil two conditions (Article 80 of the Rules of Court). It must come within the jurisdiction of the Court and it must be directly connected with the subject-matter of the principal claim. The Court notes that Serbia's counter-claim relates exclusively to the fighting which took place in the summer of 1995 in the course of what was described by Croatia as Operation "Storm" and its aftermath, that by the time that Operation "Storm" took place both Croatia and the FRY had been parties to the Genocide Convention for several years, and that Croatia does not contest that the counter-claim thus falls within the jurisdiction of the Court under Article IX of the Genocide Convention.

Further, the Court considers that the counter-claim is directly connected with the claim of Croatia both in fact and in law. The legal basis for both the claim and the counter-claim is the Genocide Convention. Moreover, the hostilities in Croatia in 1991–1992 that gave rise to most of the allegations in the claim were directly connected with those in the summer of 1995, not least because Operation "Storm" was launched as a response to what Croatia maintained was the occupation of part of its territory as a result of the earlier fighting.

The Court therefore concludes that the requirements of Article 80, paragraph 1, of the Rules of Court are satisfied.

III. Applicable law: The Convention on the Prevention and Punishment of the Crime of Genocide (paras. 124–166)

The Court states that, in ruling on disputes relating to the interpretation, application or fulfilment of the Convention, including those relating to the responsibility of a State for genocide, it bases itself on the Convention, but also on the other relevant rules of international law, in particular those governing the interpretation of treaties and the responsibility of States for internationally wrongful acts. It is for the Court, in applying the Convention, to decide whether acts of genocide have been committed, but it is not for the Court to determine the individual criminal responsibility for such acts. That is a task for the criminal courts or tribunals empowered to do so. The Court will nonetheless take account, where appropriate, of the decisions of international criminal courts or tribunals, in particular those of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), in examining the constituent elements of genocide in the present case. If it is established that genocide has been committed, the Court will then seek to determine the responsibility of the State, on the basis of the rules of general international law governing the responsibility of States for internationally wrongful acts.

The Court recalls that Article II of the Convention defines genocide in the following terms:

> "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> *(a)* Killing members of the group;
>
> *(b)* Causing serious bodily or mental harm to members of the group;
>
> *(c)* Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> *(d)* Imposing measures intended to prevent births within the group;
>
> *(e)* Forcibly transferring children of the group to another group."

The Court observes that, according to that Article, genocide contains two constituent elements: the physical element, namely the act perpetrated or *actus reus*, and the mental element, or *mens rea*. Although analytically distinct, the two elements are linked. The determination of *actus reus* can require an inquiry into intent. In addition, the characterization of the acts and their mutual relationship can contribute to an inference of intent.

A. The mens rea *of genocide* (paras. 132–148)

The Court points out that the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such" is the essential characteristic of genocide, which distinguishes it from other serious crimes. It is regarded as a *dolus specialis*, that is to say a specific intent, which, in order for genocide to be established, must be present in addition to the intent required for each of the individual acts involved.

1. The meaning and scope of "destruction" of a group (paras. 134–139)

(a) Physical or biological destruction of the group (paras. 134–136)

The Court notes that the *travaux préparatoires* of the Convention show that the drafters originally envisaged two types of genocide, physical or biological genocide, and cultural genocide, but that this latter concept was eventually dropped in this context. It was accordingly decided to limit the scope of the Convention to the physical or biological destruction of the group. It follows that "causing serious … mental harm to members of the group" within the meaning of Article II *(b)*, even if it does not directly concern the physical or biological destruction of members of the group, must be regarded as encompassing only acts carried out with the intent of achieving the physical or biological destruction of the group, in whole or in part. As regards the forcible transfer of children of the group to another group within the meaning of Article II *(e)*, this can also entail the intent to destroy the group physically, in whole or in part, since it can have consequences for the group's capacity to renew itself, and hence to ensure its long-term survival.

(b) The scale of destruction of the group (paras. 137–139)

Since it is the group, in whole or in part, which is the object of the genocidal intent, the Court is of the view that it is difficult to establish such intent on the basis of isolated acts. It considers that, in the absence of direct proof, there must be evidence of acts on a scale that establishes an intent not only to target certain individuals because of their membership of a particular group, but also to destroy the group itself in whole or in part.

2. The meaning of the destruction of the group "in part" (paras. 140–142)

Citing its previous case law, the Court recalls that the destruction of the group "in part" within the meaning of Article II of the Convention must be assessed by reference to a number of criteria. First, "the intent must be to destroy at least a substantial part of the particular group", and this is a "critical" criterion. Furthermore, "it is widely accepted that genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area" and, accordingly, "[t]he area of the perpetrator's activity and control are to be considered". Account must also be taken of the prominence of the allegedly targeted part within the group as a whole. In particular, the Court must consider whether "a specific part of the group is emblematic of the overall group, or is essential to its survival".

3. Evidence of the dolus specialis (paras. 143–148)

The Court considers that, in the absence of a State plan expressing the intent to commit genocide, such an intent may be inferred from the individual conduct of perpetrators of the acts contemplated in Article II of the Convention. It goes on to explain that, in order to infer the existence of *dolus specialis* from a pattern of conduct, it is necessary that this is the only inference that could reasonably be drawn from the acts in question.

B. The actus reus of genocide (paras. 149–166)

1. The relationship between the Convention and international humanitarian law (paras. 151–153)

The Court notes that the Convention and international humanitarian law are two distinct bodies of rules, pursuing different aims. The Court makes it clear that it is called upon here to decide a dispute concerning the interpretation and application of the Genocide Convention, and will not therefore rule, in general or in abstract terms, on the relationship between the Convention and international humanitarian law. It nonetheless points out that, in so far as both of these bodies of rules may be applicable in the context of a particular armed conflict, the rules of international humanitarian law might be relevant in order to decide whether the acts alleged by the Parties constitute genocide within the meaning of Article II of the Convention.

2. The meaning and scope of the physical acts in question (paras. 154–166)

The Court analyses the meaning to be given to the acts prohibited under Article II of the Convention, with the exception of "[f]orcibly transferring children of the group to another group" (subparagraph *(e)*), which is not relied on by either of the Parties to the case.

(a) As regards *killing members of the group*, within the meaning of subparagraph *(a)*, the Court states that this means the act of "intentionally" killing members of the group.

(b) Concerning *causing serious bodily or mental harm to members of the group*, the Court considers that, in the context of Article II, and in particular of its *chapeau*, and in light of the Convention's object and purpose, the ordinary meaning of "serious" is that the bodily or mental harm referred to in subparagraph *(b)* of that Article must be such as to contribute to the physical or biological destruction of the group, in whole or in part. The Court goes on to explain that rape and other acts of sexual violence are capable of constituting the *actus reus* of genocide within the meaning of Article II *(b)* of the Convention. Furthermore, the Court considers that the persistent refusal of the competent authorities to provide relatives of individuals who disappeared in the context of an alleged genocide with information in their possession, which would enable the relatives to establish with certainty whether those individuals are dead, and if so, how they died, is capable of causing psychological suffering. The Court concludes, however, that, to fall within Article II *(b)* of the Convention, the harm resulting from that suffering must be such as to contribute to the physical or biological destruction of the group, in whole or in part.

(c) In relation to the *deliberate infliction on the group of conditions of life calculated to bring about its physical destruction in whole or in part*, the Court

recalls that subparagraph *(c)* of Article II covers methods of physical destruction, other than killing, whereby the perpetrator ultimately seeks the death of the members of the group. Such methods of destruction include notably deprivation of food, medical care, shelter or clothing, as well as lack of hygiene, systematic expulsion from homes, or exhaustion as a result of excessive work or physical exertion. In order to determine whether the forced displacements alleged by the Parties constitute genocide in the sense of Article II of the Convention (subparagraph *(c)*, in particular), the Court seeks to ascertain whether, in the present case, those forced displacements took place in such circumstances that they were calculated to bring about the physical destruction of the group.

(d) Finally, regarding *measures intended to prevent births within the group*, the Court considers that rape and other acts of sexual violence, which may also fall within subparagraphs *(b)* and *(c)* of Article II, are capable of constituting the *actus reus* of genocide within the meaning of Article II *(d)* of the Convention, provided that they are of a kind which prevent births within the group. In order for that to be the case, it is necessary that the circumstances of the commission of those acts, and their consequences, are such that the capacity of members of the group to procreate is affected. Likewise, the systematic nature of such acts has to be considered in determining whether they are capable of constituting the *actus reus* of genocide within the meaning of Article II *(d)* of the Convention.

IV. Questions of proof (paras. 167–199)

The Parties having discussed at some length issues of the burden of proof, the standard of proof and the methods of proof, the Court proceeds to consider each of these questions in turn.

(a) Regarding the *burden of proof*, the Court recalls that it is for the party alleging a fact to demonstrate its existence, but that this principle is not an absolute one. However, it takes the view that, in the present case, neither the subject-matter nor the nature of the dispute makes it appropriate to contemplate a reversal of the burden of proof.

(b) As regards the *standard of proof*, the Court, citing its previous case law, recalls that claims against a State involving charges of exceptional gravity, as in the present case, must be proved by evidence that is fully conclusive, and emphasizes that it must be fully convinced that allegations made in the proceedings—that the crime of genocide or the other acts enumerated in Article III of the Convention have been committed—have been clearly established.

(c) Concerning *methods of proof*, the Court recalls that, in order to rule on the facts alleged, the Court must assess the relevance and probative value of the evidence proffered by the Parties in support of their versions of the facts.

In relation to documents from the proceedings of the ICTY, the Court, citing its own previous case law in the matter, recalls that it "should in principle accept as highly persuasive relevant findings of fact made by the Tribunal at trial, unless of course they have been upset on appeal", and that "any evaluation by the Tribunal based on the facts as so found for instance about the existence of the required intent, is also entitled to due weight". As regards the probative value of the ICTY Prosecutor's decisions not to include a charge of genocide in an indictment, the Court recalls that "as a general proposition the inclusion of charges in an indictment cannot be given weight". What may however be significant is the decision of the Prosecutor, either initially or in an amendment to an indictment, not to include or to exclude a charge of genocide. But that cannot be taken as decisive proof of whether or not genocide has been committed. The Court notes that the persons charged by the Prosecutor included very senior members of the political and military leadership of the principal participants in the hostilities which took place in Croatia between 1991 and 1995. The charges brought against them included, in many cases, allegations about the overall strategy adopted by the leadership in question and about the existence of a joint criminal enterprise. In that context, the fact that charges of genocide were not included in any of the indictments is of greater significance than would have been the case had the defendants occupied much lower positions in the chain of command. In addition, the Court cannot fail to note that the indictment in the case of the highest ranking defendant of all, former President Milošević, did include charges of genocide in relation to the conflict in Bosnia and Herzegovina, whereas no such charges were brought in the part of the indictment concerned with the hostilities in Croatia.

With regard to reports from official or independent bodies, the Court recalls that their value depends, among other things, on (1) the source of the item of evidence, (2) the process by which it has been generated, and (3) the quality or character of the item.

Lastly, the Court turns to the numerous statements annexed by Croatia to its written pleadings. While recognizing the difficulties of obtaining evidence in the circumstances of the case, the Court nevertheless notes that many of the statements produced by Croatia are deficient. Thus, certain statements consist of records of interviews by the Croatian police of one or sometimes several individuals which are not signed by those persons and contain no indication that those individuals were aware of the content. Moreover, the words used appear to be those of the police officers themselves. The Court considers that it cannot accord evidential weight to such statements.

Other statements appear to record the words of the witness but are not signed. Some of these statements were subsequently confirmed by signed supplementary statements deposited with the Reply and can, therefore, be given the same evidential weight as statements which bore the signature of the witness when they were initially produced to the Court. In some cases, the witness in question has testified before the Court or before the ICTY and that testimony has confirmed the content of the original statement to which the Court can, therefore, also accord some evidential weight. However, the Court cannot accord evidential weight to those statements which are neither signed nor confirmed.

Certain statements present difficulties in that they fail to mention the circumstances in which they were given or were only made several years after the events to which they refer. The Court might nonetheless accord some evidential weight to these statements. Other statements are not eyewitness accounts of the facts. The Court states that it will accord evidential weight to these statements only where they have been confirmed by other witnesses, either before the Court or before the ICTY, or where they have been corroborated by credible evidence.

V. Consideration of the merits of the principal claim (paras. 200–442)

The Court seeks first to determine whether the alleged acts have been established and, if so, whether they fall into the categories of acts listed in Article II of the Convention; and then, should that be established, whether those physical acts were committed with intent to destroy the protected group, in whole or in part.

A. The actus reus of genocide (paras. 203–401)

1. Introduction (paras. 203–208)

The Court does not consider it necessary to deal separately with each of the incidents mentioned by the Applicant, nor to compile an exhaustive list of the alleged acts. It focuses on the allegations concerning localities put forward by Croatia as representing examples of systematic and widespread acts committed against the protected group, from which an intent to destroy it, in whole or in part, could be inferred: these are the localities cited by Croatia during the oral proceedings or in regard to which it called witnesses to give oral testimony, as well as those where the occurrence of certain acts has been established before the ICTY.

Recalling that, under the terms of Article II of the Convention, genocide covers acts committed with intent to destroy a national, ethnical, racial or religious group in whole or in part, the Court observes that, in its written pleadings, Croatia defines that group as the Croat national or ethnical group on the territory of Croatia, which is not contested by Serbia. For the purposes of its discussion, the Court chooses to designate that group using the terms "Croats" or "protected group" interchangeably.

2. Article II (a): killing members of the protected group (paras. 209–295)

In order to determine whether killings of members of the protected group, within the meaning of Article II *(a)* of the Convention, were committed, the Court examines evidence included in the case file concerning Vukovar and its surrounding area, Bogdanovci, Lovas and Dalj (region of Eastern Slavonia), Voćin (region of Western Slavonia), Joševica, Hrvatska Dubica and its surrounding area (region of Banovina/Banija), Lipovača (region of Kordun), Saborsko and Poljanak (region of Lika), and Škabrnja and its surrounding area, Bruška and Dubrovnik (region of Dalmatia).

Following its analysis, the Court considers it established not only that a large number of killings were carried out by the JNA and Serb forces during the conflict in several localities in Eastern Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia, but that a large majority of the victims were members of the protected group, which suggests that they may have been systematically targeted. The Court notes that while the Respondent has contested the veracity of certain allegations, the number of victims and the motives of the perpetrators, as well as the circumstances of the killings and their legal categorization, it has not disputed the fact that members of the protected group were killed in the regions in question. The Court thus finds that it has been proved by conclusive evidence that killings of members of the protected group, as defined above, were committed, and that the *actus reus* of genocide specified in Article II *(a)* of the Convention has therefore been established. The Court adds that, at this stage of its reasoning, it is not required to draw up a complete list of the killings carried out, nor to make a conclusive finding as to the total number of victims.

3. Article II (b): causing serious bodily or mental harm to members of the group (paras. 296–360)

The Court then turns to the question of whether serious bodily or mental harm was caused to members of the group. It first examines the claims that Croats were the victims of physical injury, ill-treatment and acts of torture, rape and sexual violence in Vukovar and its surrounding area (particularly in the camps at Ovčara and Velepromet), Bapska, Tovarnik, Berak, Lovas and Dalj (region of Eastern Slavonia), in Kusonje, Voćin and Đulovac (region of Western Slavonia), and lastly in Knin (region of Dalmatia).

Secondly, the Court addresses Croatia's argument that the psychological pain suffered by the relatives of missing persons constituted serious mental harm. It takes the view, however, that Croatia has failed to provide evidence of psychological suffering sufficient to constitute serious mental harm within the meaning of Article II *(b)* of the Convention. The Court nonetheless observes that the Parties have expressed their willingness, in the interest of the families concerned, to elucidate the fate of those who disappeared in Croatia between 1991 and 1995. Noting Serbia's assurance that it will fulfil its responsibilities in the co-operation process with Croatia, the Court encourages the Parties to pursue that co-operation in good faith and to utilize all means available to them in order that the issue of the fate of missing persons can be settled as quickly as possible.

In conclusion, the Court considers it established that during the conflict in a number of localities in Eastern Slavonia, Western Slavonia, and Dalmatia, the JNA and Serb forces injured members of the protected group and perpetrated acts of ill-treatment, torture, sexual violence and rape. These acts caused such bodily or mental harm as to contribute to the physical or biological destruction of the protected group. The Court considers that the *actus reus* of genocide within the meaning of Article II *(b)* of the Convention has accordingly been established.

4. Article II (c): deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part (paras. 361–394)

The Court considers whether, as Croatia asserts, the JNA and Serb forces deliberately inflicted on the protected group conditions of life calculated to bring about its physical destruction in whole or in part, within the meaning of Article II *(c)* of the Convention. In order to do so, it examines the evidence provided concerning the allegations of rape, deprivation of food and medical care, the systematic expulsion of Croats from their homes and their forced displacement, restrictions on movement, Croats being forced to display signs of their ethnicity, the destruction and looting of Croat property, the vandalizing of their cultural heritage and their subjection to forced labour.

While recognizing that some of the alleged acts have been proven, the Court nonetheless concludes that Croatia has failed to establish that acts capable of constituting the *actus reus* of genocide, within the meaning of Article II *(c)* of the Convention, were committed by the JNA and Serb forces.

5. Article II (d): measures intended to prevent births within the group (paras. 395–400)

On the question of whether acts which might fall within the meaning of Article II *(d)* of the Convention were committed against the protected group, the Court finds that Croatia has failed to show that rapes and other acts of sexual violence were perpetrated by the JNA and Serb forces against Croats in order to prevent births within the group, and that, hence, the *actus reus* of genocide within the meaning of Article II *(d)* of the Convention has not been established.

Conclusion on the actus reus *of genocide* (para. 401)

The Court is fully convinced that, in various localities in Eastern Slavonia, Western Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia, the JNA and Serb forces perpetrated against members of the protected group acts falling within subparagraphs *(a)* and *(b)* of Article II of the Convention, and that the *actus reus* of genocide has been established.

B. The genocidal intent (dolus specialis) *(paras. 402–440)*

The *actus reus* of genocide having been established, the Court examines whether the acts perpetrated by the JNA and Serb forces were committed with intent to destroy, in whole or in part, the protected group.

1. Did the Croats living in Eastern Slavonia, Western Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia constitute a substantial part of the protected group? (paras. 405–406)

In order to determine whether the Croats living in these regions constituted a substantial part of the protected group, the Court takes account not only of the quantitative element, but also of the geographic location and prominence of the targeted part of the group. As to the quantitative element, the Court notes that the ethnic Croats living in the regions in question constituted slightly less than half of the ethnic Croat population living in Croatia. Regarding the geographic location, it recalls that the acts committed by the JNA and Serb forces in the said regions targeted the Croats living there, within which these armed forces exercised and sought to expand their control. Finally, the Court notes that Croatia has provided no information as regards the prominence of that part of the group.

The Court concludes from the foregoing that the Croats living in the regions of Eastern Slavonia, Western Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia constituted a substantial part of the Croat group.

2. Is there a pattern of conduct from which the only reasonable inference to be drawn is an intent of the Serb authorities to destroy, in part, the protected group? (paras. 407–439)

The Court examines the 17 factors suggested by Croatia to establish the existence of a pattern of conduct revealing a genocidal intent—the most important of which concern the scale and allegedly systematic nature of the attacks, the fact that those attacks are said to have caused casualties and damage far in excess of what was justified by military necessity, the specific targeting of Croats and the nature, extent and degree of the injuries caused to the Croat population—as well as the findings of the ICTY Trial Chamber in the *Mrkšić et al.* case (Judgment of 27 September 2007) and the *Martić* case (Judgment of 12 June 2007).

The Court notes that there were similarities, in terms of the *modus operandi* used, between some of the attacks confirmed to have taken place. Thus it observes that the JNA and Serb forces would attack and occupy the localities and create a climate of fear and coercion, by committing a number of acts that constitute the *actus reus* of genocide within the meaning of Article II *(a)* and *(b)* of the Convention. Finally, the occupation would end with the forced expulsion of the Croat population from these localities.

The Court observes that its findings and those of the ICTY are mutually consistent and establish the existence of a pattern of conduct that consisted, from August 1991, in widespread attacks by the JNA and Serb forces on localities with Croat populations in various regions of Croatia, according to a generally similar *modus operandi*.

The Court recalls, however, that for a pattern of conduct to be accepted as evidence of intent to destroy the group, in whole or in part, such intent must be the only reasonable inference which can be drawn from the said pattern of conduct. It notes in this respect that in its oral argument, Croatia put forward two factors which, in its view, should lead the Court to arrive at such a conclusion: the context in which those acts were committed and the opportunity which the JNA and Serb forces had of destroying the Croat population. The Court examines these in turn.

(a) Context (paras. 419–430)

The Court analyses the context in which the acts constituting the *actus reus* of genocide within the meaning of subparagraphs *(a)* and *(b)* of Article II of the Convention were committed, in order to determine the aim pursued by the authors of those acts.

The Court considers that there is no need to enter into a debate on the political and historical origins of the events that took place in Croatia between 1991 and 1995. It notes that the Memorandum of the Serbian Academy of Sciences and Arts (SANU) cited by Croatia has no official standing and certainly does not contemplate the destruction of the Croats. It cannot be regarded, either by itself or in connection with any of the other factors relied on by Croatia, as an expression of the *dolus specialis*.

The Court addresses the findings of the ICTY. It notes that, according to the latter, the political objective being pursued by the leadership of the Serb Autonomous Region (SAO) of Krajina and then the RSK, and shared with the leaderships in Serbia and in the Republika Srpska in Bosnia and Herzegovina, was to unite Serb areas in Croatia and in Bosnia and Herzegovina with Serbia in order to establish a unified territory, and to establish an ethnically Serb territory through the displacement of the Croat and other non-Serb population through a campaign of persecutions.

The Court further notes that, according to the conclusions of the ICTY, the acts that constitute the *actus reus* of genocide within the meaning of Article II *(a)* and *(b)* of the Convention were not committed with intent to destroy the Croats, but rather with that of forcing them to leave the regions concerned so that an ethnically homogeneous Serb State could be created. The Court agrees with this conclusion.

The Court therefore concludes that Croatia's contentions regarding the overall context do not support its assertion that genocidal intent is the only reasonable inference to be drawn.

As regards the events at Vukovar, to which Croatia has given particular attention, the Court notes that the ICTY found that the attack on that city constituted a response to the declaration of independence by Croatia, and above all an assertion of Serbia's grip on the SFRY. It follows from this, and from the fact that numerous Croats of Vukovar were evacuated, that the existence of intent to physically destroy the Croatian population is not the only reasonable conclusion that can be drawn from the illegal attack on Vukovar. Finally, the Court adds that the conclusions of the ICTY indicate that the intent of the perpetrators of the ill-treatment at Ovčara was not to physically destroy the members of the protected group, as such, but to punish them because of their status as enemies, in a military sense.

(b) Opportunity (paras. 431–437)

The Court states that it will not seek to determine whether or not, in each of the localities it has previously considered, the JNA and Serb forces made systematic use of the opportunities to physically destroy Croats.

It considers, on the other hand, that the mass forced displacement of Croats is a significant factor in assessing whether there was an intent to destroy the group, in whole or in part. It recalls in this respect that it has previously found that Croatia has not demonstrated that such forced displacement constituted the *actus reus* of genocide within the meaning of Article II *(c)* of the Convention.

In the present case, the Court notes that, as emerges in particular from the findings of the ICTY, forced displacement was the instrument of a policy aimed at establishing an ethnically homogeneous Serb State. In that context, the expulsion of the Croats was brought about by the creation of a coercive atmosphere, generated by the commission of acts including some that constitute the *actus reus* of genocide within the meaning of Article II *(a)* and *(b)* of the Convention. Those acts had an objective, namely the forced displacement of the Croats, which did not entail their physical destruction. The Court finds that the acts committed by the JNA and Serb forces essentially had the effect of making the Croat population flee the territories concerned. It was not a question of systematically destroying that population, but of forcing it to leave the areas controlled by these armed forces.

Regarding the events at Vukovar, to which Croatia has given particular attention, the Court notes that, in the *Mrkšić et al.* case, the ICTY established several instances of the JNA and Serb forces evacuating civilians, particularly Croats. The ICTY further found that Croat combatants captured by the JNA and Serb forces had not all been executed. Thus, following their surrender to the JNA, an initial group of Croat combatants was transferred on 18 November 1991 to Ovčara, and then to Sremska Mitrovica in Serbia, where they were held as prisoners of war. Similarly, a group of Croat combatants held at Velepromet was transferred to Sremska Mitrovica on 19–20 November 1991, while civilians not suspected of having fought alongside Croat forces were evacuated to destinations in Croatia or Serbia. This shows that, in many cases, the JNA and Serb forces did not kill those Croats who had fallen into their hands.

The Court considers that it is also relevant to compare the size of the targeted part of the protected group with the number of Croat victims, in order to determine whether the JNA and Serb forces availed themselves of opportunities to destroy that part of the group. In this connection, Croatia put forward a figure of 12,500 Croat deaths, which is contested by Serbia. The Court notes that, even assuming that this figure is correct—an issue on which it makes no ruling—the number of victims alleged by Croatia is small in relation to the size of the targeted part of the group.

The Court concludes from the foregoing that Croatia has failed to show that the perpetrators of the acts which form the subject of the principal claim availed themselves of opportunities to destroy a substantial part of the protected group.

Conclusion on the dolus specialis (para. 440)

In its general conclusion on the *dolus specialis*, the Court finds that Croatia has not established that the only reasonable inference that can be drawn from the pattern of conduct it relied upon was the intent to destroy, in whole or in part, the Croat group. It takes the view that the acts constituting the *actus reus* of genocide within the meaning of Article II *(a)* and *(b)* of the Convention were not committed with the specific intent required for them to be characterized as acts of genocide.

The Court further notes that the ICTY prosecutor has never charged any individual on account of genocide against the Croat population in the context of the armed conflict which took place in the territory of Croatia in the period 1991–1995.

C. General conclusion on Croatia's claim (paras. 441–442)

It follows from the foregoing that Croatia has failed to substantiate its allegation that genocide was committed. Accordingly, no issue of responsibility under the Convention for the commission of genocide can arise in the present case. Nor can there be any question of responsibility for a failure to prevent genocide, a failure to punish genocide, or complicity in genocide.

In view of the fact that *dolus specialis* has not been established by Croatia, its claims of conspiracy to commit genocide, direct and public incitement to commit genocide, and attempt to commit genocide also necessarily fail.

Accordingly, Croatia's claim must be dismissed in its entirety.

The Court states that it is consequently not required to pronounce on the inadmissibility of the principal claim as argued by Serbia in respect of acts prior to 8 October 1991. Nor does it need to consider whether acts alleged to have taken place before 27 April 1992 are attributable to the SFRY, or, if so, whether Serbia succeeded to the SFRY's responsibility on account of those acts.

VI. Consideration of the merits of the counter-claim (paras. 443–523)

A. Examination of the principal submissions in the counter-claim: whether acts of genocide attributable to Croatia were committed against the national and ethnical group of Serbs living in Croatia during and after Operation "Storm" (paras. 446–515)

The Court begins by noting that two points were not disputed between the Parties, and may be regarded as settled. First, the Serbs living in Croatia at the time of the events in question—who represented a minority of the population—did indeed constitute a "national [or] ethnical" "group" within the meaning of Article II of the Genocide Convention, and the Serbs living in the Krajina region, who were directly affected by Operation "Storm", constituted a "substantial part" of that national or ethnical group. Secondly, the acts alleged by Serbia—or at least the vast majority of them—assuming them to be proved, were committed by the regular armed forces or police of Croatia.

The Court observes, on the other hand, that the Parties completely disagree on two key questions. First, Croatia denies that the greater part of the acts alleged by Serbia even took place; and secondly, it denies that those acts, even if some of them were proved, were carried out with intent to destroy, in whole or in part, the national or ethnical group of the Croatian Serbs as such. The Court addresses those two questions.

1. The actus reus of genocide (paras. 452–499)

(a) The evidence presented by Serbia in support of the facts alleged (paras. 454–461)

The Court analyses the evidence produced by Serbia and discusses the probative value it should be accorded.

(b) Whether the acts alleged by Serbia have been effectively proved (paras. 462–498)

(i) Killing of civilians as a result of the allegedly indiscriminate shelling of Krajina towns

The Court begins by summarizing the decisions of the ICTY in the *Gotovina* case, which it considers highly relevant for the purposes of the present case.

The Court thus notes that the ICTY Trial Chamber held that two of the defendants had taken part in a joint criminal enterprise aimed at the expulsion of the Serb civilian population from the Krajina, through indiscriminate shelling of the four towns of Knin, Benkovac, Obrovac and Gračac, the purpose of which—alongside any strictly military objectives—was to terrorize and demoralize the population so as to force it to flee. In order to reach this conclusion, the Trial Chamber relied, first, on certain documents, including the transcript of a meeting held at Brioni on 31 July 1995, just a few days before the launch of Operation "Storm", under the chairmanship of President Tudjman and secondly, and above all, on the so-called "200 Metre Standard", under which only shells impacting less than 200 metres from an identifiable military target could be regarded as having been aimed at that target, whilst those impacting more than 200 metres from a military target should be regarded as evidence that the attack was deliberately aimed at both civilian and military targets, and was therefore indiscriminate. Applying that standard to the case before it, the Trial Chamber found that the artillery attacks on the four towns mentioned above (but not on the other Krajina towns and villages) had been indiscriminate, since a large proportion of shells had fallen over 200 metres from any identifiable military target.

The Court then observes that the ICTY Appeals Chamber disagreed with the Trial Chamber's analysis and reversed the latter's decision. The Appeals Chamber held that the "200 Metre Standard" had no basis in law and lacked any convincing justification. The Chamber accordingly concluded that the Trial Chamber could not reasonably find, simply by applying that standard, that the four towns in question had been shelled indiscriminately. It further held that the Trial Chamber's reasoning was essentially based on the application of the standard in question, and that none of the evidence before the Court—particularly the Brioni Transcript—showed convincingly that the Croatian armed forces had deliberately targeted the civilian population. The Appeals Chamber accordingly found that the prosecution had failed to prove a "joint criminal enterprise", and acquitted the two accused on all of the counts in the indictment (including murder and deportation).

The Court recalls that it should in principle accept as highly persuasive relevant findings of facts made by the ICTY at trial, unless of course they have been upset on appeal. That should lead the Court, in the present case, to give the greatest weight to factual findings by the Trial Chamber which were not reversed by the Appeals Chamber, and to give due weight to the findings and determinations of the Appeals Chamber on the issue of whether or not the shelling of the Krajina towns during Operation "Storm" was indiscriminate.

The Court notes that Serbia argued that the findings of an ICTY Appeals Chamber should not necessarily be accorded more weight than those of a Trial Chamber, particularly in the circumstances of the *Gotovina* case. The Court rejects that argument however. Irrespective of the manner in which the members of the Appeals Chamber are chosen—a matter on which it is not for the Court to pronounce—the latter's decisions represent the last word of the ICTY on the cases before it when one of the parties has chosen to appeal from the Trial Chamber's Judgment. Accordingly, the Court cannot treat the findings and determinations of the Trial Chamber as being on an equal footing with those of the Appeals Chamber. In cases of disagreement, it is bound to accord greater weight to what the Appeals Chamber Judgment says, while ultimately retaining the power to decide the issues before it on the facts and the law.

The Court concludes from the foregoing that it is unable to find that there was any indiscriminate shelling of the Krajina towns deliberately intended to cause civilian casualties. It would only be in exceptional circumstances that it would depart from the findings reached by the ICTY on an issue of this kind. Serbia has indeed drawn the Court's attention to the controversy aroused by the Appeals Chamber's Judgment. However, no evidence, whether prior or subsequent to that Judgment, has been put before the Court which would incontrovertibly show that the Croatian authorities deliberately intended to shell the civilian areas of towns inhabited by Serbs. In particular, no such intent is apparent from the Brioni Transcript. Nor can such intent be regarded as incontrovertibly established on the basis of the statements by persons having testified before the ICTY Trial Chamber in the *Gotovina* case, and cited as witnesses by Serbia in the present case.

The Court observes that Serbia further argues that, even if the artillery attacks on the Krajina towns were not indiscriminate, and thus lawful under international humanitarian law, that would not prevent the Court from holding that those attacks were unlawful under the Genocide Convention, if they were motivated by an intent to destroy the Serb population of the Krajina, in whole or in part. In this connection, the Court explains that there can be no doubt that, as a general rule, a particular act may be perfectly lawful under one body of legal rules and unlawful under another. Thus it cannot be excluded in principle that an act carried out during an armed conflict and lawful under international humanitarian law can at the same time constitute a violation by the State in question of some other international obligation incumbent upon it. However, it is not the task of the Court in the context of the counter-claim to rule on the relationship between international humanitarian law and the Genocide Convention. The question to which it must respond is whether the artillery attacks on the Krajina towns in August 1995, in so far as they resulted in civilian casualties, constituted "killing [of] members of the [Krajina Serb] group", within the meaning of Article II *(a)* of the Genocide Convention, so that they may accordingly be regarded as constituting the *actus reus* of genocide. "Killing" within the meaning of Article II *(a)* of the Convention always presupposes the existence of an intentional element (which is altogether distinct from the "specific intent" necessary to establish genocide), namely the intent to cause death. It follows that, if one takes the view that the attacks were exclusively directed at military targets, and that the civilian casualties were not caused deliberately, one cannot consider those attacks, inasmuch as they caused civilian deaths, as falling within the scope of Article II *(a)* of the Genocide Convention.

The Court concludes for the foregoing reasons that it has not been shown that "killing[s] [of] members of the [protected] group", within the meaning of Article II of the Convention, were committed as a result of the artillery attacks on towns in that region during Operation "Storm" in August 1995.

(ii) Forced displacement of the Krajina Serb population

The Court notes that it is not disputed that a substantial part of the Serb population of the Krajina fled that region as a direct consequence of the military actions carried out by Croatian forces during Operation "Storm", in particular the shelling of the four towns referred to above. The transcript of the Brioni meeting makes it clear that the highest Croatian political and military authorities were well aware that Operation "Storm" would provoke a mass exodus of the Serb population; they even to some extent predicated their military planning on such an exodus, which they considered not only probable, but desirable. In any event, even if it were proved that it was the intention of the Croatian authorities to bring about the forced displacement of the Serb population of the Krajina, such displacement would only be capable of constituting the *actus reus* of genocide if it was calculated to bring about the physical destruction, in whole or in part, of the targeted group, thus bringing it within the scope of subparagraph *(c)* of Article II of the Convention. The Court finds that the evidence before it does not support such a conclusion. Even if there was a deliberate policy to expel the Serbs from the Krajina, it has in any event not been shown that such a policy was aimed at causing the physical destruction of the population in question.

(iii) Killing of Serbs fleeing in columns from the towns under attack

The Court considers that there is sufficient evidence to establish that attacks on Serb refugee columns did take place, and that they were in part carried out by Croatian forces, or with their acquiescence.

The Court's conclusion is that killings were in fact committed during the flight of the refugee columns, even if it is unable to determine their number, and even though there is significant doubt as to whether they were carried out systematically. These killings, which fall within the scope of subparagraph *(a)* of Article II of the Genocide Convention, constitute the *actus reus* of genocide.

(iv) Killing of Serbs having remained in the areas of the Krajina protected by the United Nations

The Court finds that the occurrence of summary executions of Serbs in the United Nations protected areas (UNPAs) during Operation "Storm" and the following weeks has been established by the testimony of a number of witnesses heard by the ICTY in the *Gotovina* case. The Trial Chamber was

sufficiently convinced by that evidence to accept it as proof that Croatian military units and special police carried out killings of Serbs in at least seven towns of the Krajina. Moreover, Croatia itself has admitted that some killings did take place. The Court notes that, although the Appeals Chamber overturned the Trial Chamber's Judgment, it did not reverse the latter's factual findings regarding the killings and ill-treatment of Serbs by members of the Croatian army and police. The Court accordingly considers that the factual findings in the Trial Chamber Judgment on the killing of Serbs during and after Operation "Storm" within the UNPAs must be accepted as "highly persuasive", since they were not "upset on appeal".

Basing itself on the jurisprudence of the ICTY and other evidence, the Court finds that acts falling within subparagraph *(a)* of Article II of the Genocide Convention were committed by members of the Croatian armed forces against a number of Serb civilians, and soldiers who had surrendered, who remained in the areas of which the Croatian army had taken control during Operation "Storm".

(v) Ill-treatment of Serbs during and after Operation "Storm"

The same considerations as those set out in the previous section regarding the allegations of killings of Serbs in the UNPAs lead the Court to the view that there is sufficient evidence of ill-treatment of Serbs. The ICTY Trial Chamber in the *Gotovina* case found that such acts had in fact taken place. The Court considers it established that many of the acts in question were at least of a degree of gravity such as would enable them to be characterized as falling within subparagraph *(b)* of Article II of the Genocide Convention. It states that it is not necessary, at this stage of its reasoning, to determine whether those acts, or certain of them, also amounted to "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" within the meaning of subparagraph *(c)* of Article II of the Convention.

(vi) Large-scale destruction and looting of Serb property during and after Operation "Storm"

The Court recalls that, in order to come within the scope of Article II *(c)* of the Genocide Convention, the acts alleged by Serbia must have been such as to have inflicted on the protected group conditions of life calculated to bring about its physical destruction in whole or in part. The Court finds that the evidence before it does not enable it to reach such a conclusion in the present case. Even if Serb property was looted and destroyed, it has in any event not been established that this was aimed at bringing about the physical destruction of the Serb population of the Krajina.

Conclusion as to the existence of the actus reus of genocide (para. 499)

In light of the above, the Court is fully convinced that, during and after Operation "Storm", Croatian armed forces and police perpetrated acts against the Serb population falling within subparagraphs *(a)* and *(b)* of Article II of the Genocide Convention, and that these acts constituted the *actus reus* of genocide.

2. The genocidal intent (dolus specialis) (paras. 500–515)

(a) The Brioni Transcript (paras. 501–507)

In the Court's view, the passages from the Brioni Transcript relied on by Serbia are far from demonstrating an intention on the part of the Croatian leaders physically to destroy the group of the Croatian Serbs, or the substantial part of that group constituted by the Serbs living in Krajina.

At most, the view might be taken that the Brioni Transcript shows that the leaders of Croatia envisaged that the military offensive they were preparing would have the effect of causing the flight of the great majority of the Serb population of the Krajina, that they were satisfied with that consequence and that, in any case, they would do nothing to prevent it because, on the contrary, they wished to encourage the departure of the Serb civilians. However, even that interpretation, assuming it to be correct, would be far from providing a sufficient basis for the Court to make a finding of the existence of the specific intent which characterizes genocide.

The Court further notes that this conclusion is confirmed by the way the Brioni Transcript was dealt with by the ICTY Trial and Appeals Chambers in their decisions in the *Gotovina* case.

In conclusion, the Court considers that, even taken together and interpreted in light of the contemporaneous overall political and military context, the passages from the Brioni Transcript quoted by Serbia, like the rest of the document, do not establish the existence of the specific intent *(dolus specialis)* which characterizes genocide.

(b) Existence of a pattern of conduct indicating genocidal intent (paras. 508–514)

The Court cannot see in the pattern of conduct on the part of the Croatian authorities immediately before, during and after Operation "Storm" a series of acts which could only reasonably be understood as reflecting the intention, on the part of those authorities, physically to destroy, in whole or in part, the group of Serbs living in Croatia. As the Court has already stated, not all of the acts alleged by Serbia as constituting the physical element of genocide have been factually proved. Those which have been proved—in particular the killing of civilians and the ill-treatment of defenceless individuals—were not committed on a scale such that they could only point to the existence of a genocidal intent. Finally, even if Serbia's allegations in regard to the refusal to allow the Serb refugees to return home—allegations disputed by Croatia—were true, that would still not prove the existence of the *dolus specialis*: genocide presupposes the intent to destroy a group as such, and not to inflict damage upon it or to remove it from a territory, irrespective of how such actions might be characterized in law.

Conclusion regarding the existence of the dolus specialis*, and general conclusion on the commission of genocide* (para. 515)

The Court concludes from the foregoing that the existence of the *dolus specialis* has not been established. Accordingly, the Court finds that it has not been proved that

genocide was committed during and after Operation "Storm" against the Serb population of Croatia.

B. Discussion of the other submissions in the counter-claim (paras. 516–521)

Since the Court has not found any acts capable of being characterized as genocide in connection with the events during and after Operation "Storm", it considers itself bound to conclude that Croatia did not breach its obligations under subparagraph *(e)* of Article III. Moreover, in the absence of the necessary specific intent which characterizes genocide, Croatia cannot be considered to have engaged in "conspiracy to commit genocide" or "direct and public incitement to commit genocide", or in an attempt to commit genocide, all of which presuppose the existence of such an intent.

The Court further concludes that, since Serbia has failed to prove the existence of an act of genocide, or of any of the other acts mentioned in Article III of the Convention, committed against the Serb population living in Croatia, there can be no breach of the obligation to punish under Article VI of that Convention.

Having found in the present Judgment that no internationally wrongful act in relation to the Genocide Convention has been committed by Croatia, the Court concludes that it is bound also to reject Serbia's submissions requesting the cessation of the internationally wrongful acts attributable to Croatia and reparation in respect of their injurious consequences.

General conclusion on the counter-claim (paras. 522–523)

For all of the foregoing reasons, the Court finds that the counter-claim must be dismissed in its entirety.

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Returning to the issue of missing persons already addressed in the context of its examination of the principal claim, the Court notes that individuals also disappeared during Operation "Storm" and its immediate aftermath. It reiterates its request to both Parties to continue their co-operation with a view to settling as soon as possible the issue of the fate of missing persons.

The Court recalls, furthermore, that its jurisdiction in this case is based on Article IX of the Genocide Convention, and that it can therefore only rule within the limits imposed by that instrument. Its findings are therefore without prejudice to any question regarding the Parties' possible responsibility in respect of any violation of international obligations other than those arising under the Convention itself. In so far as such violations may have taken place, the Parties remain liable for their consequences. The Court encourages the Parties to continue their co-operation with a view to offering appropriate reparation to the victims of such violations, thus consolidating peace and stability in the region.

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Separate opinion of President Tomka

Although President Tomka shares the conclusions of the Court on the merits of the claim and the counter-claim, in his separate opinion, he explains his views on the Court's temporal jurisdiction and on the admissibility of the claim.

He begins by noting that, in its 2008 Judgment on preliminary objections, the Court concluded that it required further elements to rule on the two issues raised by Serbia's second preliminary objection. In President Tomka's view, today's Judgment does not indicate what new elements the Court received that enabled it to resolve the remaining jurisdictional issue. Rather, the Court adopts a legal construction that it could have adopted in 2008. In addition, President Tomka notes that the issues raised by the Court in its 2008 Judgment differ from those addressed by the Court in this Judgment.

President Tomka highlights that Serbia was only bound by the Genocide Convention as a party to it in its own name from 27 April 1992. He agrees with the conclusion that even if acts occurring prior to this date were attributable to Serbia, they cannot have amounted to a breach of the Convention by it. President Tomka disagrees, however, that the Court's jurisdiction over Croatia's claim extends to acts occurring prior to 27 April 1992 and alleged to amount to violations of the Genocide Convention on the basis of Croatia's argument that Serbia succeeded to the responsibility of the SFRY for those acts.

In his view, neither the text nor the *travaux préparatoires* of Article IX of the Genocide Convention support the Court's conclusion in this respect.

President Tomka outlines that the relevant dispute under Article IX must be between Contracting Parties and must concern "the interpretation, application or fulfilment" of the Convention by *those* Contracting Parties. In his view, the presence of the words "including those [disputes] relating to the responsibility of a State for genocide" do not alter this conclusion. Rather, the word "including" makes it apparent that such disputes are a subset of those relating to "the interpretation, application or fulfilment" of the Convention. Moreover, the *travaux préparatoires* reveal that the inclusion within the Court's jurisdiction of disputes relating to "the responsibility of a State for genocide" was intended to allow the Court to consider allegations that a State is responsible for acts of genocide perpetrated by individuals and attributable to it, and which thus amount to breaches of the Convention by the State. President Tomka indicates that this is the understanding that is reflected in earlier decisions of the Court and in Croatia's submissions.

While the Judgment refers to the "essential subject-matter of the dispute" as being "whether Serbia is responsible for violations of the Genocide Convention and, if so, whether Croatia may invoke that responsibility", President Tomka is doubtful whether this accurately reflects the dispute's "essential subject-matter" as presented by Croatia in its Application and final submissions. In any event, he notes that a dispute regarding Serbia's succession to the responsibility of the SFRY is not one about "the interpretation, application or fulfilment" of the Convention by Serbia. In this respect, he notes that the

first two of the three issues identified in the Judgment as being in dispute relate to the SFRY's application and fulfilment of the Convention. The third issue, relating to Serbia's alleged succession to responsibility, does not relate to Serbia's obligations under the Convention and its failure to properly interpret, apply or fulfil them. President Tomka is unconvinced that the compromissory clause in Article IX extends to questions of State succession to responsibility. He notes that the term "responsibility" was not given by the Convention's drafters the meaning given to it by the Court in this case and that it remains a distinct term and concept from that of "succession" in international law. He therefore regards matters relating to succession to responsibility as beyond the jurisdiction *ratione materiae* provided for in Article IX of the Convention.

President Tomka notes that Croatia, among other States, denied the legal continuity between the FRY and SFRY and must bear the consequences of its position on that issue. As Serbia was not a party to the Genocide Convention until 27 April 1992, any dispute about acts occurring before that date cannot be about the interpretation, application or fulfilment of the Convention by Serbia and, in his view, the Court does not have jurisdiction over it.

However, President Tomka indicates that this does not prevent the Court from considering acts prior to 27 April 1992, without formally ruling on their conformity with the SFRY's obligations. He acknowledges that there may have been a certain factual identity between the actors involved in the armed conflict in Croatia both before and after 27 April 1992. However, he notes that this factual identity should not be confused with the situation in law, where ultimately the thesis of discontinuity between the SFRY and FRY prevailed. Nonetheless, President Tomka considers that the Court, in determining whether acts occurring *after* 27 April 1992 were committed with the necessary *dolus specialis*, could have looked at events taking place before that date in order to determine whether a pattern of acts existed from which the requisite intent could be inferred.

President Tomka also raises concerns with respect to the admissibility of Croatia's claim. He observes that the Court in this case indicates its readiness to rule on the responsibility of the SFRY, a State which is not before it, as a precursor to determining the responsibility of Serbia. President Tomka notes the Court's position that the *Monetary Gold* principle is inapplicable here because the SFRY is no longer in existence. He accepts that this might be an appropriate position to take where there is an agreement as to which of the successor States will take responsibility for the acts of a predecessor State, as in the *Gabčíkovo-Nagymaros* case. However, he regards the situation as more complicated where there is uncertainty as to which of a number of States might bear responsibility for the acts of a predecessor State. Highlighting that Serbia is only one of five equal successor States to the SFRY, he notes that a finding as to the SFRY's responsibility could have implications for several, or each, of those successor States, depending on what view is taken on the allocation of responsibility as between them. He notes in this respect that the 2001 *Agreement on Succession Issues* provides for outstanding "claims against the SFRY" to be "considered by the Standing Joint Committee established" by that Agreement.

However, President Tomka emphasizes that the *Monetary Gold* principle will serve to limit the effects of the Judgment in this case to its unusual facts. He concludes with the observation that where States only recognize the Court's jurisdiction in a limited way, claims such as the ones in this case are framed so as to make them fall within the scope of a given convention. President Tomka notes that the Court in this case recognized that many atrocities were committed, but that the Parties failed to prove the presence of genocidal intent. He indicates that if the Court had been granted a more general jurisdiction, the claims could have been framed differently.

Separate opinion of Judge Owada

In his separate opinion, Judge Owada states that, although he voted in favour of the Judgment as a whole, he has not been able to associate himself with the conclusion reached by the Court in subparagraph (1) of the operative paragraph (paragraph 524) of the Judgment, which rejects the *ratione temporis* jurisdictional objection raised by Serbia in the present case.

Judge Owada recalls that the Court, in its earlier Judgment in the present case ("2008 Judgment") held that "the second preliminary objection submitted by the Republic of Serbia does not, in the circumstances of the case, possess an exclusively preliminary character" (2008 Judgment, p. 466, para. 146). Judge Owada points out that this decision was taken in accordance with paragraph 7 of Article 79 of the Rules of Court, amended in 1978 (which corresponds to Article 79, paragraph 9, of the current Rules of Court). Judge Owada goes on to examine the origin of the text of that Article by reference to the discussions at the time of the Judgment in the *Barcelona Traction, Light and Power Company, Limited* case at its Second Phase in 1970 and the unpublished *travaux preparatoires* of the 1972 revision of the Rules of Court. Judge Owada then turns his attention to the authoritative interpretation of that Article of the Rules of Court given by the Court subsequently, in particular in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*I.C.J. Reports 1986*, p. 14). In Judge Owada's view, in light of the history of the Rules of Court and this authoritative interpretation, the decision by the Court in subparagraph (4) of paragraph 146 of its 2008 Judgment must be read as making a decision, binding on the Parties, as well as on the Court itself, that "because [the issues raised in the preliminary objection in question] contain both preliminary aspects and other aspects relating to the merits, they will have to be dealt with at the stage of the merits" (*Military and Paramilitary Activities in and against Nicaragua, (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 31, para. 41). Judge Owada finds that the present Judgment has failed to carry out the task assigned to the Court by this instruction of the 2008 Judgment.

Judge Owada recalls that in dealing with the core issues of jurisdiction *ratione temporis* raised by the Respondent in its second preliminary objection, the present Judgment refers to three distinct arguments advanced by the Applicant at the merits phase of the present case. Judge Owada endorses the Court's approach in dealing with the first and second

of these contentions, the first of which is that the Genocide Convention, providing for *erga omnes* obligations, has retroactive effect and the second of which is that what came to emerge as the FRY during the period 1991–1992 was an entity *in statu nascendi* born out of the then existing SFRY in the sense of Article 10, paragraph 2, of the ILC Articles on State Responsibility. Judge Owada accepts that with respect to the arguments advanced by the Applicant in relation to these two contentions, the Judgment offers a careful analysis in substance. Judge Owada therefore endorses the Court's conclusion that on the basis of these two contentions there is no valid basis, as a matter of law, that can provide the Court with jurisdiction *ratione temporis* to entertain the present case, in so far as it relates to acts that took place before 27 April 1992, the date on which the Respondent declared its independence to become a party to the Genocide Convention.

Judge Owada parts ways with the Court in relation to its treatment of the third contention advanced by the Applicant, according to which the law of State succession in respect of international responsibility is applicable under the specific circumstances of the situation surrounding the SFRY and the FRY, where a special link existed between the SFRY and the FRY.

On that latter point, Judge Owada begins by recalling that in justification of the conclusion of the Court on the jurisdictional objection *ratione temporis* raised by Serbia, the Judgment makes a reference to the doctrine of State succession in respect of international responsibility (paragraphs 106 *et seq.*).

However, Judge Owada notes that even a cursory examination of the material contained in Section V of the Judgment dealing with the "Consideration of the Merits of the Principal Claim" persuades us that all of the requirements mentioned in the three-stage process listed in paragraph 112 have to be examined in order for the Court to be able to decide on the applicability *vel non* of the law of State succession in respect of international responsibility as a plausible basis for establishing the jurisdiction of the Court to determine whether Serbia is responsible for violations of the Convention. Judge Owada states that if one examines each of these requirements in the context of the facts of the case, it seems clear that the attempt of the Applicant has to fail at the first stage of this process, to the extent that the acts relied on by Croatia, even assuming that they were committed by the SFRY, were found not to fall within the category of acts contrary to the Convention.

Judge Owada admits that the Judgment tries to disassociate itself from any position that might look like an endorsement of the doctrine of State succession in respect of international responsibility, even on a *prima facie* basis or on the basis of plausibility. However, in Judge Owada's view, in spite of the Judgment's seemingly careful approach to that doctrine and in spite of its formal disclaimer, it would seem difficult to interpret the thesis that lies crucially at the heart of the logic of the Judgment as anything else than an effort to link the logic of the Judgment, in whatever neutral a manner as it may be, with this doctrine, as a factor relevant for providing the Court with the jurisdiction *stricto sensu* under the Convention by consent, either through some consent, implied, of the Parties, or through the operation of rules of general international law under Article IX.

Judge Owada is unconvinced by the reasoning leading the Court to find that "the rules on succession that may come into play in the present case fall into the same category as those on treaty interpretation and responsibility of States" (paragraph 115). Judge Owada observes that the Court reaches this conclusion after referring to a general statement in the 2007 Judgment as quoted in paragraph 115 of the present Judgment. However, Judge Owada finds that the intent and purpose of that passage in the 2007 Judgment is to restrictively define the scope of the jurisdiction conferred by the consent of the parties under Article IX of the Convention. In contrast, Judge Owada observes, the intent of paragraph 115 would appear to be to expand the scope of the jurisdiction of the Court conferred by the consent of the parties under Article IX of the Convention by arguing that the law of State succession in respect of international responsibility could be relevant to the "interpretation, application or fulfilment" of the Convention for the purposes of determining the scope of jurisdiction.

Judge Owada also observes that the Judgment continues to base its argument on a highly debatable position of the Court in its earlier Judgment on Preliminary Objections relating to the scope and the legal implications of the declaration made by the FRY on 27 April 1992. This is an issue in respect of which Judge Owada affirms his dissenting view to the position taken by the Court in its 2008 Judgment (2008 Judgment, p. 451, para. 111) and confirmed in the present Judgment (paragraph 76) as it is in contradiction with the jurisprudence established by the Court in the cases concerning the *Legality of Use of Force* (see, for example, *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, p. 279).

Judge Owada finally takes the view that the present Judgment should have pursued the path prescribed by the 2008 Judgment and examined the relevant aspects, both of facts and law, of the merits of the case before arriving at the conclusion that the claim of the Applicant cannot be upheld on the merits. According to Judge Owada, even under the present structure of the Judgment, the Court would have been required to examine the legal validity of all the alleged rules of international law advanced by the Applicant, including those relating to State succession in respect of international responsibility, as a means to establish the legal basis for enabling the Court to exercise jurisdiction with regard to the merits. In Judge Owada's submission, the present Judgment has failed to do that.

Separate opinion of Judge Keith

1. Judge Keith prepared his separate opinion to give further reasons in support of those given by the Court for its conclusions that the Applicant and the Respondent had each failed to establish the necessary intent, that is, the intent to destroy in whole or in part the particular protected group as such.

2. In respect of Croatia, Judge Keith gave particular attention to the 17 factors which it said demonstrated that intent singly or collectively. In respect of the counter-claim presented by Serbia he examined the details of the minutes of the meeting held by the Croatian military leadership,

minutes which Serbia contended showed the existence of that specific intent.

3. Given his conclusions on the essential elements, Judge Keith did not consider it necessary to express his views on the existence of the criminal acts alleged by each Party, beyond noting in respect of those matters the Parties' concessions and, in the principal claim, convincing findings of the ICTY.

Separate opinion of Judge Skotnikov

Judge Skotnikov, in his separate opinion, disagrees with the Court's conclusion that it has jurisdiction to rule upon the entirety of the claim brought by Croatia, in so far as this conclusion relates to acts said to have occurred before 27 April 1992 (the date on which the FRY itself came into existence). He points out, in this connection, that the Court, when deciding on jurisdiction, was required to either identify the legal mechanism by which the FRY (now Serbia) assumed obligations under the Genocide Convention before it came into existence or to determine that no such legal mechanism existed. Instead, it merely suggests that obligations under the Genocide Convention might be applicable to the FRY before 27 April 1992 by virtue of succession to responsibility. This preliminary issue is then transformed into a question for the merits. After answering in the negative the question of whether acts contrary to the Genocide Convention took place prior to 27 April 1992, the Court does not return to the issue of succession to responsibility. Had this issue been dealt with as a preliminary one, as it should have been, in order to demonstrate Serbia's consent to the Court's jurisdiction, the Court would have had to establish that the doctrine of succession to responsibility was part of general international law at the time of Serbia's succession to the Genocide Convention on 27 April 1992. This is an impossible task since there is no jurisprudence or State practice to support this hypothesis.

Judge Skotnikov recalls that, when considering the second preliminary objection which is addressed in the present Judgment, the Court had, in 2008, reserved as indispensable the "question of the applicability of the obligations under the Genocide Convention to the FRY before 27 April 1992" (*Preliminary Objections, Judgment, (Croatia* v. *Serbia*), para. 129). In 2015, the Court simply leaves without answer this question. Thus, the Court fails to fulfil its duty to satisfy itself that it has jurisdiction.

Before turning to the merits, Judge Skotnikov notes that, while addressing cases arising from events related to the dissolution of the SFRY, the Court has created at least three "parallel universes". In one, the FRY was not a member of the United Nations before 1 November 2000 (the 2004 Judgment on *Preliminary Objections, Legality of Use of Force*). In another, the FRY was a member of the United Nations well before that date (as implied in the 2007 *Bosnia and Herzegovina* v. *Serbia and Montenegro* Judgment). In yet another, the FRY's membership of the United Nations at the time of the institution of proceedings, or, rather, the lack of it, is devoid of any consequences (the 2008 Judgment on *Preliminary Objections, Croatia* v. *Serbia*). In 2015, in the present Judgment, a fourth, very peculiar "parallel universe" has emerged—one in which the Court is agnostic as to whether the FRY may have been bound by obligations under the Genocide Convention before it came into existence as a State; this, however, does not prevent the Court from ruling on the part of the Croatian claim relating to the period when the FRY did not exist.

On the merits, Judge Skotnikov maintains his view that nothing in Article IX of the Genocide Convention suggests that the Court is empowered to go beyond settling disputes relating to State responsibility. As to whether or not the crime of genocide or other acts enumerated in Article III of the Convention have been committed, the Court's role is limited by its lack of criminal jurisdiction. The Court's role is to determine whether it has been sufficiently established that acts proscribed by the Genocide Convention were committed. After making this determination, the Court must then continue to deal with its primary task of addressing the question of State responsibility for genocide.

Judge Skotnikov notes that the Court never approaches this task, since it concludes that genocide and other punishable acts referred to in Article III of the Convention did not take place. While he agrees with this conclusion, he is of the view that, instead of insisting on the Court's capacity to conduct its own enquiry (which the Court is ill-equipped to do), it would have been sufficient to have taken notice of the relevant proceedings of the ICTY, which have never involved any charges of genocide in respect of events in Croatia.

Dissenting opinion of Judge Cançado Trindade

1. In his Dissenting Opinion, composed of 19 parts, Judge Cançado Trindade presents the foundations of his personal dissenting position, pertaining to the Court's decision, encompassing the adopted methodology, the approach pursued, the whole reasoning in its treatment of issues of evidential assessment as well as of substance, in addition to the Court's conclusion on the Applicant's claim.

2. He begins his Dissenting Opinion by drawing attention (part I) to the framework of the settlement of the dispute at issue, ineluctably linked to the imperative of the *realization of justice*, in particular in the international adjudication by the Court of cases of the kind, pertaining to grave breaches of human rights and of International Humanitarian Law, under the Convention against Genocide, in the light of *fundamental considerations of humanity*.

3. Preliminarily, Judge Cançado Trindade draws attention (part II) to the unprecedented delays of 16 years in the *cas d'espèce*: he ponders that, "[p]aradoxically, the graver the breaches of international law appear to be, the more time-consuming and difficult it becomes to impart justice" (para. 14). He finds such prolonged delays in the international adjudication of cases of the kind most regrettable, in particular from the perspective of the victims (*justitia longa, vita brevis*).

4. Turning to the issue of jurisdiction (part III), Judge Cançado Trindade observes that, in the *cas d'espèce*, opposing Croatia to Serbia, responsibility cannot be shifted to an extinct State; there is personal continuity of policy and practices in the period of occurrences (1991 onwards). The

1948 Convention against Genocide being a human rights treaty (as generally acknowledged), the law governing State succession to human rights treaties applies (with *ipso jure* succession). There can be no break in the protection afforded to human groups by the Genocide Convention in a situation of dissolution of State amidst violence, when protection is most needed.

5. In a situation of this kind, there is *automatic succession* to, and *continuing applicability* of, the Genocide Convention, which otherwise would be deprived of its appropriate effects (*effet utile*). Once the Court's jurisdiction is established in the initiation of proceedings, any subsequent lapse or change of attitude of the State concerned can have no bearing upon such jurisdiction (*venire contra factum proprium non valet*). Moreover, automatic succession to human rights treaties is reckoned in the practice of United Nations supervisory organs (such as, e.g., the HRC and the CERD Committees).

6. The *essence* of the present case,—Judge Cançado Trindade adds,—lies on *substantive* issues pertaining to the interpretation and application of the Convention against Genocide, rather than on issues of jurisdiction/admissibility (part IV), as acknowledged by the contending Parties themselves in the course of the proceedings. He stresses that automatic succession to, and continuity of obligations of, the Convention against Genocide, is an *imperative of humaneness* (part V), so as to secure protection to human groups when they stand most in need of it.

7. In Judge Cançado Trindade's perception, the *principle of humanity* permeates the whole Convention against Genocide, which is essentially *people-oriented*; it permeates the whole *corpus juris* of protection of human beings, which is essentially *victim-oriented*, encompassing also the International Law of Human Rights (ILHR), International Humanitarian Law (IHL) and the International Law of Refugees (ILR), besides contemporary International Criminal Law (ICL) (para. 84). The principle of humanity has a clear incidence in the protection of human beings, in particular in situations of *vulnerability* or *defencelessness* (paras. 58–65).

8. The United Nations Charter itself,—he proceeds,—professes the determination to secure respect for human rights everywhere; the principle of humanity,—in line with the long-standing jusnaturalist thinking (*recta ratio*),—permeates likewise the Law of the United Nations (paras. 73–76). The principle of humanity, furthermore, has met with judicial recognition, on the part of contemporary international human rights tribunals as well as international criminal tribunals (paras. 77–82). Grave violations of human rights and acts of genocide, among other atrocities, are in breach of absolute prohibitions of *jus cogens* (para. 83).

9. Judge Cançado Trindade sustains that the determination of *State responsibility* under the Genocide Convention not only was intended by its draftsmen (as its *travaux préparatoires* show), but also is in line with its *rationale*, as well as its object and purpose (part VI). The Genocide Convention is meant to prevent and punish the crime of genocide,—which is contrary to the spirit and aims of the United Nations,—so as to liberate humankind from this scourge. He warns that to attempt to make the application of the Genocide Convention an impossible task, would render the Convention meaningless, an almost dead letter (para. 94).

10. Judge Cançado Trindade then proceeds to a detailed examination of the issue of the standard of proof. He demonstrates that international human rights tribunals (the IACtHR and the ECtHR), in their jurisprudence, have *not* pursued a stringent and high threshold of proof in cases of grave breaches of the rights of the human person; they have resorted to factual presumptions and inferences, as well as to the shifting or reversal of the burden of proof (paras. 100–121). He regrets that this jurisprudential development was not taken into account by the Court in the present Judgment (para. 124).

11. And he adds that, in the same line of rebutting a high threshold of evidence, international criminal tribunals (the ICTFY and the ICTR) have, in their jurisprudence, even in the absence of direct proofs, drawn proof of genocidal intent from inferences of fact (paras. 125–139). The Court, both in the present case and earlier on, in the *Bosnian Genocide* case (2007), appears to have imposed too high a threshold of evidence (for the determination of genocide), not in line with the established case-law of international criminal tribunals and of international human rights tribunals on standard of proof (para. 142). After all,—Judge Cançado Trindade proceeds,—

> "Ultimately, intent can only be inferred, from such factors as the existence of a general plan or policy, the systematic targeting of human groups, the scale of atrocities, the use of derogatory language, among others. The attempts to impose a high threshold for proof of genocide, and to discredit the production of evidence (e.g., witness statements) are most regrettable, ending up in reducing genocide to an almost impossible crime to determine, and the Genocide Convention to an almost dead letter. This can only bring impunity to the perpetrators of genocide,—States and individuals alike,—and make any hope of access to justice on the part of victims of genocide fade away. Lawlessness would replace the rule of law" (para. 143).

12. He adds another word of caution "against what may appear as a regrettable deconstruction of the Genocide Convention", in attempting to characterize a situation "as one of armed conflict, so as to discard genocide. The two do not exclude each other" (para. 144). In his view,

> "In adjudicating the present case, the ICJ should have kept in mind the importance of the Genocide Convention as a major human rights treaty and its historic significance for humankind. A case like the present one can only be decided in the light, not at all of State sovereignty, but rather of the imperative of safeguarding the life and integrity of human groups under the jurisdiction of the State concerned, even more so when they find themselves in situations of utter vulnerability, if not defencelessness. The life and integrity of the population prevail over contentions of State sovereignty, particularly in face of misuses of this latter" (para. 145).

13. Judge Cançado Trindade further observes that the fact-finding undertaken by the United Nations, at the time of the occurrences (part IX), contains important elements conforming the widespread and systematic pattern of destruction

in the attacks in Croatia: such is the case of the reports of the former United Nations Commission on Human Rights (1992–1993) and of the reports of the Security Council's Commission of Experts (1993–1994). Those occurrences also had repercussion in the United Nations II World Conference on Human Rights (1993), as he well remembers. There has also been judicial recognition (in the case-law of the ICTFY—paras. 180–194) of the widespread and/or systematic attacks against the Croat civilian population.

14. Judge Cançado Trindade then proceeds to a detailed examination of the widespread and systematic pattern of destruction, in his view well-established in the present proceedings before the Court, which encompassed indiscriminate attacks against the civilian population, with massive killings, torture and beatings, systematic expulsion from homes (and mass exodus), and destruction of group culture (part X). That widespread and systematic pattern of destruction also comprised rape and other sexual violence crimes (part XI), which disclose the necessity and importance of a *gender analysis* (paras. 260–277).

15. There was, furthermore,—he continues,—a systematic pattern of disappeared or missing persons (part XII). Enforced disappearance of persons is a *continuing* grave breach of human rights and International Humanitarian Law; with its destructive effects, it bears witness of the expansion of the notion of victims (so as to comprise not only the missing persons, but also their close relatives, who do not know their whereabouts). The situation created calls for a proper standard of evidence, and the shifting or reversal of the burden of proof, which cannot be laid upon those victimized (paras. 313–318).

16. Here, again, it is important to take note—which the ICJ has not done—of the important case-law of international human rights tribunals (the IACtHR and the ECtHR—paras. 300–310 and 313) on this particular issue of enforced disappearance of persons. In sum,—Judge Cançado Trindade observes,—

> "The evidence produced before the Court in the present case of the *Application of the Convention against Genocide* clearly establishes, in my perception, the occurrence of massive killings of targeted members of the Croat civilian population during the armed attacks in Croatia, amidst a systematic pattern of extreme violence, encompassing also torture, arbitrary detention, beatings, sexual assaults, expulsion from homes and looting, forced displacement and transfer, deportation and humiliation, in the attacked villages. It was not exactly a war, it was a devastating onslaught of civilians. It was not only 'a plurality of common crimes' that 'cannot, in itself, constitute genocide', as Counsel for Serbia argued before the Court in the public sitting of 12.03.2014; it was rather an onslaught, a plurality of atrocities, which, in itself, by its extreme violence and devastation, can disclose the intent to destroy (*mens rea* of genocide)" (para. 237).

17. He adds that the aforementioned grave breaches of human rights and of International Humanitarian Law amount to breaches of *jus cogens*, entailing State responsibility and calling for reparations to the victims. This is in line with the idea of *rectitude* (in conformity with the *recta ratio* of natural law), underlying the conception of Law (in distinct legal systems—*Droit* / *Right* / *Recht* / *Direito* / *Derecho* / *Diritto*) as a whole (paras. 319–320).

18. In the present case, the widespread and systematic pattern of destruction took place in pursuance of a plan, with an ideological content (part XIII (1)). In this respect,—Judge Cançado Trindade proceeds,—both contending Parties addressed the historical origins of the armed conflict in Croatia, and the ICTFY examined expert evidence of it. The Court did not find it necessary to dwell upon this; yet, the ideological incitement leading to the outbreak of hostilities was brought to its attention by the contending Parties, as an essential element for a proper understanding of the case.

19. The evidence produced before the Court, concerning the aforementioned widespread and systematic pattern of destruction, shows that the armed attacks in Croatia were not exactly a war, but rather an onslaught (cf. *supra*); one of its manifestations was the practice of marking Croats with white ribbons, or armbands, or of placing white sheets on the doors of their homes (part XIII (2)). Another manifestation was the mistreatment by Serb forces of the mortal remains of the deceased Croats, and other successive findings in numerous mass graves, added to further clarifications obtained from the cross-examination of witnesses before the Court (in public and closed sittings) (part XIII (3)–(5)).

20. The widespread and systematic pattern of destruction was also manifested in the forced displacement of persons and homelessness, and subjection of the victims to unbearable conditions of life (part XIII (6)). That pattern of destruction, approached as a whole, also comprised the destruction of cultural and religious heritage (monuments, churches, chapels, city walls, among others); it would be artificial to attempt to dissociate physical/biological destruction from the cultural one (part XIII (7)).

21. The evidence produced before the Court in respect of selected devastated villages—Lovas, Ilok, Bogdanovci and Vukovar (in the region of Eastern Slavonia), and Saborsko (in the region of Lika),—shows that the *actus reus* of genocide (Article II (*a*), (*b*) and (*c*) of the Genocide Convention)—has been established (part XIV). Furthermore, the intent to destroy (*mens rea*) the targeted groups, in whole or in part, can be inferred from the evidence submitted (even if not direct proofs) (part XV). The extreme violence in the perpetration of atrocities in the planned pattern of destruction bears witness of such intent to destroy. And Judge Cançado Trindade adds:

> "In my understanding, evidential assessments cannot prescind from axiological concerns. Human values are always present, as acknowledged by the historical emergence of the principle, in process, of the *conviction intime* (*livre convencimento* / *libre convencimiento* / *libero convincimento*) of the judge. Facts and values come together, in evidential assessments. The inference of *mens rea* / *dolus specialis*, for the determination of responsibility for genocide, is undertaken as from the *conviction intime* of each judge, as from human conscience.
>
> Ultimately, conscience stands above, and speaks higher than, any wilful *Diktat*. The evidence produced before the ICJ pertains to the *overall conduct* of the State concerned, and not to the conduct only of individuals, in each crime examined in an isolated way. The *dossier* of the present

case concerning the *Application of the Convention against Genocide* (Croatia *versus* Serbia) contains irrefutable evidence of a widespread and systematic pattern of extreme violence and destruction (…)" (paras. 469–470).

22. There is thus,—he proceeds,—need of *reparations* to the victims (part XVI),—an issue which was duly addressed by the contending Parties themselves before the Court,—to be determined by the Court in a subsequent phase of the case. The difficult path to *reconciliation* (part XVII), in Judge Cançado Trindade's view, starts with the acknowledgment that the widespread and systematic pattern of destruction ends up victimizing everyone, on both sides. The next step towards reconciliation lies in the provision of reparations (in all its forms). Reconciliation also calls for adequate apologies, honouring the memory of the victims. Another step by the contending Parties in the same direction lies in the identification and return of all mortal remains to each other.

23. The adjudication of a case like the present one shows the need to go beyond the strict inter-State outlook. Judge Cançado Trindade sustains that the Genocide Convention is *people-centered*, and there is need to focus attention on the people or population concerned, in pursuance of a humanist outlook, in the light of the principle of humanity (part XVIII). In interpreting and applying the Genocide Convention,—he adds,—attention is to be turned to the victims, rather than to inter-State susceptibilities (paras. 494–496).

24. In Judge Cançado Trindade's view, the Court's evidential assessment and determination of the facts of the *cas d'espèce* has to be comprehensive, and not atomized. All the atrocities, presented to the Court, conforming the aforementioned pattern of destruction, have to be taken into account, not only a sample of them, for the determination of State responsibility under the Genocide Convention (paras. 503–507). Large-scale crimes, such as rape and other sexual violence crimes, expulsion from homes (and homelessness), forced displacements, deprivation of food and medical care, cannot be minimized (para. 500).

25. Judge Cançado Trindade stresses that the Court's conceptual framework and reasoning as to the law have likewise to be comprehensive, and not atomized, so as to secure the *effet utile* of the Genocide Convention (para. 508). The branches that conform the *corpus juris* of the international protection of the rights of the human person—ILHR, IHL, ILR and ICL—cannot be approached in a compartmentalized way; there are approximations and convergences among them (paras. 509–511).

26. He recalls that the Genocide Convention, which is *victim-oriented*, cannot be approached in a static way, as it is a "living instrument" (paras. 511–512 and 515). Judge Cançado Trindade sustains that customary and conventional IHL are to be properly seen in interaction, and not to be kept separately from each other. A violation of the substantive provisions of the Genocide Convention is bound to be a violation of customary international law on the matter as well (para. 513). Furthermore,—he proceeds,—the interrelated elements of *actus reus* and *mens rea* of genocide cannot be approached separately either.

27. He then turns to general principles of law (*prima principia*), and in particular the principle of humanity, of great relevance to both conventional and customary international law; such *prima principia* confer an ineluctable axiological dimension to the international legal order (para. 517). He adds that human rights treaties—such as the Genocide Convention—have a hermeneutics of their own, which calls for a comprehensive approach as to the facts and as to the law, and not an atomized or fragmented one, as pursued by the Court's majority.

28. Judge Cançado Trindade warns against the posture of the ICJ in the present Judgment—also reflected in its prior Judgment in the *Bosnian Genocide* case (2007),—of ascribing an overall importance to individual State *consent*, regrettably putting it well above the imperatives of the realization of justice at international level. In a domain such as the one of human rights treaties in general, and the Genocide Convention in particular, international law appears, more than voluntary, as indeed *necessary*, and the protected rights and fundamental human values stand above State interests or its "will" (para. 516).

29. The imperative of the *realization of justice* acknowledges that conscience (*recta ratio*) stands above the "will" (para. 518); consent yields to objective justice. Judge Cançado Trindade reiterates out that the Genocide Convention is concerned with human groups in situations of vulnerability or defencelessness; it calls for a people-centered outlook, focused on the victims (paras. 520–522). He further warns that the comprehensive outlook that he sustains to the Genocide Convention is to take into account "the *whole factual context* of the present case opposing Croatia to Serbia,—and not only just a sample of selected occurrences in some municipalities, as the Court's majority does" (para. 523).

30. That whole factual context, in his assessment, "clearly discloses a widespread and systematic pattern of destruction,—which the Court's majority seems to be at pains with, at times minimizing it, or not even taking it into account" (para. 523). This calls—Judge Cançado Trindade adds—for "a comprehensive, rather than atomized, consideration of the matter, faithful to humanist thinking and keeping in mind the principle of humanity, which permeates the whole of the ILHR, IHL, ILR and ICL, including the Genocide Convention" (para. 523). And he adds:

> "My dissenting position is grounded not only on the assessment of the arguments produced before the Court by the contending parties (Croatia and Serbia), but above all on issues of principle and on fundamental values, to which I attach even greater importance. I have thus felt obliged, in the faithful exercise of the international judicial function, to lay the foundations of my own dissenting position in the *cas d'espèce* in the present Dissenting Opinion" (para 524).

31. In sum,—Judge Cançado Trindade concludes,—in the interpretation and application of the Convention against Genocide, fundamental principles and human values exert a relevant role; there is here the primacy of the concern with the victims of human cruelty, as, after all, the *raison d'humanité* prevails over the *raison d'État* (para. 547). In his

understanding, this is what the International Court *of Justice* should have decided in the present Judgment on the case concerning the *Application of the Convention against Genocide*.

Declaration of Judge Xue

Judge Xue reserves her position with regard to the Court's finding that in the context of the present case it could found its jurisdiction on the basis of State succession to responsibility under Article IX of the Genocide Convention. She maintains the view that Serbia's second objection to jurisdiction *ratione temporis* and admissibility should be upheld and she voted against the operative paragraph 1 of the Judgment.

I. Issues left over by the 2008 Judgment

On the "two inseparable issues" left over by the 2008 Judgment, Judge Xue observes that the Court's conclusions that Serbia was bound by the Convention with effect only from 27 April 1992 and that the Genocide Convention is not retroactive even in respect of State responsibility are conclusive legal findings. She is of the opinion that, therefore, Serbia's second jurisdictional objection should be upheld.

The Court's treatment of State succession to responsibility as a separate heading for the consideration of jurisdiction *ratione temporis*, in her opinion, is a questionable departure from the 2008 Judgment. Procedurally, Croatia's alternative argument about Serbia's succession to the responsibility of the Socialist Federal Republic of Yugoslavia ("the SFRY") does raise a new claim for jurisdiction, a claim that is based on treaty obligations undertaken by a third party. When the Court has already concluded in the Judgment that even in respect of State responsibility the Convention is not retroactive, that claim is apparently related to the question of succession rather than responsibility.

Substantively, given the bulk of the alleged acts concerned (most of them took place before 27 April 1992), the issue of succession is so crucial for the case that Croatia's alternative argument should be dealt with at the same length as Croatia's principal argument. Late invocation of that argument by Croatia indeed raises the issue of procedural fairness for Serbia.

II. Political premise of Serbia's succession

Judge Xue points out that the question of succession in the present case is a complicated issue. From 1992 to 2000, Serbia remained in a *sui generis* status, which gave rise to a series of legal questions regarding its standing before the Court. In her view, the political premise of Serbia's succession was much dictated by the fact that its 1992 declaration and Note were more often treated with political expediency than given consistent legal interpretation under international law in the light of the factual situation.

While upholding the validity of Serbia's commitments to international obligations, the Court in the 2008 Judgment, however, does not indicate the legal consequences that are necessarily derived from the change of that political premise.

Under international law, in her view, the implication of the new political premise is arguably threefold for Serbia. First of all, Serbia, being one of the successor States rather than the sole continuator of the SFRY, does not enjoy all the rights of its predecessor, nor does it continue to assume all of the SFRY's international obligations and responsibility as the same international personality. Secondly, such status will determine the confines of the Serbia's treaty obligations in accordance with international law. Thirdly, its treaty relations with the other successor States will be governed by their agreement as well as general rules of treaty law.

In the present case, both of Croatia's arguments for Serbia's succession to the responsibility of the SFRY involve the political premise of Serbia's succession. As Serbia is not a continuator but one of the successor States of the SFRY, it succeeded to the Genocide Convention on the date of its proclamation and was, therefore, bound by it only with effect from 27 April 1992. Succession matters among the newly independent States that succeeded to the SFRY are governed by the Agreement on Succession Issues of 29 June 2001. It is against this factual background on the basis of the aforesaid political premise that the Court is called to interpret Article IX of the Genocide Convention so as to determine whether there is any legal ground in international law for the Court to found its jurisdiction with regard to acts that occurred before 27 April 1992.

III. Interpretation of Article IX of the Genocide Convention

On the interpretation of Article IX, Judge Xue believes that the Court should first determine whether State succession to responsibility falls within the terms of Article IX and, if so, in the context of the present case, whether or not Serbia should succeed to the responsibility of the SFRY. Only when these issues are settled, does the Court have the jurisdiction to address the merits of the case, but not the other way round.

Judge Xue observes that it is difficult to establish, either from the drafting history or the substantive provisions of the Convention, that the term of State responsibility in Article IX also includes State succession to responsibility. While the State parties unequivocally precluded retroactive effect to the Convention and remained dubious about State responsibility for violations of the Convention, it would be much more unlikely that they would agree to import State succession to responsibility into the terms of Article IX.

Judge Xue emphasizes that, under Article IX of the Convention, the Court is not called to settle *any dispute* that concerns interpretation, application and fulfilment of the Convention, but a dispute that should directly relate to the rights and obligations of the parties. The conditions for entailing State responsibility are governed by general international law. Unless and until such conditions are satisfied, no State responsibility can be invoked.

When the Court sets out to determine whether the alleged acts of genocide relied on by Croatia against Serbia were attributable to the SFRY and thus engaged its responsibility, its consideration, regardless of the ultimate finding, is necessarily based on the presumption in favour of succession to responsibility and the presumption that Serbia may succeed to the responsibility of the SFRY for the latter's violation of

the obligations under the Convention. Thus, the Convention is actually applied retroactively to Serbia. Although the rules of State responsibility have developed considerably since the adoption of the Genocide Convention, little can be found about State succession to responsibility in the field of general international law.

In short, notwithstanding the caution given in the Judgment, the approach taken by the Court in resolving the current dispute may, in her view, create serious implications that the Court does not intend to have for future treaty interpretation.

IV. "Time gap" in the protection

Finally, Judge Xue wishes to add one word on Croatia's argument that a decision to limit jurisdiction to events after 27 April 1992 would create a "time gap" in the protection afforded by the Convention. While, from the viewpoint of human rights protection, that is obviously a strong and appealing argument, the jurisdiction of the Court, in the present case, has to be "confined to obligations arising under the Convention itself" and undertaken by Serbia. This kind of "time gap", if any, could occur not only in the event of State succession, but also with any State before it becomes a party to the Convention. That is the limit of treaty régime.

Judge Xue further points out that the jurisdiction of the Court is just one of the means available for the fulfilment of the Convention. Moreover, when a State opts out of the clause of Article IX when it ratifies or accedes to the Convention, it does not mean that the people of that State party will not obtain the protection of the Convention. Ultimately, it is national measures that will play the major role in preventing genocide and punishing perpetrators of genocidal crimes. At the international level, in the situation related to the present case, the International Criminal Tribunal for the former Yugoslavia (ICTY) was established to bring to justice those responsible for crimes committed during the course of the SFRY's dissolution process, despite the fact that the SFRY ceased to exist. Although individual criminal responsibility and State responsibility are distinct, protection and justice thus accorded are equally important. Whether Serbia should be held responsible for the SFRY's alleged breach of its international obligations under the Convention can only be adjudged in accordance with international law.

Declaration of Judge Donoghue

Judge Donoghue agrees with the Court's conclusions regarding both the claim and the counter-claim. She comments on the parts of the Judgment that discuss the *actus reus* of genocide.

As to the claim, Judge Donoghue addresses the written witness statements submitted by Croatia. She believes that written witness statements should contain basic identifying information (including name, nationality, residence and date and place of signature), as well as sufficient information to permit evaluation of the reliability of the evidence (e.g., relationship between the witness and the parties, detailed description of the facts, source of the witness's information). Many statements submitted by Croatia are deficient, although this is not the basis for the Court's rejection of Croatia's claim. Judge Donoghue also notes that the Court relies heavily on witness statements when it considers whether the *actus reus* of genocide is established in some localities, especially when there are no relevant ICTY factual findings or admissions by Serbia. Recalling the high standard of proof that governs this case, she considers it unfortunate that the Court does not consistently explain the reasons for its conclusion that the *actus reus* exists (or does not exist) in a particular locality.

In connection with the counter-claim, Judge Donoghue addresses the Court's examination of the question whether there were intentional killings during the shelling of Knin. She agrees that the Court does not have a basis to find that civilian deaths in Knin were the result of indiscriminate shelling. However, she disagrees with the suggestion in the Judgment that the term "killing", as used in subparagraph *(a)* of Article II of the Genocide Convention, does not extend to deaths resulting from attacks that are directed exclusively at military targets and that do not deliberately target civilians.

Separate opinion of Judge Gaja

This Judgment understandably follows the approach taken by the Court in 2007 in its Judgment on the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*. Both Judgments use the same or a similar legal framework when considering issues relating to the responsibility of States for the commission of acts of genocide and the criminal responsibility of individuals for genocide. Certain aspects that are specific to State responsibility are underrated.

International criminal tribunals tend to apply a restrictive definition of genocide. A restrictive definition can also be found in the Elements of Crimes adopted by the Assembly of States Parties to the Rome Statute. The reasons for a restrictive definition are not applicable to issues of State responsibility.

The mental element of genocide may be easier to identify when considering State responsibility, which does not presuppose finding that an individual or organ committed certain acts with genocidal intent.

In criminal matters the standard of proof which is usually applied is that responsibility should be established beyond all reasonable doubt. The same standard appears to be too strict when applied to State responsibility. The "exceptional gravity" of the charges involving the commission of genocide should not make the establishment of international responsibility of a State more difficult.

Separate opinion of Judge Sebutinde

Judge Sebutinde concurs with the Court's conclusions in paragraphs 2 and 3 of the Operative Clause of the Judgment. She, however, disagrees with paragraph 1 thereof. In her opinion, the Court's jurisdiction *ratione temporis* under Article IX of the Genocide Convention is limited to handling disputes relating to the interpretation, application and fulfilment of the Convention by the Contracting Parties and in relation to acts

attributable to those States, in this case, Croatia and Serbia. This is because of the cardinal principle of international law that unless a different intention appears from the treaty or is otherwise established, the provisions of a treaty do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party (Art. 28 of the Vienna Convention on the Law of Treaties). In the present case, the FRY Serbia cannot be bound by the Genocide Convention prior to 27 April 1992 when by succession it became a Contracting Party. The SFRY, to which the Applicant attributes the acts committed prior to 27 April 1992, is an entity no longer in existence and is no longer a Contracting Party. Consequently, the responsibility of the FRY Serbia, (being one of five successor States to the SFRY along with the republics of Croatia, Slovenia, Bosnia and Herzegovina, and Macedonia) for acts committed by a predecessor State prior to 27 April 1992, i.e., before Serbia became a State or a party to the Genocide Convention, is not a matter within the Court's jurisdiction *ratione temporis*.

Judge Sebutinde further disagrees with the decision of the Court to accord evidential weight to a decision of the International Criminal Tribunal for the former Yugoslavia (ICTY) not to charge any individual with genocide in relation to the conflict in Croatia, as being further indication of the fact that no genocide ever took place in Croatia. In her view, such a decision is dangerously based on pure speculation, as the Court did not ascertain the reasons behind such a prosecutorial decision. Under the ICTY Statute, the decision to investigate and prosecute is solely within the Prosecutor's discretion and prerogative, with no accompanying obligation to disclose the reasons therefor. Unlike judicial decisions, the prosecutorial decision to include or exclude a particular charge against an individual is an executive one based on evidence available at the time of drafting the indictment and involves no general or definitive finding of fact. Prosecutorial discretion is influenced by a wide range of factors not connected to availability of evidence including cost and length of the trial, manageability and availability of witnesses. Furthermore, the questions which this Court and the ICTY are tasked to consider concern two completely different régimes and their answers are not determinative of each other. While the ICTY is concerned with individual criminal responsibility for the commission of particular crimes, this Court is tasked with assessing State responsibility for failure to prevent or punish the alleged perpetrators of an accumulation of crimes that might have been committed with genocidal intent. In the latter case, it is not necessary to identify each and every individual perpetrator of the crimes, before the Court can draw its conclusions. This Court is able to, and must take a global view of all the evidence, including findings already made by the ICTY. It also has before it, and is able to rule on, additional evidence that was not the subject of charges before the ICTY. Consequently, the Court should be cautious in placing any evidential weight or inference on the ICTY decision not to charge individuals with genocide arising out of the conflict in Croatia in the absence of reasons for such a prosecutorial decision.

Separate opinion of Judge Bhandari

1. Judge Bhandari has voted with the majority with respect to all three operative clauses of the present Judgment. However, with respect to the second operative clause—the rejection of Croatia's claim of genocide against Serbia—while he concurs with the majority's conclusion that the *actus reus* of genocide was committed against ethnic Croats during the relevant time period, he remains unconvinced that Croatia has discharged its burden to substantiate its claims by way of the minimum credible evidence required by the Court to allow him to be fully convinced that the only reasonable conclusion available is that such acts were perpetrated with genocidal *mens rea*.

2. Judge Bhandari then elaborates upon his concerns and misgivings regarding the analysis employed by the majority as to the existence or not of genocidal *dolus specialis*. In sum, he finds that the majority: (1) failed to lay down clear parameters and guidance to address the issue of genocidal intent, specifically with respect to the "substantiality" criterion; (2) has not taken into proper consideration the developments of the jurisprudence of international criminal tribunals on the issue of genocidal intent after the issuance of the Court's *Bosnia* Judgment of 2007; and (3) failed to properly address and respond to the 17 factors enumerated by Croatia as being capable of establishing genocidal intent.

3. While conducting a survey of recent jurisprudence from the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), Judge Bhandari notes certain developmental trends in the law of the "substantiality" criterion of genocidal intent, and regrets the silence of the majority in the face of this pertinent jurisprudential evolution. While Judge Bhandari recognizes that the Court has the prerogative to not rely on such jurisprudence, he is nevertheless of the view that the majority missed an opportunity to clarify this arcane area of public international law and hence distinguish the law of genocide from other grave offences, such as crimes against humanity.

4. Throughout his analysis, Judge Bhandari expands upon these misgivings by focusing on how the majority has treated the events that occurred in the Croatian city of Vukovar from August to November 1991, and by applying some of the developments from the ICTY and ICTR to that particular aspect of the conflict. In paying special attention to the events of Vukovar, Judge Bhandari notes that these events formed the cornerstone of the Applicant's claim and thus, he believes, deserved greater attention than they received from the Court in the present Judgment.

5. Finally, Judge Bhandari explains his dissatisfaction with the majority's reasoning that the events of Vukovar could not constitute genocidal intent because they were animated by a desire to, *inter alia*, "punish" the local Croat population. In his view, such an approach conflates the distinct legal concepts of motive and intent. Judge Bhandari also takes exception to what he believes to be the illogical and legally unsound distinction the majority has drawn in allowing a decision of the ICTY Prosecutor *not* to lay a charge of genocide in an indictment to be afforded some probative value, while

negating any evidentiary weight to a corollary decision of the Prosecutor to include a charge of genocide in an indictment.

Dissenting opinion of Judge *ad hoc* Vukas

Judge *ad hoc* Vukas starts by noting that the content of the Judgment of the International Court of Justice in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)* must be read in the context of the historic and present political circumstances. Namely, the clear elements and characteristics of genocide, committed in some areas of Croatia by the Yugoslav People's Army and Serb forces, have been neglected by the Court, because they were committed a quarter of a century ago, and their confirmation could hamper the present efforts to include the Republic of Serbia into the European Union.

In Judge *ad hoc* Vukas's view, although the Operation "Storm" was held in August 1995, it was only after the Application of the Republic of Croatia (submitted in 1999) that Serbia came to the conclusion that genocide was committed against the Serbs in Croatia many years before the Croatian Application.

According to Judge *ad hoc* Vukas, generally speaking, the Judgment of the International Court of Justice delivered at a public sitting on 3 February 2015 expresses more the view of the necessity of good relations between Croatia and Serbia, than of the duty to punish those responsible for genocide.

Judge *ad hoc* Vukas accordingly voted against the Judgment and delivered his dissenting opinion.

Separate opinion of Judge *ad hoc* Kreća

Although termed a separate opinion, the opinion of Judge *ad hoc* Kreća contains both concurring and dissenting elements.

The opinion of Judge *ad hoc* Kreća is dissenting in so far as it relates to the jurisdictional issue in the case (i.e., Serbia's second preliminary objection). Judge *ad hoc* Kreća is particularly concerned by the highly relaxed approach of the Court to its jurisdiction *ratione temporis* and the lack of a decision in relation to the vital issues of: from which date the Genocide Convention can be considered binding for the Applicant; from which date it can be considered applicable between the Parties; and until which date it can be considered binding for the SFRY. Judge *ad hoc* Kreća finds that this lax approach ignores the fundamental principle of consent. In particular, by treating the second preliminary objection of Serbia, concerning the admissibility of the claim, coincidentally with the principal claim, the Court reduces a key jurisdictional decision to some kind of accessory consequence. He expresses concern for the future implications of such an approach to the jurisdiction of the Court.

Concerning the relationship between the SFRY and the FRY, in terms of State responsibility, the opinion of Judge *ad hoc* Kreća strongly rejects any notion that rules on State succession to responsibility form part of international law, as well as the relevance of Article 10 (2) of the Articles on the Responsibility of States for Internationally Wrongful Acts to the circumstances of the case. He also rejects any possible retroactive application of the Genocide Convention, both of its compromissory clause (Article IX) and its substantive provisions.

In relation to substantive law, Judge *ad hoc* Kreća agrees that genocide within the terms of the Genocide Convention has largely not been proven.

He considers that the Court, for the most part, has engaged in an interpretation of the Genocide Convention which appropriately reflects its spirit and letter, although he expresses some concerns regarding the interrelationship between the jurisprudence of the Court and that of the ICTY, demanding that the Court take a balanced and critical approach to the jurisprudence of the ICTY with respect to genocide.

Judge *ad hoc* Kreća is of the opinion that terrible atrocities and crimes were committed by both sides in the tragic civil war in Croatia, but that these crimes rather fit within the framework of crimes against humanity and war crimes and do not fall within the scope of the Genocide Convention.

However, in relation to the issue of incitement to genocide, Judge *ad hoc* Kreća dissents in that he considers that the relationship of the régime of Croatian President Tudjman to the Ustasha ideology justifies a finding that direct and implicit incitement to genocide was committed by the Applicant.

210. QUESTIONS RELATING TO THE SEIZURE AND DETENTION OF CERTAIN DOCUMENTS AND DATA (TIMOR-LESTE *v.* AUSTRALIA) [PROVISIONAL MEASURES]

Order of 22 April 2015

On 22 April 2015, the International Court of Justice delivered its Order on the request for the modification of the Order indicating provisional measures of 3 March 2014 in the case concerning *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia)*. In this Order, the Court unanimously took the view that the change in situation was such as to justify a modification of the Order rendered on 3 March 2014.

The Court was composed as follows: President Abraham, Vice-President Yusuf; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian; Judges *ad hoc* Callinan, Cot; Registrar Couvreur.

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* *

The text of the operative paragraph (para. 21) reads as follows:

"…

The Court,

1) Unanimously,

Authorizes the return, still sealed, to Collaery Lawyers of all the documents and data seized on 3 December 2013 by Australia, and any copies thereof, under the supervision of a representative of Timor-Leste appointed for that purpose;

2) Unanimously,

Requests the Parties to inform it that the return of the documents and data seized on 3 December 2013 by Australia, and any copies thereof, has been effected and at what date that return took place;

3) Unanimously,

Decides that, upon the return of the documents and data seized on 3 December 2013 by Australia, and any copies thereof, the second measure indicated by the Court in its Order of 3 March 2014 shall cease to have effect."

*

* *

Judge Cançado Trindade appended a separate opinion to the Order of the Court; Judge *ad hoc* Callinan appended a declaration to the Order of the Court.

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* *

Chronology of the Procedure (paras. 1–10)

The Court begins by recalling that on 17 December 2013 Timor-Leste filed an Application instituting proceedings against Australia with respect to a dispute concerning the seizure on 3 December 2013 and subsequent detention by "agents of Australia of documents, data and other property which belongs to Timor-Leste and/or which Timor-Leste has the right to protect under international law". The seized material, according to Timor-Leste, includes, *inter alia*, documents, data and correspondence between Timor-Leste and its legal advisers relating to the pending Arbitration under the Timor Sea Treaty of 20 May 2002 between Timor-Leste and Australia.

On the same day, Timor-Leste submitted a Request for the indication of provisional measures pursuant to Article 41 of the Statute and Articles 73 to 75 of the Rules of Court. On 3 March 2014, the Court issued an Order indicating the following provisional measures:

> "(1) Australia shall ensure that the content of the seized material is not in any way or at any time used by any person or persons to the disadvantage of Timor-Leste until the present case has been concluded; (2) Australia shall keep under seal the seized documents and electronic data and any copies thereof until further decision of the Court; and (3) Australia shall not interfere in any way in communications between Timor-Leste and its legal advisers in connection with the pending Arbitration under the Timor Sea Treaty of 20 May 2002 between Timor-Leste and Australia, with any future bilateral negotiations concerning maritime delimitation, or with any other related procedure between the two States, including the present case before the Court."

The Court then recalls that the Agents of Timor-Leste and Australia requested the Court, in a joint letter dated 1 September 2014, "to adjourn the hearing [on the merits] set to commence on 17 September 2014, in order to enable the Parties to seek an amicable settlement". This request was granted by the Court pursuant to Article 54 of the Rules of Court and the oral proceedings were postponed.

The Court further notes that, Australia, by a letter dated 25 March 2015, expressed its wish to return to Collaery Lawyers the materials which were the subject of the proceedings, and accordingly requested modification of the Order of 3 March 2014 concerning the second provisional measure. The Court also recalls that Timor-Leste, in its written observations on Australia's request for modification of the Order, had stated that it "would have no objection to an appropriate modification of the second provisional measure for this purpose".

Reasoning of the Court (paras. 11–20)

The Court notes that, in order to rule on Australia's request, it must *a*) ascertain whether, in light of the facts brought before it by Australia, there has been a change in the situation which called for the indication of certain provisional measures in March 2014, and, if so, *b*) consider whether such a change justifies the modification or revocation of the measures previously indicated, pursuant to Article 76 (1) of the Rules of Court.

The Court observes that the measures were required because of Australia's refusal to return the documents and data seized and detained by its agents. It considers that, in view of Australia's change in position regarding the return of these

documents and data, there has indeed been a change in the situation which had given rise to the measures indicated in its Order of 3 March 2014.

The Court, then, in assessing the consequences to be drawn from the change in situation, recalls that it identified an imminent risk of irreparable harm in terms of the right of Timor-Leste to conduct arbitral proceedings and negotiations without interference "should the seized material be divulged to any person or persons involved or likely to be involved in that arbitration or in negotiations on behalf of Australia". In view of the written undertaking by the Attorney-General of Australia dated 21 January 2014, whereby he declared that no part of the Australian Government would have access to the material seized but envisaged the possibility of making use of that material in certain circumstances involving national security, the Court concluded that there remained an imminent risk of irreparable harm.

The Court now notes that the return of the documents and data seized, and any copies thereof, would be in accordance with part of Timor-Leste's submissions presented in its Application and Memorial. However, it observes that such return could only be effected on the basis of a "further decision", whereby the Court would authorize the transfer of that material and specify the modalities for that transfer.

In view of the foregoing, the Court takes the view that the change in situation is such as to justify a modification of the Order of 3 March 2014 and considers that it should authorize such return. The modification resulting from the present Order is without effect on the measures indicated in points 1 and 3 of the operative part of the Order of 3 March 2014, which will continue to have effect until the conclusion of the present proceedings, or until further decision of the Court.

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Separate opinion of Judge Cançado Trindade

Judge Cançado Trindade, while concurring in the adoption of the Order on the Modification of the Order on Provisional Measures of Protection, expresses his reservation as to the reasoning of the Court. He considers that the present Order should have been adopted by the Court *proprio motu*, on the basis of Article 75(1) of the Rules of Court, and not in the terms of a request by a contending Party, pursuant to Article 76(1). In his view, the Court is on safer ground if it acts on its own initiative and terms, rather than relying on unilateral "undertakings" on the part of States.

Moreover, contrary to what the Court finds in the present Order, Judge Cançado Trindade perceives that the objective situation has not changed. What has now changed is the state of mind of Australia.

According to Judge Cançado Trindade, the legal regime of provisional measures of protection comprises the rights to be protected, the corresponding obligations of the States concerned, and the legal consequences of non-compliance with provisional measures. The Court is fully entitled to decide thereon, without waiting for the manifestations of the "will" of a contending State party. It is human conscience, standing above the "will", that accounts for the progressive development of international law. *Ex conscientia jus oritur.*

Declaration of Judge *ad hoc* Callinan

Judge *ad hoc* Callinan states that, while he has voted in favour of the Order, he has certain observations to make. In particular, he refers to Australia's submission that any Order of the Court should be dispositive of the whole proceedings brought by Timor-Leste. In his opinion, the Court did not receive sufficient material detailed enough to enable a properly informed decision to be made in respect of that submission.

Judge *ad hoc* Callinan encourages both Parties to take all necessary steps to bring the proceedings before the Court to a conclusion. He emphasizes, however, that his declaration is not intended as an impediment in any way, to the resolution of the dispute by the Parties without further recourse to the Court.

211. QUESTIONS RELATING TO THE SEIZURE AND DETENTION OF CERTAIN DOCUMENTS AND DATA (TIMOR-LESTE *v.* AUSTRALIA) [DISCONTINUANCE]

Order of 11 June 2015

On 11 June 2015, the President of the International Court of Justice delivered an Order in the case concerning *Questions relating to the seizure and detention of certain documents and data (Timor-Leste* v. *Australia)*, recording the discontinuance of the proceedings and directing the removal of the case from the Court's list.

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* *

The Order of the President of the Court 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 17 December 2013, whereby the Democratic Republic of Timor-Leste instituted proceedings against Australia with respect to a dispute concerning the seizure on 3 December 2013, and subsequent detention, by 'agents of Australia of documents, data and other property which belongs to Timor-Leste and/or which Timor-Leste has the right to protect under international law',

Having regard to the Order of 3 March 2014, by which the Court indicated the following provisional measures:

'(1) Australia shall ensure that the content of the seized material is not in any way or at any time used by any person or persons to the disadvantage of Timor-Leste until the present case has been concluded;

(2) Australia shall keep under seal the seized documents and electronic data and any copies thereof until further decision of the Court;

(3) Australia shall not interfere in any way in communications between Timor-Leste and its legal advisers in connection with the pending *Arbitration under the Timor Sea Treaty of* 20 *May 2002* between Timor-Leste and Australia, with any future bilateral negotiations concerning maritime delimitation, or with any other related procedure between the two States, including the present case before the Court.' (*Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia), Provisional Measures, Order of* 3 *March 2014, I.C.J. Reports 2014, pp. 160–161*, para. 55),

Having regard to the Order of 28 January 2014, whereby the Court fixed 28 April 2014 and 28 July 2014 as the time-limits for the filing, respectively, of the Memorial of Timor-Leste and the Counter-Memorial of Australia,

Having regard to the Memorial and the Counter-Memorial duly filed by the Parties within the time-limits thus fixed,

Having regard to the letters dated 17 June 2014, whereby the Parties were informed that the oral proceedings would open on 17 September 2014,

Having regard to the joint letter dated 1 September 2014, whereby the Agents of Timor-Leste and Australia requested the Court 'to adjourn the hearing set to commence on 17 September 2014, in order to enable the Parties to seek an amicable settlement', and raised the possibility that the Parties might jointly seek a variation of the Order indicating provisional measures of 3 March 2014,

Having regard to the letters dated 3 September 2014, whereby the Registrar informed the Parties that the Court had decided, pursuant to Article 54 of the Rules of Court, to grant their joint request to postpone the oral proceedings,

Having regard to the letter dated 25 March 2015, whereby the Agent of Australia indicated that his Government, '[i]n affirmation of its commitment to the peaceful settlement of the dispute' and in order 'to move forward in a constructive and positive manner to put this dispute behind the Parties', wished 'to return the materials removed from the premises of Collaery Lawyers on 3 December 2013', and requested, pursuant to Article 76 of the Rules of Court, 'a modification of the second of the provisional measures' indicated by the Court in its Order of 3 March 2014,

Having regard to the Order of 22 April 2015, by which the Court

'(1) *Authorize[d]* the return, still sealed, to Collaery Lawyers of all the documents and data seized on 3 December 2013 by Australia, and any copies thereof, under the supervision of a representative of Timor-Leste appointed for that purpose;

(2) *Request[ed]* the Parties to inform it that the return of the documents and data seized on 3 December 2013 by Australia, and any copies thereof, has been effected and at what date that return took place; [and]

(3) *Decide[d]* that, upon the return of the documents and data seized on 3 December 2013 by Australia, and any copies thereof, the second measure indicated by the Court in its Order of 3 March 2014 shall cease to have effect' (*Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia), Request for the modification of the Order indicating provisional measures of* 3 *March 2014, Order of* 22 *April 2015*, para. 21);

Whereas, by a joint letter dated 15 May 2015 and received in the Registry on the same day, the two Parties, in accordance with the Court's Order of 22 April 2015, confirmed the return by Australia on 12 May 2015 of the documents and data seized on 3 December 2013;

Whereas, by a letter dated 2 June 2015 and received in the Registry on the same day, the Agent of Timor-Leste, stating that

'[f]ollowing the return of the seized documents and data by Australia on 12 May 2015, Timor-Leste successfully achieved the purpose of its Application to

the Court, namely the return of Timor-Leste's rightful property, and therefore implicit recognition by Australia that its actions were in violation of Timor-Leste's sovereign rights',

notified the Court that his Government wished to discontinue the proceedings;

Whereas a copy of that letter was immediately communicated to the Government of Australia, 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 10 June 2015 as the time-limit within which Australia could state whether it objected to the discontinuance;

Whereas, by a letter dated 9 June 2015, and received in the Registry on the same day, the Agent of Australia informed the Court that his Government had no objection to the discontinuance of the proceedings as requested by Timor-Leste, and whereas the Agent reaffirmed the statement made in his letter dated 25 March 2015 that 'Australia's request to return the material was an affirmation of Australia's commitment to the peaceful settlement of the dispute in a constructive and positive manner to put it behind the Parties', and added that '[n]o other implication should be drawn from Australia's actions';

Places on record the discontinuance by the Democratic Republic of Timor-Leste of the proceedings instituted by its Application filed on 17 December 2013; and

Directs that the case be removed from the List."

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212. OBLIGATION TO NEGOTIATE ACCESS TO THE PACIFIC OCEAN (BOLIVIA *v.* CHILE) [PRELIMINARY OBJECTION]

Judgment of 24 September 2015

In its Judgment delivered on 24 September 2015 in the case concerning the *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile),* the Court rejected the preliminary objection raised by the Republic of Chile and found that it had jurisdiction on the basis of Article XXXI of the Pact of Bogotá, to entertain the Application filed by the Plurinational State of Bolivia on 24 April 2013.

The Court was composed as follows: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian; Judges *ad hoc* Daudet, Arbour; Registrar Couvreur.

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The text of the operative paragraph (para. 56) of the Judgment reads as follows:

"…

The Court,

(1) By fourteen votes to two,

Rejects the preliminary objection raised by the Republic of Chile;

In favour: President Abraham, Vice-President Yusuf; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Sebutinde, Bhandari, Robinson, Gevorgian; Judge *ad hoc* Daudet;

Against: Judge Gaja; Judge *ad hoc* Arbour;

(2) By fourteen votes to two,

Finds that it has jurisdiction, on the basis of Article XXXI of the Pact of Bogotá, to entertain the Application filed by the Plurinational State of Bolivia on 24 April 2013.

In favour: President Abraham, Vice-President Yusuf; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Sebutinde, Bhandari, Robinson, Gevorgian; Judge *ad hoc* Daudet;

Against: Judge Gaja; Judge *ad hoc* Arbour."

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* *

Judge Bennouna appended a declaration to the Judgment of the Court; Judge Cançado Trindade appended a separate opinion to the Judgment of the Court; Judge Gaja appended a declaration to the Judgment of the Court; Judge *ad hoc* Arbour appended a dissenting opinion to the Judgment of the Court.

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* *

I. Background (paras. 15–17)

The Court begins by recalling the historical background to the case. It explains that Chile and Bolivia obtained their independence from Spain in 1818 and 1825 respectively. At the time, Bolivia had a coastline along the Pacific Ocean, measuring several hundred kilometres. On 10 August 1866, the two States signed a Treaty of Territorial Limits, which established a "line of demarcation of boundaries" separating their neighbouring coastal territories. This line was confirmed as the boundary line in the Treaty of Limits between Bolivia and Chile, signed on 6 August 1874.

In 1879, Chile declared war on Peru and Bolivia, launching what became known as the War of the Pacific, in the course of which it occupied Bolivia's coastal territories. Hostilities between Bolivia and Chile came to an end with the Truce Pact, signed in 1884 in Valparaíso. Under the terms of the Pact, Chile, *inter alia*, was to continue to govern the coastal region. As a result of these events, Bolivia lost control over its Pacific coast.

In 1895, a Treaty on the Transfer of Territory was signed between Bolivia and Chile, but never entered into force. It included provisions for Bolivia to regain access to the sea, subject to Chile acquiring sovereignty over certain territories. On 20 October 1904, the Parties signed the Treaty of Peace and Friendship (hereinafter the "1904 Peace Treaty"), which officially ended the War of the Pacific as between Bolivia and Chile. Under that Treaty, which entered into force on 10 March 1905, the entire Bolivian coastal territory became Chilean and Bolivia was granted a right of commercial transit through Chilean ports.

The Court notes that, since the conclusion of the 1904 Peace Treaty, both States have made a number of declarations and several diplomatic exchanges have taken place between them regarding the situation of Bolivia vis-à-vis the Pacific Ocean.

II. General overview of the positions of the Parties (paras. 18–24)

In its Application instituting proceedings and in its Memorial, Bolivia requests the Court to adjudge and declare that

"(*a*) Chile has the obligation to negotiate with Bolivia in order to reach an agreement granting Bolivia a fully sovereign access to the Pacific Ocean;

(*b*) Chile has breached the said obligation;

(*c*) Chile must perform the said obligation in good faith, promptly, formally, within a reasonable time and effectively, to grant Bolivia a fully sovereign access to the Pacific Ocean."

In order to substantiate the existence of the alleged obligation to negotiate and the breach thereof, Bolivia relies on "agreements, diplomatic practice and a series of declarations attributable to [Chile's] highest-level representatives". According to Bolivia most of these events took place between the conclusion of the 1904 Peace Treaty and 2012.

In its Application, Bolivia seeks to found the jurisdiction of the Court on Article XXXI of the Pact of Bogotá, which reads as follows:

> "In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, the High Contracting Parties declare that they recognize, in relation to any other American State, the jurisdiction of the Court as compulsory *ipso facto*, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them concerning:
>
> (*a*) the interpretation of a treaty;
>
> (*b*) any question of international law;
>
> (*c*) the existence of any fact which, if established, would constitute the breach of an international obligation;
>
> (*d*) the nature or extent of the reparation to be made for the breach of an international obligation."

Both Bolivia and Chile are parties to the Pact of Bogotá, which was adopted on 30 April 1948.

In its preliminary objection, Chile claims that the Court lacks jurisdiction under Article XXXI of the Pact of Bogotá to decide the dispute submitted by Bolivia. Citing Article VI of the Pact, it maintains that the matters at issue in the present case, namely territorial sovereignty and the character of Bolivia's access to the Pacific Ocean, were settled by arrangement in the 1904 Peace Treaty and that they remain governed by that Treaty, which was in force on the date of the conclusion of the Pact. In effect, Article VI provides that "[t]he procedures [laid down in the Pact of Bogotá] … may not be applied to matters already settled by arrangement between the parties, or by arbitral award or by decision of an international court, or which are governed by agreements or treaties in force on the date of the conclusion of the present Treaty".

Bolivia responds that Chile's preliminary objection is "manifestly unfounded", as it "misconstrues the subject-matter of the dispute". Bolivia maintains that the subject-matter of the dispute concerns the existence and breach of an obligation on the part of Chile to negotiate in good faith Bolivia's sovereign access to the Pacific Ocean. It states that this obligation exists independently of the 1904 Peace Treaty. Accordingly, Bolivia asserts that the matters in dispute in the present case are not matters settled or governed by the 1904 Peace Treaty, within the meaning of Article VI of the Pact of Bogotá, and that the Court has jurisdiction under Article XXXI thereof.

III. Subject-matter of the dispute (paras. 25–36)

The Court observes that Article 38, paragraph 2, of the Rules of Court provides that an application shall specify the facts and grounds on which the claim is based. In support of its contention that an obligation exists to negotiate sovereign access to the sea, Bolivia refers in its Application to "agreements, diplomatic practice and series of declarations attributable to [Chile's] highest-level representatives". It further contends that Chile—contrary to the position that it had itself adopted—later rejected and denied the existence of the alleged obligation to negotiate in 2011 and 2012, and that it has breached this obligation. On its face, therefore, the Application presents a dispute about the existence of an obligation to negotiate sovereign access to the sea, and the alleged breach thereof.

According to Chile, however, the true subject-matter of Bolivia's claim is territorial sovereignty and the character of Bolivia's access to the Pacific Ocean.

The Court considers that, while it may be assumed that sovereign access to the Pacific Ocean is, in the end, Bolivia's goal, a distinction must be drawn between that goal and the related but distinct dispute presented by the Application, namely, whether Chile has an obligation to negotiate Bolivia's sovereign access to the sea and, if such an obligation exists, whether Chile has breached it. In its Application, Bolivia does not ask the Court to adjudge and declare that it has a right to such access.

In light of the foregoing, the Court concludes that the subject-matter of the dispute is whether Chile is obligated to negotiate in good faith Bolivia's sovereign access to the Pacific Ocean and, if so, whether Chile has breached that obligation.

IV. Whether the matters in dispute before the Court fall under Article VI of the Pact of Bogotá (paras. 37–53)

The Court recalls that, pursuant to Article VI of the Pact of Bogotá, if it were to find that, given the subject-matter of the dispute as it has identified it, the matters in dispute between the Parties are matters "already settled by arrangement between the parties" or "governed by agreements or treaties in force" at the date of signature of the Pact, namely 30 April 1948, it would lack the requisite jurisdiction to decide the case on the merits. Consequently, the Court must determine whether the matters in dispute are matters "settled" or "governed" by the 1904 Peace Treaty.

As the Court has already established, the subject-matter of the dispute is whether Chile is obligated to negotiate in good faith Bolivia's sovereign access to the Pacific Ocean, and, if such an obligation exists, whether Chile has breached it. However, the Court notes that the relevant provisions of the 1904 Peace Treaty do not expressly or impliedly address the question of Chile's alleged obligation to negotiate Bolivia's sovereign access to the Pacific Ocean. The Court accordingly concludes that the matters in dispute are not matters "already settled by arrangement between the parties, or by arbitral award or by decision of an international court" or "governed by agreement or treaties in force on the date of conclusion of the [Pact of Bogotá]", within the meaning of Article VI of the Pact of Bogotá. This conclusion holds, according to the Court, regardless of whether, as Chile maintains, the two limbs of Article VI have a different scope. The Court does not therefore find it necessary in the circumstances of the case to determine whether or not there is a distinction between the legal effects of those two limbs.

The Court recalls that the Parties have presented their respective views on the "agreements, diplomatic practice and … declarations" invoked by Bolivia to substantiate its claim on the merits. It is of the view that, for purposes of determining the question of its jurisdiction, it is neither necessary nor appropriate to examine those elements.

The Court further recalls that it is for the Court itself to decide whether, in the circumstances of the case, an objection

lacks an exclusively preliminary character within the meaning of Article 79, paragraph 9, of the Rules. If so, the Court must refrain from upholding or rejecting the objection at the preliminary stage, and reserve its decision on this issue for further proceedings. In the present case, however, the Court considers that it has all the facts necessary to rule on Chile's objection, and that the question whether the matters in dispute are matters "settled" or "governed" by the 1904 Peace Treaty can be answered without determining the dispute, or elements thereof, on the merits. Consequently, the Court finds that it is not precluded from ruling on Chile's objection at this stage.

V. The Court's conclusion regarding the preliminary objection (paras. 54–55)

Bearing in mind the subject-matter of the dispute, as earlier identified, the Court concludes that the matters in dispute are not matters "already settled by arrangement between the parties, or by arbitral award or by decision of an international court" or "governed by agreements or treaties in force on the date of the conclusion of the [Pact of Bogotá]". Consequently, Article VI does not bar the Court's jurisdiction under Article XXXI of the Pact of Bogotá. Chile's preliminary objection must therefore be dismissed.

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Declaration of Judge Bennouna

In his declaration, Judge Bennouna has felt it necessary to clarify the approach and role which the Court should adopt when it examines a preliminary objection.

Judge Bennouna notes that there are three options available under Article 79, paragraph 9, of the Rules: to uphold the objection, to dismiss it, or to declare that it does not possess an exclusively preliminary character; this last option involves deferring the decision to the merits stage.

Judge Bennouna recalls that the current Article 79, paragraph 9, of the Rules was amended in 1972 in order to curb abuse of the preliminary objection procedure. It is thus only in exceptional circumstances that the Court may find that an objection does not have an exclusively preliminary character, where it does not have all the elements required to make a decision, or where such a decision would prejudge the dispute, or some aspects thereof, on the merits.

Judge Bennouna notes that where the Court upholds or rejects an objection, it implicitly regards the objection as preliminary. The Court is not bound by Article 79, paragraph 9, to begin by characterizing it as preliminary. Judge Bennouna finds that this approach accords with the sound administration of justice.

According to Judge Bennouna, paragraphs 52 and 53 of the Judgment are redundant and misconceived, because the Court revisits an argument that Bolivia had simply put forward on a subsidiary basis, namely that, in the event that the Court were to accept the definition of the subject matter of the dispute as proposed by Chile, the latter's objection would no longer possess an exclusively preliminary character. However, Judge Bennouna points out that the Court had previously rejected the definition proposed by Chile and dismissed its objection based on Article VI of the Pact of Bogotá. The argument of Bolivia had thus become moot. Judge Bennouna finds that it is therefore not necessary to enter into discussions on this issue, just before setting out the Judgment's final conclusion.

Separate opinion of Judge Cançado Trindade

1. In his Separate opinion, composed of seven parts, Judge Cançado Trindade presents the foundations of his personal position on the matter decided by the International Court of Justice (ICJ) in the present Judgment on Preliminary Objection in the case concerning the Obligation to Negotiate Access to the Pacific Ocean, between Bolivia and Chile, whereby the ICJ has found that it has jurisdiction to consider the claim lodged with it under Article XXXI of the 1948 American Treaty on Pacific Settlement (Pact of Bogotá). Although he upholds likewise the Court's jurisdiction, there are certain aspects of the question decided by the Court to which he attributes importance for its proper understanding, which are not properly reflected in the Judgment, and he feels thus obliged to dwell upon them in his Separate Opinion.

2. He begins by pointing out (Part I) that the treatment dispensed by the ICJ in the present Judgment, to the jurisdictional regime of the 1948 American Treaty on Pacific Settlement (Pact of Bogotá), and in particular to the basis of its own jurisdiction (Article XXXI of the Pact) as well as to the relevant provision (Article 79 (9)) of the Rules of Court, is far too succinct. In order to rest on a more solid ground, the Court should, in his perception, have dwelt further upon those provisions, faced as it was with the contention that the respondent State's characterization of the subject matter of the present dispute would amount to a refutation of the applicant State's case on the merits. The ICJ should, in his view, have devoted as much attention to Article XXXI of the Pact and Article 79 (9) of the Rules of Court as it did as to Article VI of the Pact, in relation to the factual context of the *cas d'espèce*.

3. In his Separate opinion, Judge Cançado Trindade addresses, at first, the relation between the jurisdictional basis and the merits in the case law of the Hague Court (PCIJ and ICJ),—focusing, earlier on, on the joinder of preliminary objections to the merits, and then on the not exclusively "preliminary" character of objections to jurisdiction (and admissibility) (Part II). Judge Cançado Trindade promptly warns that, in effect,

> "a clear cut separation between the procedural stages of preliminary objections and merits reflects the old voluntarist positivist conception of international justice subjected to State consent. Yet, despite the prevalence of the positivist approach in the era of the Permanent Court of International Justice (PCIJ), soon the old Hague Court reckoned the need to join a preliminary objection to the merits (cf. *infra*). A preliminary objection to jurisdiction *ratione materiae* is more likely to appear related to the merits of a case than an objection to jurisdiction *ratione personae* or *ratione temporis*" (para. 6).

4. To him, "the search for justice transcends any straight jacket conception of international legal procedure" (para. 7). He recalls that, throughout its history, the Hague Court (PCIJ and ICJ) has been attentive to the interests of the parties and the preservation of the equilibrium between them in the course of the procedure; hence the constant recourse by the Court to the principle of the sound administration of justice (*la bonne administration de la justice*) (para. 8). He recalls successive examples in the case law of the Hague Court disclosing its reliance on the principle of the sound administration of justice (*la bonne administration de la justice*), as from a *célèbre obiter dictum* of the PCIJ, in the *Panevezys Saldutiskis Railway* (Order of 30 June 1938), in deciding to join Lithuania's preliminary objections to the merits.

5. That *célèbre obiter dictum*,—he proceeds,—was kept in mind, along the years, by the ICJ as well, e.g., in the course of its prolonged handling of the *Barcelona Traction* case. By then it was reckoned,—he added,—that, even if the joinder to the merits appeared as an exceptional measure, "there were situations in which the clear cut separation of a preliminary objection from the merits could raise much difficulty, the solution thus being the joinder. Given the straight connection between the preliminary objection and the merits, the joinder would correspond to a necessity, in the interests of the sound administration of justice (*la bonne administration de la justice*)" (para. 10). Judge Cançado Trindade then adds that,

> "In all its historical trajectory, the PCIJ, and later on the ICJ from the very beginning of its operation, made it clear that *the Court is master of its procedure*. It does not and cannot accept straight jacket conceptions of its own procedure; reasoning is essential to its mission of realization of justice. The path followed has been a long one: for decades the idea of a 'joinder' of a preliminary objection to the merits found expression in the then Rules of Court; from the early seventies onwards, the Rules of Court began to provide for further proceedings in the cases, given the fact that the objections at issue did not disclose an exclusively 'preliminary' character" (para. 11).

6. Judge Cançado Trindade then proceeds to an examination of the case law of the PCIJ and ICJ on the matter (Part III), and the corresponding changes in the pertinent provisions of the Rules of Court (as from the Rules of 1936 and 1946), in particular the amendments introduced into the Rules of Court in 1972: the changes in the Rules of Court of 1972 passed on to the Rules of Court of 1978 and 2000, and remained the same to date. They did away with joinder of preliminary objections to the merits, and focused, from then onwards, on the "not exclusively preliminary character" of objections to jurisdiction (and admissibility).

7. The 1972 revision became the object of attention in the ICJ's Judgments on Jurisdiction and Admissibility (of 26 November 1984) and on the Merits (of 27 June 1986) in the *Nicaragua versus United States* case; it was clarified that the amendments introduced into the new provision of the Rules of Court, deleting the express reference to the joinder, were meant to provide more flexibility and to avoid procedural delays, in the interests of the sound administration of justice. From the Court's decision in the *Nicaragua versus United States* case (1984–1986) onwards,—he adds,—the ICJ has pursued this new outlook to the point at issue in its case law (e.g., the *Lockerbie* cases, 1998; the case of the *Land and Maritime Boundary between Cameroon and Nigeria*, 1998; the case of the *Application of the Convention against Genocide, Croatia versus Serbia, Preliminary Objections*, 2008).

8. Judge Cançado Trindade ponders that "[w]e are here in a domain wherein general principles of law play an important role, whether they are substantive principles (such as those of *pacta sunt servanda*, or of *bona fides*), or procedural principles" (para. 22). He then dwells upon the relevance of general principles of international procedural law, as related to the foundations of the international legal order, and on their incidence, in contentious cases, on distinct incidental proceedings (preliminary objections, provisional measures, counter claims and intervention), on the joinder of proceedings, as well as on advisory proceedings (Part IV). In his perception,

> "recourse to general principles of international procedural law is in effect ineluctable, in the realization of justice. General principles are always present and relevant, at substantive and procedural levels. Such principles orient the interpretation and application of legal norms. They rest on the foundations of any legal system, which is made to operate on the basis of fundamental principles. Ultimately, without principles there is truly no legal system. Fundamental principles form the substratum of the legal order itself" (para. 23).

9. He recalls that, in another case, like the present one, opposing two other Latin American States (Argentina and Uruguay), the case concerning *Pulp Mills on the River Uruguay* (Judgment of 20 April 2010), he deemed it fit to call the Court's attention, in his Separate opinion, to the fact that *both* contending parties, Argentina and Uruguay, had expressly invoked general principles of law in the course of the contentious proceedings. In doing so,—he added,—they were both "being faithful to the long standing tradition of Latin American international legal thinking, which has always been particularly attentive and devoted to general principles of law" (para. 24).

10. He then observes that the ICJ has remained attentive to general principles in the exercise of the international judicial function, and adds:

> "As master of its procedure, as well as of its jurisdiction, the Court is fully entitled to determine freely the order in which it will resolve the issues raised by the contending parties. And, in doing so, it is not limited by the arguments raised by the contending parties, as indicated by the principle *jura novit curia*. The Court knows the Law, and, in settling disputes, attentive to the equality of parties, it also says what the Law is (*juris dictio*, *jus dicere*)" (para. 25).

11. He next reviews the case law of the ICJ on general principles in distinct incidental proceedings (paras. 26–31),—keeping in mind the principle of the sound administration of justice (*la bonne administration de la justice*),—as well as in the joinder of proceedings (paras. 32–35), and in advisory proceedings (paras. 36–38). Judge Cançado Trindade then sums up that

> "the principle of the sound administration of justice (*la bonne administration de la justice*) permeates the

considerations of all the aforementioned incidental proceedings before the Court, namely, preliminary objections, provisional measures of protection, counter claims and intervention. As expected, general principles mark their presence, and guide, all Court proceedings. The factual contexts of the cases vary, but the incidence of those principles always takes place" (para. 30).

12. He recalls that, in his Separate opinions appended to the two Orders of the ICJ (of 17 April 2013) of joinder of the proceedings in two other Latin American cases, concerning *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)*, he deemed it fit to state:

> "In my perception, the presence of the idea of justice, guiding the sound administration of justice, is ineluctable. Not seldom the text of the Court's *interna corporis* does not suffice; in order to impart justice, in circumstances of this kind, an international tribunal such as the ICJ is guided by the *prima principia*. To attempt to offer a definition of the sound administration of justice that would encompass all possible situations that could arise would be far too pretentious, and fruitless. (…)
>
> General principles of law have always marked presence in the pursuit of the realization of justice. In my understanding, they comprise not only those principles acknowledged in national legal systems, but likewise the general principles of international law. They have been repeatedly reaffirmed, time and time again, and, even if regrettably neglected by segments of contemporary legal doctrine, they retain their full validity in our days. An international tribunal like the ICJ has consistently had recourse to them in its *jurisprudence constante*. Despite the characteristic attitude of legal positivism to attempt, in vain, to minimize their role, the truth remains that, without principles, there is no legal system at all, at either national or international level.
>
> General principles of law inform and conform the norms and rules of legal systems. In my understanding, sedimented along the years, general principles of law form the *substratum* of the national and international legal orders, they are indispensable (forming the *jus necessarium*, going well beyond the mere *jus voluntarium*), and they give expression to the idea of an *objective* justice (proper of jusnaturalist thinking), of universal scope" (*cit. in* para. 40).

13. Judge Cançado Trindade then proceeds to consider the general principles of international law, Latin American doctrine and the significance of the 1948 Pact of Bogotá (Part V), Article XXXI of which provides the jurisdictional basis for the Court's present Judgment in the case concerning the *Obligation to Negotiate Access to the Pacific Ocean*. He then recalls that, as the Pact of Bogotá was adopted in 1948, it was reckoned that stress needed to be laid by the Pact in particular upon the importance of judicial settlement. Article XXXI of the Pact, in providing for the compulsory jurisdiction of the ICJ for the settlement of "all disputes of a juridical nature", was regarded as being in line with Latin American doctrine as to the primacy of law and justice over recourse to force.

14. Already in 1948,—Judge Cançado Trindade proceeds,—the Pact of Bogotá was promptly regarded as a work of codification of peaceful settlement in international law, moving beyond the arbitral solution (deeply rooted in Latin American experience) into judicial settlement itself, "without the need of a special agreement to that effect. Without imposing any specific means of peaceful settlement, the Pact of Bogotá took a step forward in rendering obligatory peaceful settlement itself, and enhanced recourse to the ICJ" (paras. 41–42).

15. The advance achieved with the adoption of the Pact of Bogotá was the culminating point of the evolution, starting in the XIXth century, of the commitment of Latin American countries with peaceful settlement of international disputes, moving towards compulsory jurisdiction of the Hague Court. This feature of Latin American international legal thinking,—he adds,—arose out of the concertation of the countries of the region in two series of Conferences, namely: *(a)* the Latin American Conferences (1826–1889)[1]; and *(b)* the Pan American Conferences (1889–1948)[2], leading to the adoption, in 1948, of the OAS Charter and the Pact of Bogotá. The gradual outcome of this concertation echoed at the Second Hague Peace Conference (1907), and in the drafting process of the Statute of the PCIJ in 1920 and the ICJ in 1945 (para. 43).

16. The adoption of the Pact of Bogotá in 1948 was the culmination of the sustained and enduring posture of Latin American States in support of peaceful settlement of disputes, and of the compulsory jurisdiction of the Hague Court over disputes of a "juridical nature". In effect, three years after the adoption of the Charter of the United Nations in 1945,—Judge Cançado Trindade adds,—Latin American States significantly did in Bogotá in 1948 what they had announced in San Francisco as a goal: the recourse, under Article XXXI of the Pact of Bogotá, to the compulsory jurisdiction of the ICJ, for the settlement of disputes of a "juridical nature", irrespective of the position that States Parties to the Pact might have taken under the optional clause (Article 36 (2)) of the ICJ Statute (para. 44). There was, in the Pact of Bogotá, in the words of Judge Cançado Trindade,

> "a combination of the obligation to submit disputes of a juridical nature (i.e., those based on claims of legal rights) to judicial or arbitral settlement,—with the free choice of means of peaceful settlement as to other types of controversies; in this way, the 1948 Pact innovated in providing for peaceful settlement of all disputes. In adopting the 1948 Pact of Bogotá, Latin American States made a point of expressing their 'spirit of confidence', added to their 'feeling of common interest', in judicial settlement (more perfected than arbitral settlement), in particular the compulsory jurisdiction of the ICJ. Hence the relevance of Article XXXI of the Pact, also in relation to Article VI" (para. 46).

17. This may explain subsequent initiatives of its revision (in the mid fifties, in the early seventies, in the mid eighties), which, however, did not prosper, and left the Pact

[1] Starting with the Conference (*Congreso Anfictiónico*) of Panama of 1826, followed by the Conferences (with small groups of States) of Lima (1847–1848), Santiago de Chile (1856), Lima (1864–1865 and 1877–1880) and Montevideo (1888–1889).

[2] Starting with the Conference of Washington (1889), followed by the International Conferences of American States of Mexico (1901–1902), Rio de Janeiro (1906), Buenos Aires (1910), Santiago de Chile (1923), Havana (1928), Montevideo (1933), Lima (1938), and Bogotá (1948, wherein the OAS Charter and the Pact of Bogotá were adopted, initiating the era of the OAS).

unchanged (paras. 47–53). The following point examined in the present Separate opinion was the reliance on the Pact of Bogotá for judicial settlement by the ICJ (Part VI), intensified from the late eighties onwards (as disclosed by the cases, e.g., of *Border and Transborder Armed Actions* (Nicaragua *versus* Honduras, 1988), *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (2007), *Dispute regarding Navigational and Related Rights* (Costa Rica *versus* Nicaragua, 2009), *Pulp Mills on the River Uruguay* (Argentina versus Uruguay, 2010), *Territorial and Maritime Dispute* (Nicaragua *versus* Colombia, 2013), *Maritime Dispute* (Peru *versus* Chile, 2014), in addition to five other cases, currently pending before the Court[3]. Yet, Judge Cançado Trindade adds,

> "despite this recent revival of the Pact of Bogotá, I suppose no one would dare to predict, or to hazard a guess, as to further developments in its application in the future. After all, despite advances made, experience shows, within a larger context, that the parcours towards compulsory jurisdiction is a particularly long one, there still remaining a long path to follow …" (para. 55).

18. In sum,—Judge Cançado Trindade proceeds,—Article XXXI of the Pact of Bogotá was intended to enhance the jurisdiction of the Court, *ratione materiae* and *ratione temporis* (not admitting subsequent restrictions, while the Pact remains in force), as well as *ratione personae* (concerning all States Parties to the Pact). In his perception, "the traditional voluntarist conception (a derivative of anachronical legal positivism) yielded to the reassuring conception of the *jus necessarium*, to the benefit of the realization of international justice" (para. 57). It is nowadays generally acknowledged that which sets forth the engagement, by the States Parties to the Pact, as to the conventional basis of the jurisdiction of the ICJ, to settle all "disputes of a juridical nature", by means of Article XXXI, which amounts to a compromissory clause, the Pact of Bogotá has enhanced (independently of the optional clause Article 36 (2) of the ICJ Statute) the procedure of judicial settlement by the ICJ (para. 58).

19. Judge Cançado Trindade then moves into the remaining line of considerations in his Separate opinion, namely, the third way (*troisième voie/tercera vía*) under Article 79 (9) of the Rules of Court—objection not of an exclusively preliminary character (Part VII). Despite the fact that the present Judgment of the ICJ has very briefly referred to Article XXXI of the Pact of Bogotá and to Article 79 (9) of the Rules of Court (in comparison with the attention it devoted to Article VI of the Pact),—he notes,—on other occasions the ICJ has elaborated on Article 79 (9) (cases of *Nicaragua versus United States* (merits, 1986), of *Lockerbie* (preliminary objections, 1998), of *Territorial and Maritime Dispute between Nicaragua and Colombia* (preliminary objections, 2007) (paras. 59–60).

20. Judge Cançado Trindade recalls that Article 79 (9) of the Rules of Court is not limited to the ICJ deciding in one way or another (upholding or rejecting) the objection raised before it in the course of the proceedings. Article 79 (9) in effect contemplates a third way (*troisième voie/tercera vía*) (para. 61), namely, in its terms:

> "declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character. If the Court rejects the objection or declares that it does not possess an exclusively preliminary character, it shall fix time limits for the further proceedings".

21. This being so, the ICJ, moving into the merits, asserts its jurisdiction; this happens because the character of the objection contains aspects relating to the merits, and thus requires an examination of the merits. This is so in the present case concerning the *Obligation to Negotiate Access to the Pacific Ocean*, as to the dispute arisen between Bolivia and Chile, as to whether their practice subsequent to the 1904 Peace Treaty substantiates an obligation to negotiate on the part of the respondent State. He adds that Chile's objection "does not have an exclusively preliminary character, appearing rather as a defence as to the merits of Bolivia's claim" (para. 62).

22. Judge Cançado Trindade recalls that there have been negotiations, extending well after the adoption of the 1948 Pact of Bogotá, in which both contending parties were actively engaged: although in the present Judgment there is no express reference to any of such negotiations specifically, the ICJ takes note (in para. 19) of arguments made in the course of the proceedings of the cas d'espèce to the effect that negotiations took place subsequently to the 1904 Peace Treaty on unsettled issues, well beyond the date of the adoption of the Pact of Bogotá (on 30 April 1948), until 2012 (para. 63). Having stated that, he adds that

> "To assert the duty to negotiate is not the same as to assert the duty to negotiate an agreement, or a given result. The former does not imply the latter. This is a matter for consideration at the merits stage. The Court is here concerned only with the former, the claimed duty to negotiate. The objection raised by the respondent State does not appear as one of an exclusively preliminary character. The substance of it can only be properly addressed in the course of the consideration of the merits of the *cas d'espèce*, not as a 'preliminary objection'" (para. 64).

23. The Court should thus have gone into the merits on the understanding of the third way of Article 79 (9) (*supra*); this would have been, in his perception, "the proper and more prudent way for the Court" to dispose of the preliminary objection at issue (para. 66). Judge Cançado Trindade then concludes that "the objection raised by Chile appears as a defence to Bolivia's claim as to the merits, inextricably interwoven with this latter". And the Court, anyway, he adds, does not count on all the necessary information to render a decision on it as a "preliminary" issue. It is, in his view, more in line with the good administration of justice (*la bonne administration de la justice*) that the Court should keep the issue to be resolved at the merits stage, when the contending parties will have had the opportunity to plead their case in full. This would entail no delays at all for the forthcoming proceedings as to the merits. Last but not least, Article VI of the Pact of

[3] Such as the (merged) cases of *Certain Activities Carried out by Nicaragua in the Border Area* (Costa Rica *versus* Nicaragua), and of *Construction of a Road in Costa Rica along the San Juan River* (Nicaragua *versus* Costa Rica),—as well as the cases of *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean* (Costa Rica *versus* Nicaragua), *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (Nicaragua *versus* Colombia), *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast* (Nicaragua *versus* Colombia).

Bogotá, in Judge Cançado Trindade's understanding, does not exclude the Court's jurisdiction in respect of disputes arisen after 1948: "to hold otherwise would deprive the Pact of its *effet utile*. The Pact of Bogotá, in line with the mainstream of Latin American international legal doctrine, ascribes great importance to the judicial settlement of disputes, its main or central achievement, on the basis of its Article XXXI, a milestone in the conceptual development of this domain of international law" (para. 67).

Declaration of Judge Gaja

Bolivia's request put the stress on negotiations, but these are only a means for enabling Bolivia to acquire a sovereign access to the sea. This fact should have been given more weight by the majority when defining the dispute.

"Sovereign" access would have to be through a territory which was agreed in the 1904 Peace Treaty as not being under Bolivian sovereignty. The matter of Bolivian access to the sea was thus settled in 1904 and this would affect the Court's jurisdiction under the Pact of Bogotá. However, a matter that had been settled can become unsettled again if the parties so agree.

Given the connection between the role that negotiations may have had in unsettling a matter previously settled, on the one hand, and the possibility to infer from negotiations an obligation to negotiate, on the other, the Court should have found that under these circumstances Chile's objection to jurisdiction does not have an exclusively preliminary character.

Dissenting opinion of Judge *ad hoc* Arbour

Judge *ad hoc* Arbour disagreed with the decision of the Court that Chile's preliminary objection had an exclusively preliminary character within the meaning of Article 79 (9) of the Rules of Court, and can thus be disposed of at the preliminary stage. She stated it should have been postponed until after a full hearing on the merits.

She noted that the way Bolivia pleaded the subject matter of its claim changed between its Application, Memorial and the First and Second Round of Oral Hearings. As a result, it was difficult to determine the scope and content of the alleged obligation of Chile to negotiate sovereign access for Bolivia to the Pacific Ocean and, in particular, whether this alleged obligation was one of result.

Judge *ad hoc* Arbour noted that if Bolivia was alleging that Chile had an obligation to cede a sovereign part of its territory to Bolivia in order to grant it access to the Pacific, on terms to be negotiated, the Court would have no jurisdiction under Article VI of the Pact of Bogotá, since the question of sovereign access to the Pacific Ocean was a matter settled or governed by the 1904 Peace Treaty. The uncertainty about the nature, content and scope of the alleged obligation to negotiate makes it premature to decide on the subject matter. Thus Judge *ad hoc* Arbour concluded that the preliminary objection should not have been disposed of at this stage, but should have been postponed until after a full hearing on the merits.

213. CERTAIN ACTIVITIES CARRIED OUT BY NICARAGUA IN THE BORDER AREA (COSTA RICA *v.* NICARAGUA) AND CONSTRUCTION OF A ROAD IN COSTA RICA ALONG THE SAN JUAN RIVER (NICARAGUA *v.* COSTA RICA)

Judgment of 16 December 2015

On 16 December 2015, the International Court of Justice delivered its Judgment in the two joined cases of *Certain activities carried out by Nicaragua in the border area (Costa Rica* v. *Nicaragua)* and of the *Construction of a road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica).*

The Court was composed as follows: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Keith, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian; Judges *ad hoc* Guillaume and Dugard; Registrar Couvreur.

*

* *

The operative paragraph of the Judgment (para. 229) reads as follows:

"…

The Court,

(1) By fourteen votes to two,

Finds that Costa Rica has sovereignty over the "disputed territory", as defined by the Court in paragraphs 69–70 of the present Judgment;

In favour: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson; Judge *ad hoc* Dugard;

Against: Judge Gevorgian; Judge *ad hoc* Guillaume;

(2) Unanimously,

Finds that, by excavating three *caños* and establishing a military presence on Costa Rican territory, Nicaragua has violated the territorial sovereignty of Costa Rica;

(3) Unanimously,

Finds that, by excavating two *caños* in 2013 and establishing a military presence in the disputed territory, Nicaragua has breached the obligations incumbent upon it under the Order indicating provisional measures issued by the Court on 8 March 2011;

(4) Unanimously,

Finds that, for the reasons given in paragraphs 135–136 of the present Judgment, Nicaragua has breached Costa Rica's rights of navigation on the San Juan River pursuant to the 1858 Treaty of Limits;

(5)

(*a*) Unanimously,

Finds that Nicaragua has the obligation to compensate Costa Rica for material damages caused by Nicaragua's unlawful activities on Costa Rican territory;

(*b*) Unanimously,

Decides that, failing agreement between the Parties on this matter within 12 months from the date of this Judgment, the question of compensation due to Costa Rica will, at the request of one of the Parties, be settled by the Court, and reserves for this purpose the subsequent procedure in the case concerning *Certain Activities carried out by Nicaragua in the Border Area* (*Costa Rica* v. *Nicaragua*);

(*c*) By twelve votes to four,

Rejects Costa Rica's request that Nicaragua be ordered to pay costs incurred in the proceedings;

In favour: President Abraham; Vice-President Yusuf; Judges Owada, Bennouna, Cançado Trindade, Xue, Donoghue, Gaja, Bhandari, Robinson, Gevorgian; Judge *ad hoc* Guillaume;

Against: Judges Tomka, Greenwood, Sebutinde; Judge *ad hoc* Dugard;

(6) Unanimously,

Finds that Costa Rica has violated its obligation under general international law by failing to carry out an environmental impact assessment concerning the construction of Route 1856;

(7) By thirteen votes to three,

Rejects all other submissions made by the Parties.

In favour: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Gevorgian; Judge *ad hoc* Guillaume;

Against: Judges Bhandari, Robinson; Judge *ad hoc* Dugard."

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Vice-President Yusuf appended a declaration to the Judgment of the Court; Judge Owada appended a separate opinion to the Judgment of the Court; Judges Tomka, Greenwood, Sebutinde and Judge *ad hoc* Dugard appended a joint declaration to the Judgment of the Court; Judge Cançado Trindade appended a separate opinion to the Judgment of the Court; Judge Donoghue appended a separate opinion to the Judgment of the Court; Judge Bhandari appended a separate opinion to the Judgment of the Court; Judge Robinson appended a separate opinion to the Judgment of the Court; Judge Gevorgian appended a declaration to the Judgment of the Court; Judge *ad hoc* Guillaume appended a declaration to the Judgment of the Court; Judge *ad hoc* Dugard appended a separate opinion to the Judgment of the Court.

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Procedural background (paras. 1–52)

The Court begins by recalling that, on 18 November 2010, the Republic of Costa Rica (hereinafter "Costa Rica") instituted proceedings against the Republic of Nicaragua (hereinafter "Nicaragua") in the case concerning *Certain*

Activities carried out by Nicaragua in the Border Area (Costa Rica v. *Nicaragua)* (hereinafter the "*Costa Rica* v. *Nicaragua* case"). In its Application, Costa Rica alleged in particular that Nicaragua had invaded and occupied Costa Rican territory, and dug a channel thereon; it also reproached Nicaragua with conducting works (notably dredging of the San Juan River) in violation of its international obligations. The Court further states that, on the same day, Costa Rica filed a request for provisional measures, as a result of which, by an Order of 8 March 2011 (hereinafter "the Order of 8 March 2011"), the Court indicated certain provisional measures addressed to both Parties.

The Court goes on to recall that, by an Application filed in the Registry on 22 December 2011, Nicaragua instituted proceedings against Costa Rica in a dispute concerning *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)* (hereinafter the "*Nicaragua* v. *Costa Rica* case"). In that Application, Nicaragua stated that the case related to "violations of Nicaraguan sovereignty and major environmental damages on its territory", contending, in particular, that Costa Rica was carrying out major road construction works in the border area between the two countries along the San Juan River, in violation of several international obligations and with grave environmental consequences.

The Court explains that, by two separate Orders dated 17 April 2013, it joined the proceedings in *the Costa Rica* v. *Nicaragua* and *Nicaragua* v. *Costa Rica* cases. It adds that, by an Order of 22 November 2013 rendered in the *Costa Rica* v. *Nicaragua* case, it reaffirmed the provisional measures indicated on 8 March 2011 and indicated new provisional measures addressed to both Parties.

Finally, the Court recalls that public hearings were held in the joined cases from 14 April 2015 to 1 May 2015, where both Parties' experts were heard.

I. Jurisdiction of the Court (paras. 54–55)

The Court notes that both Costa Rica and Nicaragua invoke, as bases of jurisdiction, Article XXXI of the Pact of Bogotá and the declarations by which they recognized the compulsory jurisdiction of the Court under paragraphs 2 and 5 of Article 36 of the Statute, and that neither Party has contested the Court's jurisdiction to entertain the other Party's claims. The Court finds that it has jurisdiction over both cases.

II. Geographical and historical context and origin of the disputes (paras. 56–64)

The Court first recalls the geographical context to the two cases. It explains in this regard that the San Juan River runs approximately 205 km from Lake Nicaragua to the Caribbean Sea. At a point known as "Delta Colorado" (or "Delta Costa Rica"), the San Juan River divides into two branches: the Lower San Juan, which is the northerly of these two branches and flows into the Caribbean Sea about 30 km downstream from the delta; and the Colorado River, the southerly and larger of the two branches, which runs entirely within Costa Rica, reaching the Caribbean Sea at Barra de Colorado, about 20 km south-east of the mouth of the Lower San Juan. The area situated between the Colorado River and the Lower San Juan is broadly referred to as *Isla Calero* (approximately 150 sq km). Within that area, there is a smaller region known to Costa Rica as *Isla Portillos* and to Nicaragua as Harbor Head (approximately 17 sq km); it is located north of the former Taura River. In the north of *Isla Portillos* is a lagoon, called *Laguna Los Portillos* by Costa Rica and Harbor Head Lagoon by Nicaragua. This lagoon is at present separated from the Caribbean Sea by a sandbar (see attached sketch-map No. 1). The area includes two wetlands of international importance: the *Humedal Caribe Noreste* (Northeast Caribbean Wetland) and the *Refugio de Vida Silvestre Río San Juan* (San Juan River Wildlife Refuge).

The Court then describes the historical context to the present disputes between the Parties. It observes in this regard that, following hostilities between the two States in 1857, the Governments of Costa Rica and Nicaragua concluded in 1858 a Treaty of Limits (hereinafter the "1858 Treaty"), which fixed the course of the boundary between the two countries from the Pacific Ocean to the Caribbean Sea. While establishing Nicaragua's *dominium* and *imperium* over the waters of the San Juan River, at the same time it affirmed Costa Rica's right of free navigation on the river for the purposes of commerce. Following challenges by Nicaragua on various occasions to the validity of this Treaty, Costa Rica and Nicaragua signed another instrument on 24 December 1886, whereby the two States agreed to submit the question of the validity of the 1858 Treaty, as well as various other points of "doubtful interpretation", to the President of the United States, Grover Cleveland, for arbitration.

The Court notes that, in the Award handed down by him in 1888, President Cleveland, *inter alia*, confirmed the validity of the Treaty, and that, subsequent to that decision, in 1896 Costa Rica and Nicaragua agreed to establish two national Demarcation Commissions, which were to include an engineer, who "shall have broad powers to decide whatever kind of differences may arise in the course of any operations and his ruling shall be final". United States General Edward Porter Alexander was so appointed. During the demarcation process (which began in 1897 and was concluded in 1900), General Alexander rendered five awards, the first three of which are of particular relevance to the *Costa Rica* v. *Nicaragua* case.

The Court further explains that, starting in the 1980s, disagreements arose between Costa Rica and Nicaragua concerning the precise scope of Costa Rica's rights of navigation under the 1858 Treaty. This dispute led Costa Rica, on 29 September 2005, to file an Application with the Court instituting proceedings against Nicaragua. On 13 July 2009 the Court rendered its Judgment, *inter alia*, clarifying Costa Rica's navigational rights and the extent of Nicaragua's power to regulate navigation on the San Juan River.

The Court then comes to the origin of the two disputes, indicating that, on 18 October 2010, Nicaragua started dredging the San Juan River in order to improve its navigability, while also carrying out works in the northern part of *Isla Portillos*. The Court notes that Costa Rica contends that Nicaragua had artificially created a channel (both Parties refer to such channels as "*caños*") on Costa Rican territory, in *Isla Portillos* between the San Juan River and *Laguna Los Portillos*/Harbor Head Lagoon, whereas Nicaragua argues that it was only clearing an existing *caño* on Nicaraguan territory. The

Court further notes that Nicaragua also sent some military units and other personnel to that area.

The Court then explains that, in December 2010, Costa Rica started works for the construction of Route 1856 Juan Rafael Mora Porras (hereinafter the "road"), which runs in Costa Rican territory along part of its border with Nicaragua, and has a planned length of 159.7 km, extending from Los Chiles in the west to a point just beyond "Delta Colorado" in the east. For 108.2 km, the road follows the course of the San Juan River (see attached sketch-map No. 2). Finally, the Court notes that, on 21 February 2011, Costa Rica adopted an Executive Decree declaring a state of emergency in the border area, which Costa Rica maintains exempted it from the obligation to conduct an environmental impact assessment before constructing the road.

III. Issues in the Costa Rica v. *Nicaragua case* (paras. 65–144)

A. Sovereignty over the disputed territory and alleged breaches thereof (paras. 65–99)

The Court observes that, since it is uncontested that Nicaragua conducted certain activities in the disputed territory, it is necessary, in order to establish whether there was a breach of Costa Rica's territorial sovereignty, to determine which State has sovereignty over that territory. The Court recalls that the "disputed territory" was defined by the Court in its Order of 8 March 2011 on provisional measures as "the northern part of *Isla Portillos*, that is to say, the area of wetland of some 3 square kilometres between the right bank of the disputed *caño* [dredged by Nicaragua in 2010], the right bank of the San Juan River up to its mouth at the Caribbean Sea and the Harbor Head Lagoon". The Court points out that this definition does not specifically refer to the stretch of coast abutting the Caribbean Sea which lies between the Harbor Head Lagoon (which lagoon both Parties agree is Nicaraguan) and the mouth of the San Juan River, adding that, since neither Party has requested the Court to define the boundary more precisely with regard to this coast, the Court itself will accordingly refrain from doing so.

In order to settle the question of which of the two Parties has sovereignty over the disputed territory, the Court examines the relevant provisions and passages relied on by the Parties in the 1858 Treaty, the Cleveland Award and the Alexander Awards. The Court considers that these lead to the conclusion that Article II of the 1858 Treaty, which places the boundary on the "right bank of the … river", must be interpreted in the context of Article VI, which provides that "the Republic of Costa Rica shall … have a perpetual right of free navigation on the … waters [of the river] between [its] mouth … and a point located three English miles below Castillo Viejo". As General Alexander observed in demarcating the boundary, the 1858 Treaty regards the river, "in average condition of water", as an "outlet of commerce". In the view of the Court, Articles II and VI, taken together, provide that the right bank of a channel of the river forms the boundary on the assumption that this channel is a navigable "outlet of commerce". Thus, Costa Rica's rights of navigation are linked with sovereignty over the right bank, which has clearly been attributed to Costa Rica as far as the mouth of the river.

The Court notes Nicaragua's argument that, as a result of natural modifications in the geographical configuration of the disputed territory, the "first channel" to which General Alexander referred in his first Award is now a channel connecting the river, at a point south of the Harbor Head Lagoon, with the southern tip of that lagoon, and that this is the *caño* that it dredged in 2010 only to improve its navigability. Costa Rica disputes this, contending that the *caño* is an artificial one. The Court then proceeds to examine the evidentiary materials submitted by the Parties. It finds that the satellite and aerial images relied on by Nicaragua are insufficient to prove that a natural channel linked the San Juan River with the Harbor Head Lagoon following the same course as the *caño* that it dredged. The Court further observes that the affidavits of Nicaraguan State officials, which were prepared after the institution of proceedings by Costa Rica, provide little support for Nicaragua's contention. Regarding the maps submitted by the Parties, the Court finds that, while these tend on the whole to give support to Costa Rica's position, their significance is limited, given that they are all small-scale maps which are not focused on the details of the disputed territory. Finally, as regards *effectivités*, the Court, noting that these are in any event of limited significance, points out that they cannot affect the title to sovereignty resulting from the 1858 Treaty and the Cleveland and Alexander Awards.

The Court further notes that the existence over a significant span of time of a navigable *caño* in the location claimed by Nicaragua is put into question by some of the evidence, in particular the fact that in the bed of the channel there were trees of considerable size and age which had been cleared by Nicaragua in 2010. Furthermore, the fact that, as the Parties' experts agree, the *caño* dredged in 2010 no longer connected the river with the lagoon by mid-summer 2011 casts doubt on the existence over a number of years of a navigable channel following the same course before Nicaragua carried out its dredging activities. This *caño* could hardly have been the navigable outlet of commerce referred to above.

The Court therefore concludes that the right bank of the *caño* which Nicaragua dredged in 2010 is not part of the boundary between Costa Rica and Nicaragua, and that the territory under Costa Rica's sovereignty extends to the right bank of the Lower San Juan River as far as its mouth in the Caribbean Sea. Sovereignty over the disputed territory thus belongs to Costa Rica.

The Court recalls that it is not contested that Nicaragua has carried out various activities in the disputed territory since 2010, including excavating three *caños* and establishing a military presence in parts of that territory. These activities were in breach of Costa Rica's territorial sovereignty. Nicaragua is responsible for these breaches and consequently incurs the obligation to make reparation for the damage caused by its unlawful activities (see below, Section E).

The Court then considers Costa Rica's submission that, "by occupying and claiming Costa Rican territory", Nicaragua also committed other breaches of its obligations, including in particular its obligation "not to use the San Juan River to carry out hostile acts" under Article IX of the 1858 Treaty. The Court, however, takes the view that no evidence

of hostilities in the San Juan River has been provided, and accordingly rejects Costa Rica's submission on this point.

Costa Rica further asks the Court to find a breach by Nicaragua of "the prohibition of the threat or use of force under Article 2 (4) of the Charter of the United Nations and Article 22 of the Charter of the Organization of American States". The Court observes that the relevant conduct of Nicaragua has already been addressed in the context of its examination of the violation of Costa Rica's territorial sovereignty. The Court notes, however, that the fact that Nicaragua considered that its activities were taking place on its own territory does not exclude the possibility of characterizing them as an unlawful use of force. This raises the issue of their compatibility with both the United Nations Charter and the Charter of the Organization of American States. Nonetheless, in the circumstances, given that the unlawful character of these activities has already been established, the Court is of the view that it need not dwell any further on this submission.

Finally, Costa Rica requests the Court to find that Nicaragua made the territory of Costa Rica "the object, even temporarily, of military occupation, contrary to Article 21 of the Charter of the Organization of American States". The Court considers that, having already established that the presence of military personnel of Nicaragua in the disputed territory was unlawful because it violated Costa Rica's territorial sovereignty, it does not need to ascertain whether this conduct of Nicaragua constitutes a military occupation in breach of Article 21 of the Charter of the Organization of American States.

B. Alleged violations of international environmental law (paras. 100–120)

The Court then turns to Costa Rica's allegations concerning violations by Nicaragua of its obligations under international environmental law in connection with its dredging activities to improve the navigability of the Lower San Juan River.

1. Procedural obligations (paras. 101–112)

The Court begins by examining Costa Rica's allegations regarding Nicaragua's violation of procedural obligations.

(a) The alleged breach of the obligation to carry out an environmental impact assessment (paras. 101–105)

The Court starts by addressing Costa Rica's contention that Nicaragua breached its obligation to conduct an environmental impact assessment.

After recalling its conclusion in the case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, namely that "it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource" (*I.C.J. Reports 2010 (I)*, p. 83, para. 204), the Court explains that, even though that statement referred to industrial activities, the underlying principle applies generally to proposed activities which may have a significant adverse impact in a transboundary context. Thus, to fulfil its obligation to exercise due diligence in preventing significant transboundary environmental harm, a State must, before embarking on an activity having the potential adversely to affect the environment of another State, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment.

The Court recalls that determination of the content of the environmental impact assessment should be made in light of the specific circumstances of each case. If the environmental impact assessment confirms that there is a risk of significant transboundary harm, the State planning to undertake the activity is required, in conformity with its due diligence obligation, to notify and consult in good faith with the potentially affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk.

The Court notes that, in the present case, the principal risk cited by Costa Rica was the potential adverse impact of those dredging activities on the flow of the Colorado River, which could also adversely affect Costa Rica's wetland.

Having examined the evidence in the case file, including the reports submitted and testimony given by experts called by both Parties, the Court finds that the dredging programme planned in 2006 was not such as to give rise to a risk of significant transboundary harm, either with respect to the flow of the Colorado River or to Costa Rica's wetland. In light of the absence of risk of significant transboundary harm, Nicaragua was not required to carry out an environmental impact assessment.

(b) The alleged breach of an obligation to notify and consult (paras. 106–111)

The Court then turns to Costa Rica's allegation that Nicaragua has breached an obligation to notify and consult with it, both under general international law and pursuant to a number of instruments, namely the 1858 Treaty, the Convention on Wetlands of International Importance especially as Waterfowl Habitat, signed at Ramsar on 2 February 1971 (hereinafter the "Ramsar Convention"), and the Convention for the Conservation of Biodiversity and Protection of Priority Wildlife Areas in Central America.

The Court observes that, contrary to what Nicaragua contends, the fact that the 1858 Treaty may contain limited obligations concerning notification or consultation in specific situations does not exclude any other procedural obligations with regard to transboundary harm which may exist in treaty or customary international law. In any event, the Court finds that, since Nicaragua was not under an international obligation to carry out an environmental impact assessment in light of the absence of risk of significant transboundary harm, it was not required to notify, or consult with, Costa Rica.

As regards the Ramsar Convention, the Court notes that, although Article 3, paragraph 2, contains an obligation to notify, that obligation is limited to notifying the Ramsar Secretariat of changes or likely changes in the "ecological character of any wetland" in the territory of the notifying State. In the present case, the Court considers that the evidence before it does not indicate that Nicaragua's dredging programme has brought about any changes in the ecological character of the wetland, or that it is likely to do so unless it

were to be expanded. Thus the Court finds that no obligation to inform the Ramsar Secretariat arose for Nicaragua. Regarding Article 5 of that same instrument, the Court observes that, while this provision contains a general obligation to consult "about implementing obligations arising from the Convention", it does not create an obligation on Nicaragua to consult with Costa Rica concerning a particular project that it is undertaking, in this case the dredging of the Lower San Juan River. In light of the above, Nicaragua was not required under the Ramsar Convention to notify, or consult with, Costa Rica prior to commencing its dredging project.

Finally, as to the Convention for the Conservation of Biodiversity and Protection of Priority Wildlife Areas in Central America, the Court sees no need to take its enquiry further, as neither of the two provisions invoked by Costa Rica contains a binding obligation to notify or consult.

(c) Conclusion (para. 112)

The Court concludes that it has not been established that Nicaragua breached any procedural obligations owed to Costa Rica under treaties or the customary international law of the environment. The Court takes note of Nicaragua's commitment, made in the course of the oral proceedings, to carry out a new environmental impact study before any substantial expansion of its current dredging programme. The Court further notes that Nicaragua stated that such a study would include an assessment of the risk of transboundary harm, and that it would notify, and consult with, Costa Rica as part of that process.

2. Substantive obligations concerning transboundary harm (paras. 113–120)

The Court, having already found that Nicaragua is responsible for the harm caused by its activities in breach of Costa Rica's territorial sovereignty, proceeds to examine whether Nicaragua is responsible for any transboundary harm allegedly caused by its dredging activities which have taken place in areas under Nicaragua's territorial sovereignty, in the Lower San Juan River and on its left bank.

The Court begins by examining the relevant applicable law. It considers that it would be necessary for it to address the question of the relationship between the 1858 Treaty as interpreted by the Cleveland Award and the current rule of customary international law with regard to transboundary harm only if Costa Rica were to prove that the dredging programme in the Lower San Juan River had produced harm to Costa Rica's territory.

However, in the Court's view Costa Rica has not provided any convincing evidence that sediments dredged from the river were deposited on its right bank. Nor has it proved that the dredging programme caused harm to its wetland, or has had a significant effect upon the Colorado River.

The Court therefore concludes that the available evidence does not show that Nicaragua breached its obligations by engaging in dredging activities in the Lower San Juan River.

C. Compliance with provisional measures (paras. 121–129)

The Court recalls that, in its Order on provisional measures of 8 March 2011, it indicated that "[e]ach Party shall refrain from sending to, or maintaining in the disputed territory, including the *caño*, any personnel, whether civilian, police or security", and also required each Party to "refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve". On the basis of facts that have become uncontested, the Court finds that Nicaragua breached its obligations under the Order of 8 March 2011 by excavating two *caños* and establishing a military presence in the disputed territory. On the other hand, it finds that there has been no breach of its provisional measures Order of 22 November 2013.

The Court thus concludes that Nicaragua acted in breach of its obligations under the 2011 Order by excavating the second and third *caños* and by establishing a military presence in the disputed territory. The Court observes that this finding is independent of its previous conclusion (see Section A) that the same conduct also constitutes a violation of the territorial sovereignty of Costa Rica.

D. Rights of navigation (paras. 130–136)

The Court recalls that, in its final submissions, Costa Rica also claims that Nicaragua has breached "Costa Rica's perpetual rights of free navigation on the San Juan in accordance with the 1858 Treaty of Limits, the 1888 Cleveland Award and the Court's Judgment of 13 July 2009".

Nicaragua contests the admissibility of this submission, which it considers not covered by the Application and as having an object unconnected with that of the "main dispute". The Court observes, however, that paragraph 41 *(f)* of Costa Rica's Application requests the Court to adjudge and declare that, "by its conduct, Nicaragua has breached … the obligation not to prohibit the navigation on the San Juan River by Costa Rican nationals". Although Costa Rica's submission could have been understood as related to the "dredging and canalization activities being carried out by Nicaragua on the San Juan River", to which the same paragraph of the Application also referred, the wording of the submission did not contain any restriction to that effect. The Court accordingly considers that Costa Rica's final submission concerning rights of navigation is admissible.

Costa Rica includes among the alleged breaches of its rights of navigation the enactment by Nicaragua of an October 2009 Decree, concerning navigation on the San Juan River. The Court observes that, while it is clear that the decree should be consistent with Article VI of the 1858 Treaty as interpreted by itself, none of the instances of interference with Costa Rica's rights of navigation specifically alleged by Costa Rica relates to the application of this Decree. The Court therefore takes the view that it is not called upon to examine this decree.

The Court further notes Costa Rica's allegations regarding five incidents where it claims breaches of its navigational rights took place. The Court finds that Nicaragua failed to

provide a convincing justification with regard to Article VI of the 1858 Treaty for the conduct of its authorities in two of these incidents, which concerned navigation by inhabitants of the Costa Rican bank of the San Juan River. The Court accordingly considers that the two incidents show that Nicaragua breached Costa Rica's rights of navigation on the San Juan River under the 1858 Treaty. It adds that, given this finding, it is unnecessary for it to examine the other incidents invoked by Costa Rica.

E. Reparation (paras. 137–144)

Finally, the Court addresses the issue of reparations. It notes in this regard that, in view of the conclusions reached by it in Sections B and D, Costa Rica's requests concerning the repeal of the 2009 Decree on navigation and the cessation of dredging cannot be granted. The Court considers that its declaration that Nicaragua breached the territorial sovereignty of Costa Rica by excavating three *caños* and establishing a military presence in the disputed territory provides adequate satisfaction for the non-material injury suffered on this account. The same applies to the declaration on the breach of the obligations under the Court's Order of 8 March 2011 on provisional measures. Lastly, the finding regarding the breach of Costa Rica's rights of navigation in the circumstances described in Section D provides adequate satisfaction for that breach.

As to Costa Rica's request for "appropriate assurances and guarantees of non-repetition", the Court considers that, although Nicaragua failed to comply with its obligations under the 2011 Order, account must also be taken of the fact that Nicaragua subsequently complied with those set out in the Order of 22 November 2013. The Court accordingly takes the view that Nicaragua will have the same attitude with regard to the legal situation resulting from the present Judgment, in particular in view of the fact that the question of territorial sovereignty over the disputed territory has now been resolved.

The Court finds that Costa Rica is entitled to receive compensation for the material damage caused by those breaches of obligations by Nicaragua that have been ascertained by the Court. It states that the relevant material damage and the amount of compensation may be assessed by the Court only in separate proceedings. The Court is of the opinion that the Parties should engage in negotiation in order to reach an agreement on these issues. However, if they fail to reach such an agreement within 12 months of the date of the present Judgment, the Court will, at the request of either Party, determine the amount of compensation on the basis of further written pleadings limited to this issue.

Finally, while noting that the breach by Nicaragua of its obligations under the 2011 Order necessitated Costa Rica engaging in new proceedings on provisional measures, the Court finds that, taking into account the overall circumstances of the case, an award of costs to Costa Rica, as the latter requested, would not be appropriate.

IV. Issues in the Nicaragua v. *Costa Rica case* (paras. 145–228)

The Court recalls at the outset that the Application filed by Nicaragua on 22 December 2011 concerns the alleged breach by Costa Rica of both procedural and substantive obligations in connection with the construction of the road along the San Juan River.

A. The alleged breach of procedural obligations (paras. 146–173)

The Court begins by considering the alleged breach of procedural obligations.

1. The alleged breach of the obligation to carry out an environmental impact assessment (paras. 146–162)

The Court turns first to Nicaragua's claim that Costa Rica breached its obligation under general international law to assess the environmental impact of the construction of the road before commencing it, particularly in view of the road's length and location.

The Court recalls that a State's obligation to exercise due diligence in preventing significant transboundary harm requires that State to ascertain whether there is a risk of significant transboundary harm prior to undertaking an activity having the potential adversely to affect the environment of another State. If that is the case, the State concerned must conduct an environmental impact assessment. The obligation in question rests on the State pursuing the activity. Accordingly, in the present case, it fell on Costa Rica, not on Nicaragua, to assess the existence of a risk of significant transboundary harm prior to the construction of the road, on the basis of an objective evaluation of all the relevant circumstances.

The Court notes that, in the oral proceedings, counsel for Costa Rica stated that a preliminary assessment of the risk posed by the road project had been undertaken when the decision to build the road was made. The Court observes that to conduct a preliminary assessment of the risk posed by an activity is one of the ways in which a State can ascertain whether the proposed activity carries a risk of significant transboundary harm. It considers, however, that Costa Rica has not adduced any evidence that it actually carried out such a preliminary assessment.

The Court points out that, in evaluating whether, as of the end of 2010, the construction of the road posed a risk of significant transboundary harm, it will have regard to the nature and magnitude of the project and the context in which it was to be carried out. Given that the scale of the road project was substantial, and given the planned location of the road along the San Juan River and the geographic conditions of the river basin where the road was to be situated (and in particular because it would pass through a wetland of international importance in Costa Rican territory and be located in close proximity to another protected wetland situated in Nicaraguan territory), the Court finds that the construction of the road by Costa Rica carried a risk of significant transboundary harm. Therefore, the threshold for triggering the obligation to evaluate the environmental impact of the road project was met.

The Court then turns to the question of whether Costa Rica was exempted from its obligation to evaluate the environmental impact of the road project because of an emergency. First, the Court recalls its holding that "it is for each State to determine in its domestic legislation or in the authorization

process for the project, the specific content of the environmental impact assessment required in each case", having regard to various factors (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, *Judgment, I.C.J. Reports 2010 (I)*, p. 83, para. 205). The Court observes that this reference to domestic law does not relate to the question of whether an environmental impact assessment should be undertaken. Thus, the fact that there may be an emergency exemption under Costa Rican law does not affect Costa Rica's obligation under international law to carry out an environmental impact assessment.

Secondly, independently of the question whether or not an emergency could exempt a State from its obligation under international law to carry out an environmental impact assessment, or defer the execution of this obligation until the emergency has ceased, the Court considers that, in the circumstances of this case, Costa Rica has not shown the existence of an emergency that justified constructing the road without undertaking an environmental impact assessment.

Given this finding, the Court does not need to decide whether there is an emergency exemption from the obligation to carry out an environmental impact assessment in cases where there is a risk of significant transboundary harm.

It follows that Costa Rica was under an obligation to conduct an environmental impact assessment prior to commencement of the construction works.

Turning next to the question of whether Costa Rica complied with its obligation to carry out an environmental impact assessment, the Court notes that Costa Rica produced several studies, including an Environmental Management Plan for the road in April 2012, an Environmental Diagnostic Assessment in November 2013, and a follow-up study thereto in January 2015. These studies assessed the adverse effects that had already been caused by the construction of the road on the environment and suggested steps to prevent or reduce them.

The Court recalls that, in its Judgment in the *Pulp Mills* case, it held that the obligation to carry out an environmental impact assessment is a continuous one, and that monitoring of the project's effects on the environment shall be undertaken, where necessary, throughout the life of the project (*I.C.J. Reports 2010 (I)*, pp. 83–84, para. 205). Nevertheless, the obligation to conduct an environmental impact assessment requires an *ex ante* evaluation of the risk of significant transboundary harm, and thus "an environmental impact assessment must be conducted prior to the implementation of a project" (*ibid*., p. 83, para. 205). In the present case, Costa Rica was under an obligation to carry out such an assessment prior to commencing the construction of the road, to ensure that the design and execution of the project would minimize the risk of significant transboundary harm. In contrast, Costa Rica's Environmental Diagnostic Assessment and its other studies were *post hoc* assessments of the environmental impact of the stretches of the road that had already been built. These studies did not evaluate the risk of future harm. The Court notes moreover that the Environmental Diagnostic Assessment was carried out approximately three years into the road's construction.

For the foregoing reasons, the Court concludes that Costa Rica has not complied with its obligation under general international law to carry out an environmental impact assessment concerning the construction of the road.

2. The alleged breach of Article 14 of the Convention on Biological Diversity (paras. 163–164)

In respect of Nicaragua's submission that Costa Rica was required to carry out an environmental impact assessment by Article 14 of the Convention on Biological Diversity, the Court considers that the provision at issue does not create an obligation to carry out an environmental impact assessment before undertaking an activity that may have significant adverse effects on biological diversity. Therefore, it has not been established that Costa Rica breached Article 14 of the Convention on Biological Diversity by failing to conduct an environmental impact assessment for its road project.

3. The alleged breach of an obligation to notify and consult (paras. 165–172)

The Court then turns to Nicaragua's contention that Costa Rica breached its obligation to notify, and consult with, Nicaragua in relation to the construction works. Nicaragua founds the existence of such obligation on three grounds, namely, customary international law, the 1858 Treaty, and the Ramsar Convention.

The Court first of all reiterates its conclusion that, if the environmental impact assessment confirms that there is a risk of significant transboundary harm, a State planning an activity that carries such a risk is required, in order to fulfil its obligation to exercise due diligence in preventing significant transboundary harm, to notify, and consult with, the potentially affected State in good faith, where that is necessary to determine the appropriate measures to prevent or mitigate that risk. It notes, however, that the duty to notify and consult does not call for examination by the Court in the present case, since it has established that Costa Rica has not complied with its obligation under general international law to perform an environmental impact assessment prior to the construction of the road.

As regards the 1858 Treaty, the Court recalls its finding in the 2009 Judgment that Nicaragua's obligation to notify Costa Rica under the said Treaty arises, amongst other factors, by virtue of Costa Rica's rights of navigation on the river, which is part of Nicaragua's territory. In contrast, the 1858 Treaty does not grant Nicaragua any rights on Costa Rica's territory, where the road is located. Therefore, no obligation to notify Nicaragua with respect to measures undertaken on Costa Rica's territory arises. The Court concludes that the 1858 Treaty did not impose on Costa Rica an obligation to notify Nicaragua of the construction of the road.

Regarding the Ramsar Convention, the Court is of the view that Nicaragua has not shown that, by constructing the road, Costa Rica has changed or was likely to change the ecological character of the wetland situated in its territory. Moreover, contrary to Nicaragua's contention, on 28 February 2012 Costa Rica notified the Ramsar Secretariat about the stretch of the road that passes through the *Humedal Caribe Noreste*. Therefore, the Court concludes that Nicaragua has not shown that Costa Rica breached Article 3, paragraph 2, of the Ramsar Convention. As regards Article 5 of the Convention, the Court finds that this provision creates

no obligation for Costa Rica to consult with Nicaragua concerning a particular project it is undertaking, in this case the construction of the road.

In conclusion, the Court finds that Costa Rica failed to comply with its obligation to evaluate the environmental impact of the construction of the road. Costa Rica remains under an obligation to prepare an appropriate environmental impact assessment for any further works on the road or in the area adjoining the San Juan River, should they carry a risk of significant transboundary harm. Costa Rica accepts that it is under such an obligation. There is no reason to suppose that it will not take note of the reasoning and conclusions in this Judgment as it conducts any future development in the area, including further construction works on the road. The Court also notes Nicaragua's commitment, made in the course of the oral proceedings, that it will co-operate with Costa Rica in assessing the impact of such works on the river. In this connection, the Court considers that, if the circumstances so require, Costa Rica will have to consult in good faith with Nicaragua, which is sovereign over the San Juan River, to determine the appropriate measures to prevent significant transboundary harm or minimize the risk thereof.

B. Alleged breaches of substantive obligations (paras. 174–223)

The Court then turns to the examination of the alleged violations by Costa Rica of its substantive obligations under customary international law and the applicable international conventions.

1. The alleged breach of the obligation not to cause significant transboundary harm to Nicaragua (paras. 177–217)

(a) The contribution of sediment from the road to the river (paras. 181–186)

Regarding the contribution of sediment from the road to the river, the Court notes that it is not contested that sediment eroded from the road is delivered to the river. As regards the total volume of sediment contributed by the road, the Court observes that the evidence before it is based on modelling and estimates by experts appointed by the Parties. The Court further observes that there is considerable disagreement amongst the experts on key data such as the areas subject to erosion and the appropriate erosion rates, which led them to reach different conclusions as to the total amount of sediment contributed by the road. Seeing no need to go into a detailed examination of the scientific and technical validity of the different estimates put forward by the Parties' experts, the Court simply notes that the amount of sediment in the river due to the construction of the road represents at most 2 per cent of the river's total load, according to Costa Rica's calculations based on the figures provided by Nicaragua's experts and uncontested by the latter.

(b) Whether the road-derived sediment caused significant harm to Nicaragua (paras. 187–216)

The Court points out that the core question it must decide is whether the construction of the road by Costa Rica has caused significant harm to Nicaragua. The Court begins its analysis by considering whether the fact that the total amount of sediment in the river was increased as a result of the construction of the road, in and of itself, caused significant harm to Nicaragua.

(i) Alleged harm caused by increased sediment concentrations in the river (paras. 188–196)

In the Court's view, Nicaragua's submission that any detrimental impact on the river that is susceptible of being measured constitutes significant harm is unfounded. Sediment is naturally present in the river in large quantities, and Nicaragua has not shown that the river's sediment levels are such that additional sediment eroded from the road passes a sort of critical level in terms of its detrimental effects. Moreover, the Court finds that, contrary to Nicaragua's submissions, the present case does not concern a situation where sediment contributed by the road exceeds maximum allowable limits, which have not been determined for the San Juan River. Thus, the Court is not convinced by Nicaragua's argument that the absolute quantity of sediment in the river due to the construction of the road caused significant harm *per se*.

The Court therefore proceeds to consider the relative impact of the road-derived sediment on the current overall sediment load of the San Juan River. On the basis of the evidence before it, and taking into account the estimates provided by the experts of the amount of sediment in the river due to the construction of the road and of the total sediment load of the San Juan River, the Court observes that the road is contributing at most 2 per cent of the river's total load. It considers that significant harm cannot be inferred therefrom, particularly taking into account the high natural variability in the river's sediment loads. In any event, in the Court's view, the only measurements that are before it do not support Nicaragua's claim that sediment eroded from the road has had a significant impact on sediment concentrations in the river.

The Court concludes that Nicaragua has not established that the fact that sediment concentrations in the river increased as a result of the construction of the road in and of itself caused significant transboundary harm.

(ii) Alleged harm to the river's morphology, to navigation and to Nicaragua's dredging programme (paras. 197–207)

The Court then examines whether the sediment contributed by the road caused any other significant harm. It begins by considering whether the increased sediment has had an adverse impact on the morphology of the river, navigation and Nicaragua's dredging programme.

The Court notes that Nicaragua has produced no direct evidence of changes in the morphology of the Lower San Juan or of a deterioration of its navigability since the construction of the road began. It further considers that the expert evidence before it establishes that the accumulation of sediment is a long-standing natural feature of the Lower San Juan, and that sediment delivery along the San Juan is not a linear process. The road-derived sediment is one of a number of factors that may have an impact on the aggradation of the Lower San Juan. The Court therefore considers that the evidence adduced

by Nicaragua does not prove that any morphological changes in the Lower San Juan have been caused by the construction of the road in particular.

As to Nicaragua's claim that the construction of the road has had a significant adverse impact on its dredging burden, the Court notes that Nicaragua has adduced no evidence of an increase in its dredging activities due to the construction of the road. The Court observes that there is no evidence that sediment due to the construction of the road is more likely to settle on the riverbed than sediment from other sources. Thus, sediment coming from the road would correspond to at most 2 per cent of the sediment dredged by Nicaragua in the Lower San Juan. The Court is therefore not convinced that the road-derived sediment led to a significant increase in the bed level of the Lower San Juan or in Nicaragua's dredging burden.

Finally, the Court turns to Nicaragua's claim that the sediment deltas along the Costa Rican bank of the river have caused significant harm to the river's morphology and to navigation. In the Court's view, the photographic evidence adduced by Nicaragua indicates that there are deltas on the Costa Rican bank of the river to which the construction of the road is contributing sediment. Nonetheless, it considers that Nicaragua has not presented sufficient evidence to prove that these deltas, which only occupy the edge of the river's channel on the Costa Rican bank, have had a significant adverse impact on the channel's morphology or on navigation.

For the foregoing reasons, the Court concludes that Nicaragua has not shown that sediment contributed by the road has caused significant harm to the morphology and navigability of the San Juan River and the Lower San Juan, nor that such sediment significantly increased Nicaragua's dredging burden.

(iii) Alleged harm to water quality and the aquatic ecosystem (paras. 208–213)

The Court then considers Nicaragua's contention concerning harm to water quality and the aquatic ecosystem. It is of the view, however, that the Environmental Diagnostic Assessment and the expert report relied upon by Nicaragua do not substantiate the claim that the construction of the road caused significant harm to the river's ecosystem and water quality.

(iv) Other alleged harm (paras. 214–216)

Lastly, the Court turns to Nicaragua's argument that the construction of the road has had an adverse impact on the health of the communities along the river, which is dependent upon the health of the river itself.

It finds, however, that Nicaragua did not substantiate its contentions regarding harm to tourism and health. The Court further observes that Nicaragua's arguments concerning the risk of toxic spills into the river and of further development of the Costa Rican bank of the river are speculative and fail to show any harm. Therefore, these arguments fail.

(c) Conclusion (para. 217)

In light of the above, the Court concludes that Nicaragua has not proved that the construction of the road caused it significant transboundary harm. Therefore, Nicaragua's claim that Costa Rica breached its substantive obligations under customary international law concerning transboundary harm must be dismissed.

2. Alleged breaches of treaty obligations (paras. 218–220)

The Court notes that Nicaragua further argues that Costa Rica violated substantive obligations contained in several universal and regional instruments, namely the Ramsar Convention, the 1990 Agreement over the Border Protected Areas between Nicaragua and Costa Rica, the Convention on Biological Diversity, the Convention for the Conservation of Biodiversity and Protection of Priority Wildlife Areas in Central America, the Central American Convention for the Protection of the Environment, the Tegucigalpa Protocol to the Charter of the Organization of Central American States, and the Regional Agreement on the Transboundary Movement of Hazardous Wastes.

The Court notes that both Nicaragua and Costa Rica are parties to the instruments invoked by Nicaragua. Irrespective of the question of the binding character of some of the provisions at issue, the Court observes that, in relation to these instruments, Nicaragua simply makes assertions about Costa Rica's alleged violations and does not explain how the "objectives" of the instruments or provisions invoked would have been breached, especially in the absence of proof of significant harm to the environment. The Court therefore considers that Nicaragua failed to show that Costa Rica infringed the above-mentioned instruments.

3. The obligation to respect Nicaragua's territorial integrity and sovereignty over the San Juan River (paras. 221–223)

As to Nicaragua's claim that the deltas created by sediment eroded from the road are "physical invasions, incursions by Costa Rica into Nicaragua's sovereign territory … through the agency of sediment" and that their presence constitutes "trespass" into Nicaragua's territory, the Court considers that, whether or not sediment deltas are created as a consequence of the construction of the road, Nicaragua's theory to support its claim of a violation of its territorial integrity *via* sediment is unconvincing. There is no evidence that Costa Rica exercised any authority on Nicaragua's territory or carried out any activity therein. Moreover, for the reasons already expressed above, Nicaragua has not shown that the construction of the road impaired its right of navigation on the San Juan River. Therefore, Nicaragua's claim concerning the violation of its territorial integrity and sovereignty must be dismissed.

C. Reparation (paras. 224–228)

With respect to reparation, the Court's declaration that Costa Rica violated its obligation to conduct an environmental impact assessment is the appropriate measure of satisfaction for Nicaragua.

The Court rejects all of Nicaragua's other submissions. To conclude, it notes that Costa Rica has begun mitigation works in order to reduce the adverse effects of the construction of the road on the environment. It expects that Costa

Rica will continue to pursue these efforts in keeping with its due diligence obligation to monitor the effects of the project on the environment. The Court further reiterates the value of ongoing co-operation between the Parties in the performance of their respective obligations in connection with the San Juan River.

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Declaration of Vice-President Yusuf

Whilst agreeing with the operative clauses of the Judgment, Judge Yusuf notes that both Parties claimed that their territorial integrity had been breached by the actions of the other. The reasoning of the Court, in his view, inadequately addresses these submissions.

The inviolability of borders is a fundamental part of territorial integrity. An intrusion onto the territory of a State, however small, breaches the territorial inviolability of a State, which is enshrined in the Charter of the Organization of American States, the Charter of the United Nations, and in customary international law. Violation of this principle is not necessarily linked to a breach of the use or threat of force by the intruding party, as is evident from the United Nations Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States.

Moreover, in its previous case law, the Court has emphasized the pivotal role that respect for territorial integrity plays in the international community. By failing to reiterate and emphasize the importance of this principle, the present Judgment is inconsistent with the Court's previous case law.

Separate opinion of Judge Owada

Although Judge Owada voted in favour of the conclusions reached by the Court in the operative part of the Judgment, in his separate opinion, he wishes to elaborate his view on those aspects of the reasoning of the Court which he finds have not been developed with sufficient clarity in the Judgment.

I. The issue of sovereignty over the disputed territory

Judge Owada observes that the Court has rightly concluded that the legal instruments relevant for determining sovereignty over the "disputed territory" should be the 1858 Treaty, the Cleveland Award of 1888 and the Alexander Award of 1897 (Judgment, paragraph 76). However, Judge Owada finds that the Judgment has not been sufficiently articulate on the logical sequence that exists between these legal instruments. In Judge Owada's view, what is decisive for the purpose of determining sovereignty over the disputed territory is first and foremost the interpretation of the relevant legal instruments in light of their assigned roles and purposes in their contexts.

Judge Owada proceeds by emphasizing that under these circumstances the task for the Court has not and cannot have been to identify the geographical location of "the first channel met" or to follow the line described in the first Alexander Award in 1897. Judge Owada takes the position that the resolution by the Court of the question of territorial sovereignty over the disputed territory is to be based on the same legal sources and the same legal reasoning that General Alexander applied in implementing the Cleveland Award of 1888 which provided the authoritative and binding interpretation and determination of the boundary prescribed by the 1858 Treaty. Judge Owada notes that General Alexander was trying, in his first Award, faithfully to follow the prescription of Article II of the 1858 Treaty.

As Judge Owada further observes and discusses in detail, the unequivocal outcome that the Court has reached in the present Judgment on the question of sovereignty over the disputed territory is confirmed by the application of the underlying reasoning of the first and third Alexander Awards to the present-day geographical situation of the disputed area.

Judge Owada recalls that the Parties in the present case have provided the Court with a number of arguments and have produced a range of supporting evidentiary materials, all relating to the question of whether or not any navigable channels might have traversed or currently traverse the disputed territory. Judge Owada concurs with the Court's evaluation of this evidence while emphasizing his own conclusion that the totality of such evidence amounts in fact to very little that is material or conclusive for determining the question of territorial sovereignty over the disputed territory.

II. Legal consequences of the Court's finding relating to sovereignty over the disputed territory

Judge Owada begins this part of his separate opinion by distinguishing the situation involved in the present dispute from the situation of a classical territorial dispute that is typically brought before the International Court of Justice following attempts by the parties to come to a peaceful settlement. Judge Owada points out that in the present case, as is implied in the language of the Judgment itself, the territorial dispute has been caused primarily through unilateral action taken in the form of a physical incursion by one State into the territory of another State that had been primarily held for many years by the latter State.

In Judge Owada's view, given this undisputable fact, it would have been appropriate for the Court to have treated the acts by Nicaragua in question as a straightforward case of the commission of an internationally wrongful act which could arguably amount to an act constituting an unlawful use of force under Article 2 (4) of the United Nations Charter. Judge Owada notes that while he has concurred with the Court's conclusions on this matter, it would have been more appropriate for the Court to have gone further by declaring that these internationally wrongful acts by Nicaraguan authorities constituted an unlawful use of force under Article 2 (4) of the United Nations Charter.

Judge Owada further observes that the Judgment's reference in this context to the *Cameroon* v. *Nigeria* case seems inappropriate and could be quite misleading. According to Judge Owada, that case should clearly be distinguished from the present situation, inasmuch as the *Cameroon* v. *Nigeria*

case had not been caused by an action of one Party to alter the existing *status quo* through unilateral means.

III. The nature of the requirement to conduct an environmental impact assessment

Judge Owada begins this part of his separate opinion by observing that in the process of carrying out the obligation to act in due diligence under international environmental law, the requirement of conducting an environmental impact assessment becomes a key element for determining whether certain activities may cause significant transboundary harm. Judge Owada recalls that in this context both Parties referred approvingly to the *dictum* from the Court's Judgment in the case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, where the Court had referred to the environmental impact assessment as "a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law" (*I.C.J. Reports 2010 (I)*, p. 83, para. 204).

Judge Owada observes that this dictum of the Court should be placed in contrast with the finding of the International Tribunal for the Law of the Sea in its 2011 Advisory Opinion on the Responsibilities and obligations of States with respect to activities in the Area that an environmental impact assessment as such is a "general obligation under customary international law" (*ITLOS Reports 2011*, para. 145). Judge Owada finds that, by comparison, the reasoning of this Court in its Judgment in the *Pulp Mills* case appears to take a more nuanced approach to this requirement. In Judge Owada's view, the Court in its Judgment in the *Pulp Mills* case had emphasized the importance of the environmental impact assessment in the context of the process of carrying out the obligation of due diligence, which is a holistic process. Judge Owada observes that conducting an environmental impact assessment is one important constituent element of the process that emanates from the international obligation of States to act in due diligence to avoid or mitigate significant transboundary harm, rather than a separate and independent obligation standing on its own under general international law.

In Judge Owada's view, this balanced approach has been maintained in the present Judgment and is reflected in the part of the Judgment dealing with the "requirement to carry out an environmental impact assessment" (Judgment, paragraph 104). Judge Owada recalls that the Court's conclusion in the Judgment's operative part (paragraph 229 (6)) is based on this reasoning. Finally, Judge Owada emphasizes that the environmental impact assessment, which is essentially of a technical nature, is one possible means to achieve the ultimate legal objective that is binding upon States acting in the environmental field—an obligation to act with due diligence in order to prevent significant transboundary harm in the light of the assessed risks involved.

Joint declaration of Judges Tomka, Greenwood and Sebutinde and Judge *ad hoc* Dugard

Judges Tomka, Greenwood and Sebutinde and Judge *ad hoc* Dugard consider that the Court should have ordered Nicaragua to pay the costs which Costa Rica incurred in obtaining a second order on provisional measures in 2013. They recall that Article 64 of the Statute of the Court, together with Article 97 of the Rules of Court, gives the Court the discretion to award costs. They observe that the costs incurred by Costa Rica were a consequence of serious violations by Nicaragua of its obligations under the Court's 2011 Order on provisional measures. They note that Nicaragua could have taken action that would have rendered hearings in October 2013 unnecessary, but failed to do so. Costa Rica was therefore compelled to incur costs in seeking the further order on provisional measures. Although Costa Rica will be able to recover compensation for damage resulting from Nicaragua's breach of the 2011 Order, it will be unable to recover the expense of nearly a week of hearings. Judges Tomka, Greenwood and Sebutinde and Judge *ad hoc* Dugard consider that it is illogical for a State faced with a breach of provisional measures to be treated less favourably if it seeks redress before the Court than if it undertakes unilateral remediation measures. They take the view that, while the power to award costs under Article 64 has never before been used, the exceptional circumstances of this case warrant the Court exercising that power and awarding costs to Costa Rica.

Separate opinion of Judge Cançado Trindade

1. In his Separate opinion, composed of twelve parts, Judge Cançado Trindade observes at first that, although he aligned with the majority in the present Judgment of the International Court of Justice (ICJ), of 16 December 2015, in the two joined cases of *Certain Activities Carried out by Nicaragua in the Border Area* (Costa Rica *versus* Nicaragua) and of the *Construction of a Road in Costa Rica along the San Juan River* (Nicaragua *versus* Costa Rica), he finds that there are certain points ensuing therefrom which, though not dwelt upon at depth by the Court in its reasoning, are in his view endowed with importance, related as they are to the proper exercise of the international judicial function. He feels thus obliged to dwell upon them, in the present Separate opinion, nourishing the hope that it may be useful for the handling of this matter by the ICJ in future cases.

2. Judge Cançado Trindade begins by singling out (part I) the points he has in mind, namely: *a*) the manifestations of the preventive dimension in contemporary international law; *b*) the evolution and conformation of the autonomous legal regime of Provisional Measures of Protection; *c*) provisional measures and the enlargement of the scope of protection; *d*) the breach of Provisional Measures of Protection as an autonomous breach, engaging State responsibility by itself; *e*) the ICJ's determination of breaches of obligations under Provisional Measures of Protection. Next, he presents his reflections, in the form of a plea, for the prompt determination of breaches of Provisional Measures of Protection.

3. Judge Cançado Trindade then proceeds to examine the following points, namely: *a*) supervision of compliance with Provisional Measures of Protection; *b*) breach of provisional measures and reparation for damages; *c*) due diligence, and the interrelatedness between the principle of prevention and the precautionary principle; *d*) the path towards the progressive development of Provisional Measures of Protection. The way is then paved for the presentation, in an epilogue, of a recapitulation of his conclusions on the aforementioned points.

4. As to the first of the above points, namely, the manifestations of the preventive dimension in contemporary international law (part II), Judge Cançado Trindade observes that the present two joined cases of *Certain Activities Carried out by Nicaragua in the Border Area* and of the *Construction of a Road in Costa Rica along the San Juan River* bring to the fore the relevance of that *preventive dimension*, as reflected in the present Judgment, in the finding and legal consequences of breaches of Provisional Measures of Protection (in the *Certain Activities* case), as well as in the acknowledgment of the obligation to conduct an environmental impact assessment (EIA) (in the *Construction of a Road* case as well). This preventive dimension grows in importance in the framework of regimes of protection (such as those, e.g., of the human person, and of the environment). Moreover, it brings us particularly close to general principles of law (para. 4).

5. Such preventive dimension stands out clearly in the succession of the Court's Orders of Provisional Measures of Protection of 8 March 2011, 16 July 2013 and 22 November 2013, and has been addressed by the contending parties in the course of the proceedings (written and oral phases) before the Court (also at the merits stage). The Court has duly considered the submissions of the parties, and has found that the respondent State incurred (in the *Certain Activities* case) into a breach of the obligations under its Order of Provisional Measures of Protection of 8 March 2011, by the excavation of two *caños* in 2013 and the establishment of a military presence in the disputed territory (paras. 127 and 129, and resolutory point n. 3 of the *dispositif*).

6. Judge Cançado Trindade recalls that, already for some time, he has been drawing the Court's attention to the *autonomous legal regime* of Provisional Measures of Protection, in the way he conceives, and has been conceptualizing, along the years, such autonomous legal regime, in successive Dissenting and Individual Opinions in this Court (part III). The present Judgment of the ICJ in the two joined cases of *Certain Activities* and of the *Construction of a Road* is yet another occasion, and a proper one, to dwell further upon it. To start with, that legal regime can be better appreciated if we consider provisional measures in their historical evolution. He recalls that, in their origins, in domestic procedural law doctrine of over a century ago, provisional measures were considered, and evolved, in order to safeguard the effectiveness of the jurisdictional function itself (para. 7).

7. They thus emerged, in the domestic legal systems,—he proceeds,—in the form of a *precautionary legal action (mesure conservatoire / acción cautelar / ação cautelar)*, aiming at guaranteeing, not directly subjective rights *per se*, but rather the jurisdictional process itself. They "had not yet freed themselves from a certain juridical formalism, conveying the impression of taking the legal process as an end in itself, rather than as a means for the realization of justice" (para. 8). With their transposition into international legal procedure, and the increasing recourse to them within the framework of domains of protection (e.g., of the human person or of the environment), they came to be increasingly resorted to, in face of the most diverse circumstances disclosing the probability or imminence of an irreparable damage, to be prevented or avoided. This had the effect, in his perception, of enlarging the scope of international jurisdiction, and of refining their conceptualization (para. 9).

8. With their considerable expansion along the last three decades, it became clear to the contending parties that they were to abstain from any action which might aggravate the dispute *pendente lite*, or may have a prejudicial effect on the compliance with the subsequent judgment as to the merits. Their *rationale* stood out clearer, turning to the protection of rights, of the equality of arms (*égalité des armes*), and not only of the legal process itself. They

> "have freed themselves from the juridical formalism of the procedural doctrine of over a century ago, and have, in my perception, come closer to reaching their plenitude. They have become endowed with a character, more than precautionary, truly *tutelary*. When their basic requisites,—of gravity and urgency, and the needed prevention of irreparable harm,—are met, they have been ordered, in the light of the needs of protection, and have thus conformed a *true jurisdictional guarantee of a preventive character*" (para. 10).

9. An international tribunal such as the ICJ has the inherent power or *faculté* to determine the *scope* of the provisional measures that it decides to order, and this comes to reinforce the preventive dimension, proper of those measures (paras. 11, 36 and 62). Such inherent power is exercised in order to secure the sound administration of justice (*la bonne administration de la justice*) (paras. 12 and 63). The autonomous legal regime of provisional measures encompasses, in Judge Cançado Trindade's conception (also explained in his own previous Dissenting and Separate opinions in the ICJ—paras. 14–16 and 21–23), their juridical nature, the rights and obligations at issue, their legal effects, and the duty of compliance with them (para. 13).

10. Provisional measures have expanded, and have in practice enlarged the scope of protection (part IV—paras. 17–18). To Judge Cançado Trindade, it is "not casual" that they came to be conceived as precautionary measures (*mesures provisoires / medidas cautelares*), prevention and precaution underlying them all. And he adds:

> "Precaution, in effect, takes prevention further, in face of the uncertainty of risks, so as to avoid irreparable damages. And here, again, in the domain of Provisional Measures of Protection, the relationship between international law and time becomes manifest. The inter-temporal dimension is here ineluctable, overcoming the constraints of legal positivism. International law endeavours to be *anticipatory* in the regulation of social facts, so as to avoid irreparable harm; Provisional Measures of Protection expand the

protection they pursue, as a true international *jurisdictional guarantee* of a preventive character" (para. 19).

11. Judge Cançado Trindade then turns to the breach of Provisional Measures of Protection, which he regards as an *autonomous* breach, engaging State responsibility by itself (part V), and *additional* to the breach which comes, or may come, later to be determined as to the merits of the case at issue (para. 24). Accordingly, the breach of a provisional measure can, in his understanding, be promptly determined, with its legal consequences, without any need to wait for the conclusion of the proceedings as to the merits (para. 25).

12. Judge Cançado Trindade then reviews the ICJ case-law on the determination of breaches of obligations under Provisional Measures of Protection (part VI), when the Court has done so at the end of the proceedings as to the merits of the corresponding cases, namely, besides the present Judgment, the previous Judgments of the ICJ as to the merits in the three cases of *LaGrand* (2001), of *Armed Activities on the Territory of the Congo* (2005), and of the *Bosnian Genocide* (2007). In the earlier case of the *Hostages in Tehran* (United States *versus* Iran, Judgment of 24 May 1980), the ICJ did not expressly assert that the Order of Provisional Measures of 15 December 1979 had been breached.

13. It found such breach (of its Order of Provisional Measures of 03 March 1999) in the *LaGrand* case (Germany *versus* United States, Judgment of 27 June 2001), but without drawing any consequences from the conduct in breach of its provisional measures. Four years later, in its Judgment of 19 December 2005 in the case concerning *Armed Activities on the Territory of the Congo* (Democratic Republic of Congo *versus* Uganda), the ICJ, turning to its Order of Provisional Measures (of 01 July 2000) adopted half a decade earlier,—concerning breaches of International Human Rights Law and International Humanitarian Law,—found that the respondent State had not complied with it, and reiterated its finding in resolutory point n. 7 of the *dispositif*.

14. Another case of determination by the ICJ of a breach of its Orders of Provisional Measures of Protection was that of the *Application of the Convention against Genocide* (Bosnia and Herzegovina *versus* Serbia and Montenegro): the Court held so in its Judgment of 26 February 2007, while the Orders of Provisional Measures had been adopted 14 years earlier, on 08 April 1993 and 13 September 1993, aiming at ceasing the atrocities that were already being perpetrated. Two years after the first Order (of 08 April 1993), the U.N. safe-area of Srebrenica collapsed, and the mass-killings of July 1995 in Srebrenica occurred, in a flagrant breach of the provisional measures ordered by the ICJ (paras. 30–31).

15. In the meantime, the proceedings in the case before the ICJ prolonged in time: as to preliminary objections until 1996; as to counter-claims until 1997, and again until 2001; and as to the merits until 2007. The manifest breaches of the ICJ's Orders of Provisional Measures of Protection of 1993 passed for a long time without determination, and without any legal consequences. It took 14 years for the Court to determine, in its Judgment on the merits (2007), the breach of its Provisional Measures of Protection in the *cas d'espèce*. In Judge Cançado Trindade's understanding,

> "there was no need to wait such a long time to determine the breach of such measures; on the contrary, they should have been promptly determined by the ICJ, with all its legal consequences. This tragic case shows that we are still in the infancy of the development of the legal regime of provisional measures of protection in contemporary international law. A proper understanding of the *autonomous legal regime* of those measures may foster their development at conceptual level" (para. 33).

16. In his following reflections as a plea for the prompt determination of breaches of Provisional Measures of Protection (part VII), Judge Cançado Trindade ponders at first that, in the *cas d'espèce* (*Certain Activities* case), the breaches of provisional measures have been determined by the Court within a reasonably short lapse of time,—unlike in the case of *Armed Activities on the Territory of the Congo* (half a decade later) and in the *Bosnian Genocide* case (almost one and a half decade later). In the *cas d'espèce*, the damages caused by the breaches of provisional measures have not been irreparable,—unlike in the *LaGrand* case,—and "with their determination by the Court in the present Judgment their effects can be made to cease" (para. 34).

17. In effect, in his understanding, "the determination of a breach of a provisional measure of protection is not—should not be—conditioned by the completion of subsequent proceedings as to the merits of the case at issue" (para. 35). The legal effects of a breach of a provisional measure of protection should, in his view, "be promptly determined, with all its legal consequences. In this way, its anticipatory rationale would be better served". In his view, "there is no room for raising here alleged difficulties as to evidence", as for the ordering of provisional measures of protection, and the determination of non-compliance with them, "it suffices to rely on *prima facie* evidence (*commencement de preuve*)" (para. 35).

18. Furthermore, the rights that one seeks to protect under provisional measures "are not necessarily the same as those vindicated on the merits", as shown in the case of the *Temple of Préah Vihéar*. Likewise, "the obligations (of prevention) are new or additional ones, in relation to those ensuing from the judgment on the merits" (para. 36). The fact that, in its practice, the ICJ has only indicated provisional measures *at the request* of a State party, in his view "does not mean that it cannot order such measures *sponte sua*, *ex officio*" (para. 37). The ICJ Statute endows the Court with the power to do so, if it considers that circumstances so require (Article 41 (1)).

19. And the Rules of Court provide that, irrespective of a request by a party, the Court may indicate provisional measures that, in its view, "are in whole or in part other than those requested" (Article 75 (2)). This happened in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria* (Order of 15 March 1996), and the case concerning *Armed Activities on the Territory of the Congo* (Democratic Republic of Congo *versus* Uganda, Order of 01 July 2000). Judge Cançado Trindade adds that

> "The Court, thus, is not conditioned by what a party, or the parties, request(s), nor—in my view—even by the existence of the request itself. Here, in the realm of Provisional Measures of Protection, once again the constraints of voluntarist legal positivism are, in my view, overcome. The

Court is not limited to what the contending parties want (in the terms they express their wish), or so request. The Court is not an arbitral tribunal, it stands above the will of the contending parties. This is an important point that I have been making on successive occasions within the ICJ, in its work of international adjudication" (para 39).

20. He next points out that there have, in effect, lately been cases lodged with the Court, where it has been called upon "to reason beyond the inter-State dimension, not being limited by the contentions or interests of the litigating States", as pointed out in his Separate opinion (paras. 227–228) in the case of *A.S. Diallo* (Guinea *versus* Democratic Republic of Congo, Judgment (merits) of 30 November 2010), and in his Dissenting Opinion in the case of *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium *versus* Senegal, Order (provisional measures) of 28 May 2009), as well as in his Dissenting Opinion in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (CERD—Georgia *versus* Russian Federation, Judgment (preliminary objections) of 01 April 2011) (paras. 40–41). Judge Cançado Trindade then warns that the Court

> "is not an arbitral tribunal, it stands above the will of the contending parties. It is not conditioned by requests or professed intentions of the contending parties. It has an inherent power or *faculté* to proceed promptly to the determination of a breach of provisional measures, in the interests of the sound administration of justice. And *recta ratio* guides the sound administration of justice (*la bonne administration de la justice*). *Recta ratio* stands above the will. It guides international adjudication and secures its contribution to the rule of law (*prééminence du droit*) at international level.
>
> The Court is entirely free to order the provisional measures that it considers necessary, so as to prevent the aggravation of the dispute or the occurrence of irreparable harm, even if the measures it decides to order are quite different from those requested by the contending parties" (paras. 42–43).

21. Judge Cançado Trindade then concludes, on this particular issue, that the ICJ may, after examining the circumstances of the *cas d'espèce*, proceed to order, *sponte sua*, provisional measures of protection. It may do so *motu proprio*, thus avoiding the aggravation of a situation. This determination *ex officio* of the occurrence of a breach of an Order of Provisional Measures of Protection is keeping in mind the preventive dimension in contemporary international law, thus avoiding further irreparable harm. In his understanding, "the Court does not have to wait until the completion of the proceedings as to the merits, especially if such proceedings are unreasonably prolonged, as, e.g., in the case of the *Bosnian Genocide*" (para. 44).

22. Judge Cançado Trindade then turns to the issue of the supervision of *compliance* with Provisional Measures of Protection (part VIII). The fact that the ICJ has, so far, very seldom proceeded to the determination of a breach of provisional measures in the subsequent proceedings as to the merits of the respective cases, in his view does not mean that it cannot do so promptly, by means of another Order of Provisional Measures. The Court,—he proceeds,—has monitoring powers as to compliance with provisional measures. If any unforeseeable circumstance may arise, the ICJ is "endowed with inherent powers or *facultés* to take the decision that ensures compliance with the provisional measures it has ordered, and thus the safeguard of the rights at stake" (para. 45). This enhances the preventive dimension of provisional measures, as well as the rule of law (*prééminence du droit*) at international level (para. 46).

23. The following point examined by Judge Cançado Trindade is that of the breach of provisional measures and reparation for damages (in its distinct forms) (part IX),—a point which has not passed unperceived in the present Judgment of the ICJ in the two joined cases of *Certain Activities* and of the *Construction of a Road*: the Court has addressed reparations in the two joined cases,—in particular its declaration (in the *Certain Activities* case) of a breach of provisional measures as an "adequate *satisfaction*" to the applicant, without the need to award costs. (In the joined case of *Construction of a Road*, its declaration of breach of the obligation to conduct an environmental impact assessment has likewise provided adequate *satisfaction* to the applicant).

24. The grant of this form of reparation (satisfaction) in the two joined cases is necessary and reassuring. Judge Cançado Trindade adds that, the fact that the ICJ did not establish a breach of provisional measures nor did it indicate new provisional measures *already* in its Order of 16 July 2013 (as it should, for the reasons explained in his Dissenting Opinion appended thereto), and only did so in its subsequent Order of 22 November 2013, gives weight to its decision not to award costs. After all,—he proceeds,—"the prolongation of the proceedings (as to provisional measures) was due to the hesitation of the Court itself. Accordingly, the relevant issue here is, thus, reparation (rather than costs of hearings) for breach of Provisional Measures of Protection" (para. 50).

25. In effect, "breach and duty of reparation come together"; as he pointed out in his Separate opinion in the *A.S. Diallo* case (*Guinea* v. *Democratic Republic of Congo*, reparations, Judgment of 19 June 2012), "the duty of reparation has deep historical roots, going back to the origins of the law of nations, and marking presence in the legacy of the 'founding fathers' of our discipline" (para. 51). The duty of reparation,—Judge Cançado Trindade adds,—is "widely acknowledged as one of general or customary international law", as "the prompt and indispensable complement of an international wrongful act, so as to cease all the consequences ensuing therefrom, and to secure respect for the international legal order". Breach and duty of reparation "form an *indissoluble whole*" (para. 51). And he concludes, on this particular issue, that

> "The interrelationship between breach and duty of reparation marks presence also in the realm of the autonomous legal regime of Provisional Measures of Protection. A breach of a provisional measure promptly generates the duty to provide reparation for it. It is important, for provisional measures to achieve their plenitude (within their legal regime), to remain attentive to reparations—in their distinct forms—for their breach. Reparations (to a greater extent than costs) for the autonomous breach of Provisional Measures of Protection are a key element for the consolidation of the autonomous legal regime of Provisional Measures of Protection" (para. 52).

26. Judge Cançado Trindade then draws attention to due diligence, and the interrelatedness between the principle of prevention and the precautionary principle (part X). These are elements which marked presence in the Judgment the ICJ has just adopted, in the two joined cases of *Certain Activities Carried out by Nicaragua in the Border Area* and of the *Construction of a Road in Costa Rica along the San Juan River*, just as they did in an earlier Latin American case, that of the *Pulp Mills on the River Uruguay* (2010), opposing Argentina to Uruguay (paras. 53–54): "while the principle of prevention assumes that risks can be objectively assessed so as to avoid damage, the precautionary principle assesses risks in face of uncertainties, taking into account the vulnerability of human beings and the environment, and the possibility of irreversible harm" (para. 55).

27. He then ponders that, "[u]nlike the positivist belief in the certainties of scientific knowledge", the precautionary principle "is geared to the duty of *due diligence*, in face of scientific uncertainties; precaution is thus, nowadays, more than ever, needed". It is "not surprising that some environmental law Conventions give expression to both the principle of prevention and the precautionary principle, acknowledging the link between them, providing the foundation of the duty to conduct an environmental impact assessment",—as upheld by the ICJ in the joined case of the *Construction of a Road* (para. 56). In the present Judgment,—he continues,—the Court, addressing the requirement of due diligence in order to prevent significant transboundary environmental harm. It focused on the undertaking of an environmental impact assessment "in the wider realm of general international law" (para. 57).

28. Judge Cançado Trindade then endeavours to detect the path towards the progressive development of provisional measures of protection (part XI), which he regards as the main lesson to be learned from the adjudication of the *cas d'espèce*, the joined case of *Certain Activities*. The conformation of an *autonomous legal regime* of Provisional Measures of Protection, with all its elements and implications, is to be further developed. As he had already warned in his previous Dissenting Opinion in the ICJ's Order of 16 July 2013 in the present two joined cases of *Certain Activities* and of the *Construction of a Road*, wherein the Court decided not to indicate new provisional measures, nor to modify the provisional measures indicated in its previous Order of 08 March 2011, and he deems it fit here to reiterate:

> "My thesis, in sum, is that provisional measures, endowed with a conventional basis,—such as those of the ICJ (under Article 41 of the Statute),—are also endowed with autonomy, have a legal regime of their own, and non-compliance with them generates the responsibility of the State, entails legal consequences, without prejudice of the examination and resolution of the concrete cases as to the merits.
>
> (…) Provisional measures of protection generate obligations (of prevention) for the States concerned, which are distinct from the obligations which emanate from the Judgments of the Court as to the merits (and reparations) of the respective cases. This ensues from their autonomous legal regime, as I conceive it. There is, in my perception, pressing need nowadays to refine and to develop conceptually this autonomous legal regime (…).
>
> (…) [T]he matter before the Court calls for a more pro-active posture on its part, so as not only to settle the controversies filed with it, but also to tell what the Law is (*juris dictio*), and thus to contribute effectively to the avoidance or prevention of irreparable harm in situations of urgency, to the ultimate benefit of *all* subjects of international law,—States as well as groups of individuals, and *simples particuliers*. After all, the human person (living in harmony in her natural habitat) occupies a central place in the new *jus gentium* of our times" (*cit. in* para. 59).

29. Judge Cançado Trindade adds that the rights protected by Provisional Measures of Protection are not necessarily the same as those pertaining to the merits of the case at issue; and the obligations ensuing from Provisional Measures of Protection are distinct from, and additional to, the ones that may derive later from the Court's subsequent decision as to the merits (para. 61). In case of a breach of a provisional measure of protection, "the notion of victim of a harm emerges also in the framework of such provisional measures; irreparable damages can, by that breach, occur in the present context of prevention" (para. 61). This being so, the determination of such breach "does not need to wait for the conclusion of the proceedings as to the merits of the case at issue, particularly if such proceedings are unduly prolonged" (para. 63).

30. Furthermore, "the determination of their breach is not conditioned by the existence of a request to this effect by the State concerned"; the Court,—he concludes on the present point,—"is fully entitled to proceed promptly to the determination of their breach *sponte sua*, *ex officio*, in the interests of the sound administration of justice (*la bonne administration de la justice*)" (para. 64). The refinement of the autonomous legal regime of Provisional Measures of Protection (encompassing reparation in its distinct forms, and eventually costs) "can clarify further this domain of international law marked by prevention and the duty of due diligence, and can thus foster the progressive development of those measures in the contemporary law of nations, faithful to their preventive dimension, to the benefit of all the *justiciables*" (para. 66). In doing so, international case-law seems to be preceding legal doctrine (para. 66).

31. In the last part (XII) of his Separate opinion, in presenting a recapitulation of all his arguments, Judge Cançado Trindade ponders that Provisional Measures of Protection provide, as just seen, "a fertile ground for reflection at the juridico-epistemological level. Time and law are here ineluctably together, as in other domains of international law" (para. 67). Provisional measures underline the preventive dimension, "growing in clarity, in contemporary international law". Provisional measures "have undergone a significant evolution, but there remains a long way to go for them to reach their plenitude" (para. 67).

Separate opinion of Judge Donoghue

Judge Donoghue considers that States have an obligation under customary international law to exercise due diligence in preventing significant transboundary environmental harm. This obligation of due diligence follows from the synthesis of basic principles of the international legal order, in particular, sovereign equality and territorial sovereignty. The measures that a State of origin must take to meet this due

diligence obligation depend on the particular circumstances, and can include environmental impact assessment, notification of potentially affected States and consultation with such States. However, Judge Donoghue does not consider that the Court is in a position to prescribe specific rules of customary international law regarding these three topics. As to notification and consultation, she also has misgivings about the precise formulation adopted by the Court.

Separate opinion of Judge Bhandari

In his separate opinion Judge Bhandari recalls that he has voted with the majority in finding that Costa Rica has violated international law by failing to produce an Environmental Impact Assessment (EIA) in relation to its comprehensive road project along the San Juan River. However, he laments the lack of clear guidelines concerning the requirements of an EIA under international law, and proceeds to recommend certain minimum requirements that, in his view, must be satisfied when conducting an EIA. He begins his analysis with an overview of modern trends and various bedrock principles in contemporary international environmental law, including: the principle of sustainable development; the principle of preventive action; global commons; the precautionary principle; the polluter pays principle; and the concept of transboundary harm. He then discusses how the requirement to conduct an EIA arises from these principles. The opinion further notes that at present the régime of international environmental law relating to the performance of EIAs is scattered throughout a patchwork of different international instruments, and ultimately fails to lay down certain minimum procedural and substantive requirements. By reference to the Espoo Convention and other authorities, Judge Bhandari endeavours to distil certain basic obligations relating to the conduct of an EIA that, he believes, ought to be incorporated into the canon of international environmental law. Finally, Judge Bhandari urges nations to come together to conclude an international treaty governing the minimum requirements of EIAs. Absent the creation of such a *régime*, he suggests that nations may wish to follow the suggestions contained in his opinion as "best practices" to be applied by nation States in discharging their duty to conduct a transboundary EIA.

Separate opinion of Judge Robinson

Judge Robinson's separate opinion explains the reasons for which he voted against the Court's rejection in paragraph 229 (7) of the Judgment of all other submissions made by the Parties. Judge Robinson is of the view that the Court should have explicitly determined Costa Rica's claim that Nicaragua breached Article 2 (4) of the United Nations Charter, rather than deciding, as the Judgment states, not to "dwell any further" on this submission "given that the unlawful character of these activities has already been established".

Article 2 (4) of the United Nations Charter prohibiting the "threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations", is, in the Court's own words, "a cornerstone of the United Nations Charter". Given the foundational nature of the prohibition in the international legal order, as well as the role envisaged for the Court in upholding the Purposes of the United Nations Charter, the Court should play its part in strengthening respect for the prohibition on the use of force. In Judge Robinson's view, the Court should develop a practice of making an express and discrete finding on a claim that the prohibition of the use of force has been breached, unless it is of the opinion that the claim is patently unmeritorious or frivolous.

Judge Robinson interprets the "injury suffered by Costa Rica" discussed in paragraph 97, as incorporating *any potential* injury suffered by Costa Rica as a result of the breach of the use of force. He is unconvinced that it is possible to ensure that injury is remedied without an examination of the fact of and circumstances surrounding the potential breach. Judge Robinson is equally sceptical that, in the context of this case, reparation flowing from Nicaragua's breach of territorial sovereignty may remedy any injury suffered as a result of breach of the prohibition of the use of force. The Court did not examine any equivalence between the two norms, which, in Judge Robinson's view, serve distinct functions and reflect overlapping but not identical concerns.

The Court's jurisprudence establishes that a State's actions must reach a certain threshold before they qualify as an unlawful use of force. Assessing whether or not this threshold has been met requires an analysis of the gravity and the purpose of the allegedly unlawful measures. It is Judge Robinson's view that the evidence before the Court in this case shows that Nicaragua did breach the prohibition on the use of force.

Declaration of Judge Gevorgian

Judge Gevorgian explains in his declaration the reasons why he has voted against paragraph 1 of the *dispositif*, which provides that "Costa Rica has sovereignty over the 'disputed territory'". In his view, this finding of the Court—made in response to a claim brought by Costa Rica only when presenting its final submissions in the *Certain Activities* case—was not required in the circumstances of the case.

Judge Gevorgian shares the Court's refusal to delimit the course of the boundary in the "disputed territory" defined by the Court in its Orders for provisional measures rendered on 8 March 2011 and 22 November 2013. However, he finds problematic that the Court declares Costa Rica's sovereignty over an area whose limits are far from being clear. In Judge Gevorgian's opinion, the Court should have avoided such a finding for two main reasons.

First, the Parties did not address the issue of the precise location of the mouth of the river or of the boundary at the coast, as the majority rightly indicates in paragraph 70 of the Judgment. Therefore, Judge Gevorgian considers that the Court was not in a position to fully address Costa Rica's final submission.

Second, the geography of the disputed area—in which important geomorphological alterations have occurred in the last century—is highly unstable. Thus, according to Judge Gevorgian, the Court's conclusion on sovereignty over the disputed territory may become the source of future disagreement between the Parties.

Declaration of Judge *ad hoc* Guillaume

Judge *ad hoc* Guillaume agrees with a number of the findings reached by the Court. He has, however, expressed his disagreement on a point in the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)*. He notes that this case originally related solely to those activities, and that all Costa Rica was seeking was judgment against Nicaragua for having violated its sovereignty over the northern part of *Isla Portillos*. It was only at the close of the oral proceedings that, for the first time, Costa Rica asked the Court to find that it had sovereignty over the disputed territory. The Court has so decided, while failing to determine in full the limits of that territory.

Judge *ad hoc* Guillaume recalls that, according to the Court's jurisprudence, the subject-matter of a dispute is defined by the claims submitted in the application, as is provided in Article 40 of the Statute. Additional claims are admissible only if they fall within the scope of that subject-matter. The sole exception to that rule is if the new claims were implicit in the application, or arose directly out of the question which was the subject-matter of the application (*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 656, citing *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 267).

Judge *ad hoc* Guillaume points out that Costa Rica's new claims have transformed a case concerning State responsibility into a territorial dispute. He takes the view that this is not possible, and accordingly concludes that the new claims were out of time and therefore inadmissible. For this reason, he voted against point 1 of the operative clause.

Judge *ad hoc* Guillaume has also clarified his thinking on a number of other points. As regards freedom of navigation on the San Juan River, he observes that Costa Rica cited five incidents which had allegedly infringed that freedom. Judge *ad hoc* Guillaume notes that the Court accepted only two of these as proven. He believes that two incidents over a period of several years, regrettable though they may be, cannot be regarded as indicative of Nicaragua's overall conduct.

In the second case, that concerning the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)*, Judge *ad hoc* Guillaume notes that this road was not only constructed without a prior environmental impact assessment, but had caused real harm to Nicaragua. However, Judge *ad hoc* Guillaume notes that Nicaragua failed to show that such harm was "significant". Since this jurisprudential threshold had not been reached, Judge *ad hoc* Guillaume finds that Costa Rica's responsibility has not been engaged.

Separate opinion of Judge *ad hoc* Dugard

The obligation to conduct an environmental impact assessment in respect of an activity that poses a risk of significant transboundary harm featured prominently in both *Certain Activities* and *Construction of a Road*. The Court chose to describe this obligation as one of "general international law", but a scrutiny of this term suggests that it is almost synonymous with "customary international law". The obligation to conduct an environmental impact assessment is an obligation independent from the duty of due diligence, which is the standard of conduct required of a State when carrying out such an assessment. Although it has been suggested that the environmental impact assessment obligation has no content, an analysis of the Court's decision established the presence of certain rules inherent in such an obligation.

The Court, relying on the principles it had expounded in respect of the content of the environmental impact assessment obligation, rightly found that Costa Rica had breached its obligation to conduct an environmental impact assessment by failing to conduct such an assessment when it embarked on the construction of a road along the San Juan River. The circumstances showed clearly that the road posed a risk of significant harm to Nicaragua's environment.

The Court's handling of the complaint of Costa Rica that Nicaragua had failed to conduct an adequate environmental impact assessment when it planned its programme to improve the navigability of the San Juan River by dredging was less satisfactory. I therefore dissented on this issue.

Without examining the factual situation pertaining to Nicaragua's dredging programme when it was planned in 2006 and the risk it posed to Costa Rica's wetland, the Court tersely declared that the reports submitted to the Court and the testimony of witnesses called by both Parties led it to conclude that Nicaragua's dredging programme planned in 2006 was not such as to give rise to a risk of significant transboundary harm. A close examination of the most relevant reports and the testimony of witnesses led me to conclude that they did not substantiate the Court's factual finding. In my opinion the evidence showed that the dredging of the San Juan posed a risk to Costa Rica's wetland protected by the Ramsar Convention. The evidence of one of Nicaragua's own witnesses that the fact that an activity that took place in the vicinity of a wetland protected by the Ramsar Convention was sufficient reason alone to require an environmental impact assessment was particularly compelling and seems to have been ignored by the Court. A further objection to the Court's handling of this issue is that it failed to apply the principles that it had followed in dealing with Nicaragua's complaint against Costa Rica's building of the road. There was a clear contradiction between the reasoning it applied in the two cases. Finally, an analysis of the provisions of the Ramsar Convention suggested that Nicaragua was obliged to conduct an environmental impact assessment in this case.

Undoubtedly the road Costa Rica built along the San Juan River posed a greater risk of environmental harm to the river than did Nicaragua's dredging programme to Costa Rica's wetland. This was, however, no justification for the faulty fact-finding and contradictory reasoning of the Court.

214. QUESTION OF THE DELIMITATION OF THE CONTINENTAL SHELF BETWEEN NICARAGUA AND COLOMBIA BEYOND 200 NAUTICAL MILES FROM THE NICARAGUAN COAST (NICARAGUA *v.* COLOMBIA) [PRELIMINARY OBJECTIONS]

Judgment of 17 March 2016

On 17 March 2016, the International Court of Justice delivered its Judgment regarding the preliminary objections raised by the Republic of Colombia in the case concerning the *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua* v. *Colombia)*.

The Court was composed as follows: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian; Judges *ad hoc* Brower, Skotnikov; Registrar Couvreur.

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The operative paragraph of the Judgment (para. 126) reads as follows:

"…

The Court,

(1) *(a)* Unanimously,

Rejects the first preliminary objection raised by the Republic of Colombia;

(b) By eight votes to eight, by the President's casting vote,

Rejects the third preliminary objection raised by the Republic of Colombia;

In favour: President Abraham; Judges Owada, Tomka, Bennouna, Greenwood, Sebutinde, Gevorgian; Judge *ad hoc* Skotnikov;

Against: Vice-President Yusuf; Judges Cançado Trindade, Xue, Donoghue, Gaja, Bhandari, Robinson; Judge *ad hoc* Brower;

(c) Unanimously,

Rejects the fourth preliminary objection raised by the Republic of Colombia;

(d) Unanimously,

Finds that there is no ground to rule upon the second preliminary objection raised by the Republic of Colombia;

(e) By eleven votes to five,

Rejects the fifth preliminary objection raised by the Republic of Colombia in so far as it concerns the First Request put forward by Nicaragua in its Application;

In favour: President Abraham; Judges Owada, Tomka, Bennouna, Greenwood, Donoghue, Gaja, Sebutinde, Gevorgian; Judges *ad hoc* Brower, Skotnikov;

Against: Vice-President Yusuf; Judges Cançado Trindade, Xue, Bhandari, Robinson;

(f) Unanimously,

Upholds the fifth preliminary objection raised by the Republic of Colombia in so far as it concerns the Second Request put forward by Nicaragua in its Application;

(2) *(a)* Unanimously,

Finds that it has jurisdiction, on the basis of Article XXXI of the Pact of Bogotá, to entertain the First Request put forward by the Republic of Nicaragua;

(b) By eight votes to eight, by the President's casting vote,

Finds that the First Request put forward by the Republic of Nicaragua in its Application is admissible.

In favour: President Abraham; Judges Owada, Tomka, Bennouna, Greenwood, Sebutinde, Gevorgian; Judge *ad hoc* Skotnikov;

Against: Vice-President Yusuf; Judges Cançado Trindade, Xue, Donoghue, Gaja, Bhandari, Robinson; Judge *ad hoc* Brower."

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Vice-President Yusuf, Judges Cançado Trindade, Xue, Gaja, Bhandari, Robinson and Judge *ad hoc* Brower appended a joint dissenting opinion to the Judgment of the Court; Judges Owada and Greenwood appended separate opinions to the Judgment of the Court; Judge Donoghue appended a dissenting opinion to the Judgment of the Court; Judges Gaja, Bhandari, Robinson and Judge *ad hoc* Brower appended declarations to the Judgment of the Court.

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I. Introduction

The Court recalls that in the present proceedings, Nicaragua seeks to found the Court's jurisdiction on Article XXXI of the Pact of Bogotá. According to this provision, the parties to the Pact recognize the Court's jurisdiction as compulsory in "all disputes of a juridical nature". In addition, Nicaragua maintains that the subject-matter of its Application remains within the jurisdiction of the Court, as established in the case concerning the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, since, in its 2012 Judgment (*I.C.J. Reports 2012 (II)*, p. 624) (hereinafter the "2012 Judgment"), the Court did not definitively determine the question—of which it had been seised—of the delimitation of the continental shelf between Nicaragua and Colombia in the area beyond 200 nautical miles of the Nicaraguan coast.

The Court notes that Colombia has raised five preliminary objections to the jurisdiction of the Court. Nicaragua requested the Court to reject Colombia's preliminary objections in their entirety.

Since Colombia's second preliminary objection is concerned exclusively with the additional basis for jurisdiction suggested by Nicaragua, the Court will address it after it has considered the first, third and fourth objections. The fifth preliminary objection, which concerns the admissibility of Nicaragua's claims, will be considered last.

II. First preliminary objection

In its first preliminary objection, Colombia claims that the Court lacks jurisdiction *ratione temporis* under the Pact of Bogotá, because the proceedings were instituted by Nicaragua on 16 September 2013, after Colombia's notice of denunciation of the Pact on 27 November 2012.

The Court recalls that Colombia stated in its notification that its denunciation of the Pact of Bogotá "takes effect as of today with regard to procedures that are initiated after the present notice, in conformity with [the] second paragraph of Article LVI". Under that provision, the denunciation would have no effect with respect to pending procedures initiated prior to the transmission of the notification. The Court notes that Nicaragua's Application was submitted to it after the transmission of Colombia's notification of denunciation, but before the expiry of the one-year period referred to in the first paragraph of Article LVI, according to which, at the end of that period, the Pact would cease to be in force in respect of the party denouncing it, and would continue in force for the remaining signatories.

Colombia contends that the natural implication of the express provision in the second paragraph of Article LVI of the Pact is that denunciation is effective with regard to procedures initiated after transmission of the notification of denunciation. It refutes the suggestion that its interpretation of the second paragraph of Article LVI would deny *effet utile* to the first paragraph of that provision. Even though Colombia accepts that its interpretation would mean that none of the different procedures provided for in Chapters Two to Five of the Pact could be initiated by, or against, a State which had given notification of denunciation during the year that the treaty remained in force, in accordance with the first paragraph of Article LVI, it maintains that important substantive obligations contained in the other Chapters of the Pact would nevertheless remain in force during the one-year period, so that the first paragraph of Article LVI would have a clear effect. Colombia argues that its interpretation of Article LVI is confirmed by the fact that if the parties to the Pact had wanted to provide that denunciation would not affect any procedures initiated during the one-year period of notice, they could easily have said so expressly, namely by adopting a wording similar to provisions in other treaties. Finally, Colombia maintains that its interpretation is "also consistent with the State practice of the parties to the Pact" and the *travaux préparatoires*.

Nicaragua contends that the jurisdiction of the Court is determined by Article XXXI of the Pact of Bogotá, according to which Colombia and Nicaragua had each recognized the jurisdiction of the Court "so long as the present Treaty is in force". How long the treaty remains in force is determined by the first paragraph of Article LVI, which provides that the Pact remains in force for a State which has given notification of denunciation for one year from the date of that notification. Since the date on which the jurisdiction of the Court has to be established is that on which the Application is filed, and since Nicaragua's Application was filed less than one year after Colombia gave notification of its denunciation of the Pact, it follows—in Nicaragua's view—that the Court has jurisdiction in the present case. Nicaragua further contends that the Colombian interpretation would remove from the effect of the first paragraph of Article LVI all of the procedures for good offices and mediation (Chapter Two of the Pact), investigation and conciliation (Chapter Three), judicial settlement (Chapter Four) and arbitration (Chapter Five), which together comprise forty-one of the sixty Articles of the Pact. Of the remaining provisions, several are provisions which have entirely served their purpose and would fulfil no function during the one-year period of notice, while others are inextricably linked to the procedures in Chapters Two to Five and impose no obligations independent of those procedures. Finally, Nicaragua denies that the practice of the parties to the Pact of Bogotá or the *travaux préparatoires* support Colombia's interpretation.

The Court recalls that the date at which its jurisdiction has to be established is the date on which the application is filed with the Court. By Article XXXI, the parties to the Pact of Bogotá recognize as compulsory the jurisdiction of the Court, "so long as the present Treaty is in force". The first paragraph of Article LVI provides that, following the denunciation of the Pact by a State party, the Pact shall remain in force between the denouncing State and the other parties for a period of one year following the notification of denunciation. In the Court's view, it is not disputed that, if these provisions stood alone, they would be sufficient to confer jurisdiction in the present case. The Pact was still in force between Colombia and Nicaragua on the date that the Application was filed and the fact that the Pact subsequently ceased to be in force between them would not affect that jurisdiction. The only question raised by Colombia's first preliminary objection, therefore, is whether an *a contrario* interpretation can be applied to the second paragraph of Article LVI, which states that "[t]he denunciation shall have no effect with respect to pending procedures initiated prior to the transmission of the particular notification", so altering what would otherwise have been the effect of the first paragraph as to require the conclusion that the Court lacks jurisdiction in respect of the proceedings, notwithstanding that those proceedings were instituted while the Pact was still in force between Nicaragua and Colombia. That question has to be answered by the application to the relevant provisions of the Pact of Bogotá of the rules on treaty interpretation enshrined in Articles 31 to 33 of the Vienna Convention, which reflect rules of customary international law.

The Court observes that it is not the denunciation *per se* that is capable of having an effect upon the jurisdiction of the Court under Article XXXI of the Pact, but the termination of the treaty (as between the denouncing State and the other parties) which results from the denunciation. That follows both from the terms of Article XXXI and from the ordinary meaning of the words used in Article LVI. The first paragraph of Article LVI provides that the treaty may be terminated by denunciation, but that termination will occur only after a

period of one year from the notification of denunciation. It is, therefore, this first paragraph which determines the effects of denunciation. The second paragraph of Article LVI confirms that procedures instituted before the transmission of the notification of denunciation can continue irrespective of the denunciation and thus that their continuation is ensured irrespective of the provisions of the first paragraph on the effects of denunciation as a whole.

The Court considers that Colombia's interpretation of the second paragraph of Article LVI runs counter to the language of Article XXXI. In the Court's view, a different interpretation, which is compatible with the language of Article XXXI, is that, whereas proceedings instituted before transmission of notification of denunciation can continue in any event and are thus not subject to the first paragraph of Article LVI, the effect of denunciation on proceedings instituted after that date is governed by the first paragraph. Since the first paragraph provides that denunciation terminates the treaty for the denouncing State only after a period of one year has elapsed, proceedings instituted during that year are instituted while the Pact is still in force. They are thus within the scope of the jurisdiction conferred by Article XXXI. The Court adds that the result of Colombia's proposed interpretation of the second paragraph of Article LVI would be that, during the year following notification of denunciation, most of the Articles of the Pact, containing its most important provisions, would not apply between the denouncing State and the other parties. Such a result is difficult to reconcile with the express terms of the first paragraph of Article LVI, which provides that "the present Treaty" shall remain in force during the one-year period without distinguishing between different parts of the Pact as Colombia seeks to do. The Court notes, moreover, that Colombia's interpretation is inconsistent with the object and purpose of the Pact of Bogotá, which is to further the peaceful settlement of disputes through the procedures provided for in the Pact. Although Colombia argues that the reference to "regional … procedures" in the first paragraph of Article II is not confined to the procedures set out in the Pact, Article II has to be interpreted as a whole. It is clear from the use of the word "consequently" at the beginning of the second paragraph of Article II that the obligation to resort to regional procedures, which the parties "recognize" in the first paragraph, is to be given effect by employing the procedures laid down in Chapters Two to Five of the Pact.

Finally, the Court is not persuaded by Colombia's argument that, had the parties to the Pact of Bogotá wished to provide that proceedings instituted at any time before the expiry of the one-year period stipulated by the first paragraph of Article LVI would be unaffected, they could easily have made express provision to that effect. Colombia's argument regarding the State practice in the form of the denunciation of the Pact by El Salvador in 1973 and Colombia itself in 2012, together with what Colombia describes as the absence of any reaction to the notification of those denunciations, sheds no light on the question before the Court. As regards the *travaux préparatoires*, they give no indication as to the precise purpose behind the addition of what became the second paragraph of Article LVI.

For all of the foregoing reasons the Court considers that Colombia's interpretation of Article LVI cannot be accepted. Taking Article LVI as a whole, and in light of its context and the object and purpose of the Pact, it concludes that Article XXXI conferring jurisdiction upon the Court remained in force between the Parties on the date that the Application in the present case was filed. The subsequent termination of the Pact as between Nicaragua and Colombia does not affect the jurisdiction which existed on the date that the proceedings were instituted. Colombia's first preliminary objection must therefore be rejected.

III. Third preliminary objection

Colombia contends in its third objection that the issues raised in Nicaragua's Application of 16 September 2013 were "explicitly decided" by the Court in its 2012 Judgment; the Court therefore lacks jurisdiction because Nicaragua's claim is barred by the principle of *res judicata*.

The Court first observes that Colombia's third preliminary objection has the characteristics of an objection to admissibility, which "consists in the contention that there exists a legal reason, even when there is jurisdiction, why the Court should decline to hear the case, or more usually, a specific claim therein". It will therefore deal with this objection as such.

The Court then examines the *res judicata* principle and its application to subparagraph 3 of the operative clause of the 2012 Judgment, in which the Court found "that it cannot uphold the Republic of Nicaragua's claim contained in its final submission I (3)". In its final submission I (3), Nicaragua requested the Court to adjudge and declare that:

> "[t]he appropriate form of delimitation, within the geographical and legal framework constituted by the mainland coasts of Nicaragua and Colombia, is a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties".

The Court described this submission as a request "to define 'a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties'".

Colombia considers that Nicaragua's First Request, in its Application of 16 September 2013 instituting the present proceedings, "is no more than a reincarnation of Nicaragua's claim contained in its final submission I (3)" of 2012, in so far as it asks the Court to declare "[t]he precise course of the maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them beyond the boundaries determined by the Court in its Judgment of 19 November 2012". It adds that the Court, in its 2012 Judgment, decided that the claim by Nicaragua contained in final submission I (3) was admissible, but it did not uphold it on the merits. That fact is said to prevent the Court, by virtue of *res judicata*, from entertaining it in the present case.

Colombia argues that the fate of the Second Request contained in the Application of 16 September 2013 is entirely linked to that of the first. In its Second Request, Nicaragua asks the Court to adjudge and declare

"[t]he principles and rules of international law that determine the rights and duties of the two States in relation to the area of overlapping continental shelf claims and the use of its resources, pending the delimitation of the maritime boundary between them beyond 200 nautical miles from Nicaragua's coast".

The Court notes that the question as to the effect of the *res judicata* principle relates to the admissibility of Nicaragua's First Request. The Second Request forms the subject, as such, of the fifth objection by Colombia, so the Court will examine it under that heading. It holds that even if their views converge on the elements that constitute the principle of *res judicata*, the Parties disagree on the meaning of the decision adopted by the Court in subparagraph 3 of the operative clause of its 2012 Judgment, and hence on what falls within the scope of *res judicata* in that decision.

1. The res judicata *principle*

The Parties agree that the principle of *res judicata* requires an identity between the parties (*personae*), the object (*petitum*) and the legal ground (*causa petendi*). They likewise accept that this principle is reflected in Articles 59 and 60 of the Statute of the Court.

For Colombia, there must be an identity between the parties, the object and the legal ground in order for the principle of *res judicata* to apply. Colombia adds that it is not possible for the Court, having found in the operative clause of the 2012 Judgment, which possesses the force of *res judicata*, that it "cannot uphold" Nicaragua's claim for lack of evidence, then to decide in a subsequent judgment to uphold an identical claim.

Nicaragua considers that an identity between the *personae*, the *petitum* and the *causa petendi*, though necessary for the application of the *res judicata* principle, is not sufficient. It is also necessary that the question raised in a subsequent case should previously have been disposed of by the Court finally and definitively. Consequently, Nicaragua considers that, in order to determine whether the 2012 Judgment has the force of *res judicata* in respect of its First Request in the present case, the central question is whether the Court, in that Judgment, made a decision on the delimitation of the continental shelf beyond 200 nautical miles from the Nicaraguan coast.

The Court recalls that the principle of *res judicata* is a general principle of law which establishes the finality of the decision adopted in a particular case. It is not sufficient, for the application of *res judicata*, to identify the case at issue, characterized by the same parties, object and legal ground; it is also necessary to ascertain the content of the decision, the finality of which is to be guaranteed. The Court cannot be satisfied merely by an identity between requests successively submitted to it by the same Parties; it must determine whether and to what extent the first claim has already been definitively settled. It notes that the decision of the Court is contained in the operative clause of the judgment. However, in order to ascertain what is covered by *res judicata*, it may be necessary to determine the meaning of the operative clause by reference to the reasoning set out in the judgment in question. The Court is faced with such a situation in the present case, since the Parties disagree as to the content and scope of the decision that was adopted in subparagraph 3 of the operative clause of the 2012 Judgment.

2. The decision adopted by the Court in its Judgment of 19 November 2012

The Parties have presented divergent readings of the decision adopted in subparagraph 3 of the operative clause of the 2012 Judgment, and of the reasons underpinning it. They draw opposing conclusions as to precisely what that decision covers and which issues the Court has definitively settled.

Colombia attempts to show, in essence, that the grounds of Nicaragua's First Request had already been put forward in the case concerning the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*. It further argues that, since the Court did not uphold the arguments made by Nicaragua in its 2012 Judgment, it is barred by the effect of the *res judicata* principle from dealing with Nicaragua's Application in the present case.

Colombia contends that, in the written and oral proceedings which preceded the 2012 Judgment, Nicaragua developed arguments identical to those that it puts forward in the present case. Relying on the Preliminary Information provided by it to the Commission on the Limits of the Continental Shelf (hereinafter the "CLCS"), it had claimed an extended continental shelf on the basis of Article 76 of the United Nations Convention on the Law of the Sea (hereinafter "UNCLOS") by virtue of geological and geomorphological criteria. In Colombia's view, Nicaragua had not demonstrated, as it was obliged to do, that its continental margin extended sufficiently far to overlap with the continental shelf that Colombia was entitled to claim up to 200 nautical miles from its mainland coast. It maintains that the Court, having found Nicaragua's claim to be admissible, settled it on the merits in 2012 by deciding not to uphold it. According to Colombia, that decision, whereby the Court effected a full delimitation of the maritime boundary between the Parties, was both expressly and by necessary implication a final one. Hence, when the Court held that it "[was] not in a position to delimit the continental shelf boundary between Nicaragua and Colombia" (paragraph 129 of the 2012 Judgment), what it meant was that its examination of the facts and arguments presented by Nicaragua impelled it to reject the latter's claim.

For its part, Nicaragua contends that the Court's decision, in subparagraph 3 of the operative clause of the 2012 Judgment, not to uphold its claim did not amount to a rejection of that claim on the merits. The Court expressly refused to rule on the issue because Nicaragua had not completed its submission to the CLCS. Nicaragua considers that, on 24 June 2013, it discharged the procedural obligation imposed upon it under Article 76, paragraph 8, of UNCLOS to provide the CLCS with information on the limits of its continental shelf beyond 200 nautical miles, and that the Court now has all the necessary information to carry out the delimitation and settle the dispute.

Nicaragua admits that the phrase "cannot uphold" might appear "ambiguous" from a reading of subparagraph 3 of the operative clause alone, but it contends that such ambiguity is dispelled if one looks at the reasoning of the decision.

Moreover, Nicaragua continues, the reasoning is inseparable from the operative clause, for which it provides the necessary underpinning, and must be taken into account in order to determine the scope of the operative clause of the Judgment. It follows from the reasoning of the Judgment that the operative clause takes no position on the delimitation beyond 200 nautical miles. Nicaragua is therefore of the view that the Court is not prevented, in the present case, from entertaining its claim relating to the delimitation of the continental shelf beyond 200 nautical miles.

The Court first notes that, although in its 2012 Judgment it declared Nicaragua's submission to be admissible, it did so only in response to the objection to admissibility raised by Colombia that this submission was new and changed the subject-matter of the dispute. However, it does not follow that the Court ruled on the merits of the claim relating to the delimitation of the continental shelf beyond 200 nautical miles from the Nicaraguan coast.

The Court takes the view that it must now examine the content and scope of subparagraph 3 of the operative clause of the 2012 Judgment. As a result of the disagreement between the Parties on the matter, the Court must determine the content of the decision adopted by it in response to Nicaragua's request for delimitation of "a continental shelf boundary dividing … the overlapping entitlements … of both Parties".

The Court begins by saying that it will not linger over the meaning of the phrase "cannot uphold", taken in isolation, in the way the Parties have done. It will examine this phrase in its context, in order to determine the meaning of the decision not to uphold Nicaragua's request for the Court to delimit the continental shelf between the Parties. In particular, the Court will determine whether subparagraph 3 of the operative clause of its 2012 Judgment must be understood as a straightforward dismissal of Nicaragua's request for lack of evidence, as Colombia claims, or a refusal to rule on the request because a procedural and institutional requirement had not been fulfilled, as Nicaragua argues. In order to do this, the Court will examine subparagraph 3 of the operative clause of the 2012 Judgment in its context, namely by reference to the reasoning which underpins its adoption and accordingly serves to clarify its meaning.

The Court devoted section IV of its 2012 Judgment to the "[c]onsideration of Nicaragua's claim for delimitation of a continental shelf extending beyond 200 nautical miles". That section consists of paragraphs 113 to 131 of the Judgment.

Paragraph 113 defines the question examined by the Court as whether "it [the Court] is in a position to determine 'a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties'". In paragraphs 114 to 118, the Court then concludes that the law applicable in the case, which is between a State party to UNCLOS (Nicaragua) and a non-party State (Colombia), is customary international law relating to the definition of the continental shelf, as reflected in Article 76, paragraph 1, of that Convention. Paragraphs 119 to 121 summarize Nicaragua's arguments regarding the criteria for determining the existence of a continental shelf and the procedural conditions, laid down in Article 76, paragraph 8, of UNCLOS, for a State to be able to establish the outer limits of the continental shelf beyond 200 nautical miles and the steps which Nicaragua had taken to that end. Paragraphs 122 to 124 set out Colombia's arguments opposing Nicaragua's request for delimitation of the continental shelf. In paragraphs 126 and 127 respectively, the Court points out that the fact that Colombia is not a party to UNCLOS "does not relieve Nicaragua of its obligations under Article 76 of that Convention", and it observes that, at the time of the 2012 Judgment, Nicaragua had only submitted to the CLCS "Preliminary Information", which, by its own admission, "falls short of meeting the requirements" under paragraph 8 of Article 76 of UNCLOS.

At the close of this section of its reasoning, the Court reaches the following conclusion at paragraph 129:

> "However, since Nicaragua, in the present proceedings, has not established that it has a continental margin that extends far enough to overlap with Colombia's 200-nautical-mile entitlement to the continental shelf, measured from Colombia's mainland coast, the Court is not in a position to delimit the continental shelf boundary between Nicaragua and Colombia, as requested by Nicaragua, even using the general formulation proposed by it."

The Court considers that this paragraph must be read in the light of those preceding it in the reasoning of the 2012 Judgment. Three features of that reasoning stand out. First, although the Parties made extensive submissions regarding the geological and geomorphological evidence of an extension of the continental shelf beyond 200 nautical miles submitted by Nicaragua, the Judgment contains no analysis by the Court of that evidence. Secondly, the Court considered that, in view of the limited nature of the task before it, there was no need to consider whether the provisions of Article 76 of UNCLOS, which lay down the criteria which a State must meet if it is to establish continental shelf limits more than 200 nautical miles from its coast, reflected customary international law, which it had already determined was the applicable law in the case. The Court did not, therefore, consider it necessary to decide the substantive legal standards which Nicaragua had to meet if it was to prove *vis-à-vis* Colombia that it had an entitlement to a continental shelf beyond 200 nautical miles from its coast. Thirdly, what the Court did emphasize was the obligation on Nicaragua, as a party to UNCLOS, to submit information on the limits of the continental shelf it claims beyond 200 nautical miles, in accordance with Article 76, paragraph 8, of UNCLOS, to the CLCS. It is because, at the time of the 2012 Judgment, Nicaragua had not yet submitted such information that the Court concluded, in paragraph 129, that "Nicaragua, in the present proceedings, has not established that it has a continental margin that extends far enough to overlap with Colombia's 200-nautical-mile entitlement to the continental shelf, measured from Colombia's mainland coast".

The Court considers that its conclusions in paragraph 129 can only be understood in the light of those features of its reasoning. They indicate that the Court did not take a decision on whether or not Nicaragua had an entitlement to a continental shelf beyond 200 nautical miles from its coast. The Court there speaks only of a continental margin which overlaps with the 200-nautical-mile entitlement from the Colombian mainland.

The Judgment says nothing about the maritime areas located to the east of the line lying 200 nautical miles from the islands fringing the Nicaraguan coast, beyond which the Court did not continue its delimitation exercise, and to the west of the line lying 200 nautical miles from Colombia's mainland. Yet, the Court was, as regards these areas, faced with competing claims by the Parties concerning the continental shelf: Nicaragua, on the one hand, claimed an extended continental shelf in these areas, and Colombia, on the other, maintained that it had rights in the same areas generated by the islands over which it claimed sovereignty, and that the Court indeed declared to be under its sovereignty. It therefore follows that while the Court decided, in subparagraph 3 of the operative clause of the 2012 Judgment, that Nicaragua's claim could not be upheld, it did so because the latter had yet to discharge its obligation, under paragraph 8 of Article 76 of UNCLOS, to deposit with the CLCS the "final" information on the limits of its continental shelf beyond 200 nautical miles required by that provision and by Article 4 of Annex II of UNCLOS.

3. Application of the res judicata *principle in the case*

The Court has clarified the content and scope of subparagraph 3 of the operative clause of the 2012 Judgment, taking into account the differing views expressed by the Parties on the subject. It has found that delimitation of the continental shelf beyond 200 nautical miles from the Nicaraguan coast was conditional on the submission by Nicaragua of "final" information on the limits of its continental shelf beyond 200 nautical miles, provided for in paragraph 8 of Article 76 of UNCLOS, to the CLCS. The Court thus did not settle the question of delimitation in 2012 because it was not, at that time, in a position to do so. The Court recalls that, in its Application of 16 September 2013, Nicaragua states that on 24 June 2013 it provided the CLCS with "final" information. The Court accordingly considers that the condition imposed by it in its 2012 Judgment in order for it to be able to examine the claim of Nicaragua contained in final submission I (3) has been fulfilled in the present case. It concludes that it is not precluded by the *res judicata* principle from ruling on the Application submitted by Nicaragua on 16 September 2013. In light of the foregoing, the Court finds that Colombia's third preliminary objection must be rejected.

IV. Fourth preliminary objection

The Court observes that Colombia bases its fourth preliminary objection on the assertion that, in its 2012 Judgment, the Court rejected Nicaragua's request for delimitation of the continental shelf between the Parties beyond 200 nautical miles, and fixed the boundary between each Party's maritime spaces. According to Colombia, that decision was "final and without appeal" pursuant to Article 60 of the Statute, so that, through its Application of 16 September 2013, Nicaragua was seeking to "appeal" the previous Judgment, or to have it revised.

The Court is of the view that Nicaragua does not request it to revise the 2012 Judgment, nor does it frame its Application as an "appeal". Accordingly, the Court finds that the fourth preliminary objection is not founded.

V. Second preliminary objection

The Court notes that Colombia's second preliminary objection concerns Nicaragua's argument that, independent of the applicability of Article XXXI of the Pact of Bogotá between Colombia and Nicaragua, the Court possesses continuing jurisdiction over the subject-matter of the Application. According to Nicaragua, this continuing jurisdiction is based on the Court's jurisdiction in the case concerning the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, given that the Court, in its 2012 Judgment, did not definitively determine the question of the delimitation of the continental shelf between Nicaragua and Colombia in the area beyond 200 nautical miles from the Nicaraguan coast.

Colombia denies that any such continuing jurisdiction exists in the present case. In Colombia's view, unless the Court expressly reserves its jurisdiction, which it did not do in the 2012 Judgment, there is no basis on which the Court can exercise continuing jurisdiction once it has delivered its judgment on the merits. According to Colombia, the Statute provides only two procedures by which the Court can act, without an independent basis of jurisdiction, in respect of matters which have previously been the subject of a judgment of the Court in a case between the same parties: requests under Article 60 of the Statute for interpretation of the earlier judgment and requests under Article 61 for revision of the earlier judgment. Since the present case falls within neither Article 60, nor Article 61, Colombia contends that the Court lacks jurisdiction on the additional basis advanced by Nicaragua.

Nicaragua rejects Colombia's analysis. According to Nicaragua, the Court has an obligation to exercise to the full its jurisdiction in any case properly submitted to it. The Court declined, in its 2012 Judgment, to exercise its jurisdiction in respect of the part of Nicaragua's case that is the subject of the current proceedings for reasons which, according to Nicaragua, no longer appertain. Nicaragua maintains that the Court must now exercise the jurisdiction which it possessed at the time of the 2012 Judgment. Accordingly, Nicaragua argues that the Court possesses continuing jurisdiction over the issues raised by its present Application, irrespective of whether it expressly reserved that jurisdiction in its earlier judgment. Nicaragua maintains that this basis of jurisdiction is additional to the jurisdiction conferred by Article XXXI of the Pact of Bogotá.

The Court recalls that it has already held that Article XXXI confers jurisdiction upon it in respect of the present proceedings since Nicaragua's Application was filed before the Pact of Bogotá ceased to be in force between Nicaragua and Colombia. It is therefore unnecessary to consider whether an additional basis of jurisdiction exists. Consequently, there is no ground for the Court to rule upon the second preliminary objection raised by Colombia.

VI. Fifth preliminary objection

The Court observes that Colombia contends, in the alternative, on the hypothesis that the four other objections raised by it were to be rejected, that neither of the two requests put forward in Nicaragua's Application is admissible. Colombia considers that the First Request is inadmissible due

to the fact that Nicaragua has not secured the requisite recommendation on the establishment of the outer limits of its continental shelf from the CLCS, and that the Second Request is inadmissible because, if it were to be granted, the decision of the Court would be inapplicable and would concern a non-existent dispute.

1. The preliminary objection to the admissibility of Nicaragua's First Request

In its First Request, Nicaragua asks the Court to determine "[t]he precise course of the maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them beyond the boundaries determined by the Court in its Judgment of 19 November 2012". Colombia maintains that "the [Court] cannot consider the Application by Nicaragua because the CLCS has not ascertained that the conditions for determining the extension of the outer edge of Nicaragua's continental shelf beyond the 200-nautical-mile line are satisfied and, consequently, has not made a recommendation".

Nicaragua responds that a coastal State has inherent rights over the continental shelf, which exist *ipso facto* and *ab initio*, and that its own rights over its continental shelf vest in it automatically, *ipso jure*, by operation of law. Furthermore, the CLCS is concerned only with the precise location of the outer limits of the continental shelf; it does not grant or recognize the rights of a coastal State over its shelf and is not empowered to delimit boundaries in the shelf. Nicaragua adds that, in the event of a dispute over its extended continental shelf beyond 200 nautical miles, the CLCS, in accordance with its own rules and established practice, would not address a recommendation to Nicaragua. And if the Court were to refuse to act because the CLCS had not issued such a recommendation, the result would be an impasse.

The Court has already established that Nicaragua was under an obligation, pursuant to paragraph 8 of Article 76 of UNCLOS, to submit information on the limits of the continental shelf it claims beyond 200 nautical miles to the CLCS. The Court held, in its 2012 Judgment, that Nicaragua had to submit such information as a prerequisite for the delimitation of the continental shelf beyond 200 nautical miles by the Court. The Court must now determine whether a recommendation made by the CLCS is a prerequisite in order for the Court to be able to entertain the Application filed by Nicaragua in 2013.

The Court notes that Nicaragua, as a State party to UNCLOS, is under an obligation to communicate to the CLCS the information on the limits of its continental shelf beyond 200 nautical miles, whereas the making of a recommendation, following examination of that information, is a prerogative of the CLCS. When the CLCS addresses its recommendations on questions concerning the outer limits of its continental shelf to coastal States, those States establish, on that basis, limits which are "final and binding" upon the States parties to that instrument.

The Court observes that the procedure before the CLCS relates to the delineation of the outer limits of the continental shelf, and hence to the determination of the extent of the sea-bed under national jurisdiction. It is distinct from the delimitation of the continental shelf, which is governed by Article 83 of UNCLOS and effected by agreement between the States concerned, or by recourse to dispute resolution procedures.

The Court accordingly considers that, since the delimitation of the continental shelf beyond 200 nautical miles can be undertaken independently of a recommendation from the CLCS, the latter is not a prerequisite that needs to be satisfied by a State party to UNCLOS before it can ask the Court to settle a dispute with another State over such a delimitation. The Court finds that the preliminary objection to the admissibility of Nicaragua's First Request must be rejected.

2. The preliminary objection to the admissibility of Nicaragua's Second Request

In its Second Request, Nicaragua asks the Court to determine

> "[t]he principles and rules of international law that determine the rights and duties of the two States in relation to the area of overlapping continental shelf claims and the use of its resources, pending the delimitation of the maritime boundary between them beyond 200 nautical miles from Nicaragua's coast".

Colombia contends that Nicaragua's Second Request invites the Court to make a ruling pending its decision on the First Request, and that, since the Court would have to rule on both requests simultaneously, it could not accept the Second Request, because it would be without object. Colombia is also of the view that Nicaragua's Second Request is a disguised request for provisional measures and that it should therefore be dismissed. Finally, Colombia argues that there is no dispute between the Parties concerning a hypothetical legal régime to be applied pending the decision on the maritime boundary beyond 200 nautical miles of Nicaragua's coast.

Nicaragua considers that the relevance of the Second Request depends on the Court's decision on the merits in respect of the question of the delimitation of the continental shelf beyond 200 nautical miles from Nicaragua's coast between the Parties. Nicaragua disagrees with Colombia that its Second Request is a disguised request for provisional measures. It asserts that there is indeed a dispute between the Parties, since Colombia denies that Nicaragua has any legal rights—or even any claims—beyond 200 nautical miles from its coast.

The Court notes that, in its Second Request, Nicaragua invites it to determine the principles and rules of international law governing a situation that will be clarified and settled only at the merits stage of the case. However, it is not for the Court to determine the applicable law with regard to a hypothetical situation. It recalls that its function is "to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties". This is not the case, at this stage of the proceedings, in respect of Nicaragua's Second Request. This Request does not relate to an actual dispute between the Parties, that is, "a disagreement on a point of law or fact, a conflict of legal

views or of interests between two persons", nor does it specify what exactly the Court is being asked to decide. Accordingly, the Court finds that the preliminary objection to the admissibility of Nicaragua's Second Request must be upheld.

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Joint dissenting opinion of Vice-President Yusuf, Judges Cançado Trindade, Xue, Gaja, Bhandari, Robinson and Judge *ad hoc* Brower

Introduction

1. The seven judges who authored the joint dissenting opinion regret that the Court was evenly split regarding the content and scope of a decision that was unanimously adopted by the Court only four years ago. They are of the view that Colombia's objection based on the principle of *res judicata* should have been upheld and Nicaragua's Application dismissed as inadmissible, being barred by the principle of *res judicata*.

The principle of *res judicata* in the jurisprudence of the Court and its application to the present case

2. The joint dissenting opinion outlines its authors' understanding of *res judicata*. This conception views *res judicata* as a general principle, which is reflected in Articles 59 and 60 of the Statute of the Court, according to which "the decisions of the Court are not only binding on the parties, but are final, in the sense that they cannot be reopened by the parties as regards the issues that have been determined". It is a principle which acts as a bar to a subsequent claim if there is identity of parties, identity of cause and identity of object with a previous claim that has been adjudicated upon.

3. The seven judges are, however, aware of the fact that although the Parties agree on these elements, they disagree on what the Court finally decided in its 2012 Judgment in the *Territorial and Maritime Dispute case (Nicaragua* v. *Colombia)*. They are of the view that this is to be found in the *dispositif* of the Judgment, which is endowed with *res judicata*, as well as the elements of the Court's reasoning that are "inseparable" from the operative clause of a judgment or which constitute a "condition essential to the Court's decision".

The *dispositif* of the 2012 Territorial and *Maritime Dispute* Judgment

4. The joint dissenting opinion recalls that the Court stated in the *dispositif* of the 2012 Judgment: "The Court … *[f]inds* that it cannot uphold the Republic of Nicaragua's claim contained in its final submission I (3)" (*I.C.J. Reports 2012 (II)*, p. 719, para. 251 (3)). Nicaragua had requested the Court to adjudge and declare that "[t]he appropriate form of delimitation, within the geographical and legal framework constituted by the mainland coasts of Nicaragua and Colombia, is a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties" (*ibid.*, p. 636, para. 17).

5. The joint dissenting opinion, after having surveyed judgments of the Court in which the phrase "cannot uphold" was used, concludes that the Court has consistently used that phrase to reject the submission or request of a party. Thus, its authors are of the view that the Court rejected Nicaragua's final submission I (3) in 2012. Consequently, since the Court rejected this submission in the operative paragraph of the Judgment, it took a decision to which *res judicata* attaches.

6. In the present case, Nicaragua's first request to the Court is to adjudge and declare "[t]he precise course of the maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them beyond the boundaries determined by the Court in its Judgment of 19 November 2012" (Application of Nicaragua, hereinafter "AN", para. 12). Paragraph 11 of Nicaragua's Application states that Nicaragua's claimed extended continental shelf "includes an area beyond Nicaragua's 200-nautical-mile maritime zone and in part overlaps with the area that lies within 200 nautical miles of Colombia's coast" (AN, para. 11 *(c)*), and that this entitlement to an extended continental shelf exists under both customary international law and the provisions of UNCLOS (AN, para. 11 *(a)*).

7. The seven judges are of the opinion that the final submission I (3) of Nicaragua in the *Territorial and Maritime Dispute* case and the first request in Nicaragua's Application in the present case have both the same object (the delimitation of an extended continental shelf entitlement that overlaps with Colombia's 200-nautical-mile entitlement, measured from the latter's mainland coast), the same legal ground (that such an entitlement exists as a matter of customary international law and under UNCLOS), and involve the same Parties. Nicaragua is therefore attempting to bring the same claim against the same Party on the same legal grounds. As the joint dissenting opinion's survey of the Court's use of the phrase "cannot uphold" demonstrates, the Court rejected Nicaragua's final submission I (3) in the 2012 Judgment. Nicaragua's first request in the present Application is thus an exemplary case of a claim precluded by *res judicata*.

The reasoning of the Court in the 2012 *Territorial and Maritime Dispute* Judgment

8. The seven judges of the joint dissenting opinion regret that the majority does not examine the use of the phrase "cannot uphold" and thus does not give effect to the words contained in the *dispositif* of the 2012 Judgment. The approach of the majority is based on an examination of the reasoning of the Court in that Judgment, instead of its *dispositif*. However, the seven judges maintain that even that reasoning supports the view that the Court rejected Nicaragua's claim in 2012 because it failed to establish the existence of an extended continental shelf that overlaps with Colombia's 200-nautical-mile entitlement, measured from the latter's coast.

9. The language used by the Court in paragraph 129 of the 2012 Judgment makes clear that the Court rejected Nicaragua's claim because it had "*not established* that it has a continental margin that extends far enough to overlap with Colombia's 200-nautical-mile entitlement" (emphasis added)

(in the French text: "le Nicaragua n'ayant pas … *apporté la preuve* que sa marge …").

10. This conclusion is also supported by the Court's rejection of Nicaragua's proposed "general formulation" in the 2012 Judgment, according to which it requested the Court delimit the overlapping continental shelf entitlements in general terms, such as "the boundary is the median line between the outer edge of Nicaragua's continental shelf fixed in accordance with UNCLOS Article 76 and the outer limit of Colombia's 200-mile zone" (*I.C.J. Reports 2012 (II)*, p. 669, para. 128). The Court found that "*even* using the general formulation proposed" by Nicaragua (*ibid*., p. 669, para. 129; emphasis added), it was not in a position to effect a delimitation between the Parties. The only reason that the Court had to recall and reject the "general formulation" as distinct from Nicaragua's final submission I (3) was that the former claim relied solely on the existence of an extended continental shelf that overlapped with Colombia's 200-nautical-mile entitlement, and not on the delineation of its outer limits.

11. Thus the Court's rejection of Nicaragua's request was not, as contended by the majority, based on the failure of Nicaragua to deposit information with the CLCS pursuant to Article 76 (8) of UNCLOS. Indeed, even Nicaragua itself in oral proceedings in the present case admitted that the Court decided in 2012 that Nicaragua had not established the existence of an extended continental shelf that overlapped with Colombia's 200-nautical-mile entitlement, measured from the latter's coastline.

12. Moreover, contrary to the conclusion of the majority, the Court never indicated that there was a procedural requirement incumbent on Nicaragua to submit information to the CLCS before the Court could proceed with delimitation, nor did the Court suggest that Nicaragua would be able to return to the Court once it had made its submission to the CLCS.

13. The seven judges must therefore conclude that the failure of Nicaragua to prove the existence of an extended continental shelf that overlaps with Colombia's 200-nautical-mile entitlement constituted the very basis of the decision adopted by the Court in 2012 concerning delimitation. This is a major element of the Court's reasoning which laid the foundation for the operative clause to which *res judicata* attaches.

14. Nicaragua's second request in the present case asks the Court to adjudge and declare "[t]he principles and rules of international law that determine the rights and duties of the two States in relation to the area of overlapping continental shelf claims and the use of its resources, pending the delimitation of the maritime boundary between them beyond 200 nautical miles from Nicaragua's coast" (AN, para. 12). This is a reformulation of the "general formulation" proposed to the Court by Nicaragua in the *Territorial and Maritime Dispute* proceedings. As with Nicaragua's first request in the present case, the second request is barred by *res judicata*.

The incoherence of the procedural requirement introduced by the majority

15. The majority has read a procedural requirement into the 2012 Judgment according to which a coastal State is obliged to submit information to the CLCS under Article 76 (8) of UNCLOS as a prerequisite for the delimitation of extended continental shelf entitlements between Nicaragua and Colombia. It therefore frames submission of information to the CLCS under Article 76 (8) as a condition of admissibility; in other words, as a "contention that there exists a legal reason, even when there is jurisdiction, why the Court should decline to hear the case, or more usually, a specific claim therein" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 456, para. 120).

16. However, in the 2012 Judgment, the question of admissibility of Nicaragua's final submission I (3) was expressly raised by Colombia, which argued that the request to delimit an extended continental shelf was neither implicit in the Application of Nicaragua nor was it an issue that arose directly out of the subject-matter of the dispute (*I.C.J. Reports 2012 (II)*, p. 664, para. 107). The Court rejected Colombia's objection, and declared Nicaragua's final submission I (3) admissible.

17. The majority's line of reasoning in the present case thus leaves the Court in a strange position. If one accepts the view of the majority in the current case, the Court should not, in the 2012 proceedings, have accepted Nicaragua's I (3) submission as admissible and should not have proceeded to address the claim on the merits. On the other hand, if one accepts—as the Court did in 2012—that Nicaragua's I (3) submission was admissible, then logic dictates that a submission to the CLCS under Article 76 (8) of UNCLOS cannot be a prerequisite to adjudicate upon a request for delimitation of the extended continental shelf.

18. Not only is the majority's position inconsistent with the 2012 Judgment, but it is also inconsistent with the text of Article 76 (8) of UNCLOS. This provision may be divided into three limbs, each with the imperative *shall* in the English version of the Convention: information *shall* be submitted by the coastal State; the Commission *shall* make recommendations; and the limits established upon the basis of CLCS recommendations *shall* be final and binding. It is unclear why the majority considers that the first limb of this Article constitutes a prerequisite to delimitation whereas the other two limbs do not; clearly, there is no textual support for such a reading.

The purposes of submission of information under Article 76 of UNCLOS and Article 4 of its Annex II

19. Under the provisions of UNCLOS, there are two purposes for submitting information to the CLCS. The first purpose of submitting information to the CLCS, under paragraph 76 (8), is to obtain recommendations from the CLCS regarding the outer limits of the continental shelf, should a coastal State wish to do so. Such recommendations shall then be used as the basis for delineation of the continental shelf and the resulting determination shall be opposable to other States.

20. The second purpose is to allow States that intend to claim an extended continental shelf to comply with the "sunset clause" under Article 4 of Annex II of UNCLOS, which requires States to submit "particulars" of prospective

continental shelf claims to the CLCS within ten years of the entry into force of the Convention for that State.

21. By virtue of the Decision of States Parties to UNCLOS of 20 June 2008 (SPLOS/183), States may submit "preliminary information" to the CLCS as a means of complying with their obligation under Article 4 of Annex II. This was a means of allowing States, in particular developing ones, which may lack the necessary technical capabilities, the possibility of complying with the "sunset clause" for claiming an extended continental shelf under UNCLOS, whilst providing them with the extra time required to complete the requisite geological and geomorphological surveys to prove the existence of an extended continental shelf. The majority is wrong to conflate the purposes served by these two different provisions of the UNCLOS.

Ne bis in idem and the exhaustion of treaty processes

22. The seven judges of the joint dissenting opinion argue that, even if one were to accept the majority's interpretation of the 2012 Judgment, Nicaragua should not now be able to come before the Court for a second time to attempt to remedy the procedural flaw which supposedly precluded the Court from delimiting its allegedly overlapping extended continental shelf entitlement in 2012. Allowing such an action would violate the principle of *ne bis in idem*, according to which a repeat claim is inadmissible whether or not the issue is covered by the principle of *res judicata*.

23. Moreover, the renewed presentation of a claim previously examined by the Court may be considered inadmissible if that claim relies on the same treaty process as the basis of jurisdiction of the Court. Nicaragua's Application in the present case is thus barred as a result of the exhaustion of treaty processes.

Conclusion: the authority of *res judicata* and the protection of the judicial function

24. The seven judges conclude their joint dissenting opinion by highlighting the importance of protecting the finality of judgments of the Court, both for the efficient operation of the inter-State dispute settlement system and the protection of respondent States from repeat litigation. In their view, a scenario in which the purposes of *res judicata* are no longer served undermines the judicial function as well as the sound administration of justice.

25. Nicaragua and Colombia have been embroiled in a long-running dispute for many years regarding their respective maritime entitlements. As the principal judicial organ of the United Nations, the Court is well placed to settle such disputes. But if it is to continue to be regarded as such, it cannot afford to be seen to allow States to bring the same disputes over and over again. Such a scenario would undercut the certainty, stability, and finality that judgments of this Court should provide.

Separate opinion of Judge Owada

1. Judge Owada has appended a separate opinion to discuss two separate points. The first point relates to the issue of *res judicata*, which was raised by Colombia in its third preliminary objection. Judge Owada concurs with the decision of the Court that Nicaragua's claim of an extended continental shelf and request for delimitation was not decided by the Court in the 2012 Judgment, but has appended a separate opinion to clarify his own reasoning on the issue of *res judicata*. The prerequisite for the application of the principle of *res judicata*, namely the identity of *persona*, *petitum*, and *causa petendi*, has not been raised by the Parties and is not at issue, however, the more intrinsically important issue in the present case is whether the decision reached in the 2012 Judgment contains a final and definitive determination by the Court to which the effect of *res judicata* should attach. In other words, the issue relates to the scope of the *res judicata*. In order to determine whether the claim of Nicaragua was finally and definitely determined in the 2012 Judgment, one must examine the context in which the operative part of the 2012 Judgment was developed, as well as the reasoning of the Court and the overall structure of the Judgment. An examination of these factors, which were not adequately addressed in the Judgment of the Court, leads to the conclusion that Nicaragua's request for delimitation on the basis of its claim of an extended continental shelf was not finally and definitively determined in the 2012 Judgment and therefore does not fall within the scope of *res judicata*. As a result, the third preliminary objection of Colombia should be rejected.

2. The second point concerns the opposability of UNCLOS by Colombia, a non-party, to Nicaragua, a party. As Judge Owada concurs with the reasoning of the Judgment in rejecting the fifth preliminary objection, this issue is only raised as a matter of principle because it pertains to the applicable law. It is well established that a treaty does not create obligations or rights for a third State without its consent, or *res inter alios acta*. As such, as affirmed by the 2012 Judgment, the applicable law in this dispute is not UNCLOS—which Colombia has not ratified—but is instead customary international law. Colombia has not established that the relevant provision of Article 76 of UNCLOS concerning the requirement of recommendations by the CLCS is a rule of customary international law, yet Colombia still attempts to invoke this obligation against Nicaragua, a party to UNCLOS. While Judge Owada concurs with the reasoning of the Court in rejecting the fifth preliminary objection, it thus appears as though there is an additional reason to reject this objection.

Separate opinion of Judge Greenwood

Res judicata has substantive, not merely procedural, effects. If, as Colombia maintains, the 2012 Judgment decided that Nicaragua had failed to prove that it had a continental margin which extended beyond 200 nautical miles from its baselines, that decision would have been *res judicata* and would have precluded Nicaragua from asserting a legal entitlement to an outer continental shelf *vis-à-vis* Colombia not only in these proceedings but in any forum. However,

the 2012 Judgment did not decide that. Since the Judgment said nothing at all about Nicaragua's claims in respect of the area more than 200 nautical miles from Colombia's mainland coast and more than 200 nautical miles from Nicaragua's mainland coast, no question of *res judicata* could arise in respect of that area. Even in respect of the area within 200 nautical miles of the Colombian mainland coast, a study of the 2012 Judgment shows that the Court did not decide what Nicaragua had to prove, nor does the Judgment disclose any analysis by the Court of the strengths and weaknesses of the evidence adduced by Nicaragua. In these circumstances, the Judgment cannot be regarded as a ruling that Nicaragua had failed to discharge its burden of proof. Nevertheless, since the arguments in respect of *res judicata* in relation to the two areas differ, it would have been preferable for the Court to have dealt with them separately in the present Judgment.

Dissenting opinion of Judge Donoghue

Judge Donoghue does not agree with the Court's interpretation of dispositive subparagraph (3) of the Judgment in *Territorial and Maritime Dispute (Nicaragua* v. *Colombia) (I.C.J. Reports 2012 (II)*, p. 719, para. 251 (3)). As a consequence, she disagrees with the conclusion that the Court reaches today as to Colombia's third preliminary objection, pursuant to which Colombia asserted that the doctrine of *res judicata* rendered the present Application inadmissible.

The Court today states that it decided in 2012 that Nicaragua's delimitation claim could not be upheld because Nicaragua had not yet made a submission to the Commission on the Limits of the Continental Shelf with respect to the limits of its continental shelf beyond 200 nautical miles. Because Nicaragua has now made such a submission, the Court concludes that the doctrine of *res judicata* does not preclude it from ruling on Nicaragua's first request in the present case.

According to Judge Donoghue, however, the Court in 2012 took a decision on the merits of Nicaragua's claim. In particular, it determined that Nicaragua had failed to prove that its continental shelf entitlement extended far enough to overlap with the entitlement generated by Colombia's mainland and thus was not in a position to delimit as requested by Nicaragua. This determination was essential to the Court's decision that it could not uphold Nicaragua's claim. She therefore considers that the doctrine of *res judicata* denies Nicaragua the opportunity to prove the same facts for a second time in a second case against the same respondent, and that Nicaragua's first request is inadmissible to that extent.

However, Judge Donoghue notes that the 2012 Judgment did not address the question of the existence of an overlap between Nicaragua's entitlement and the entitlement generated by Colombia's islands in the area located beyond 200 nautical miles from Nicaragua's coast. The doctrine of *res judicata* does not apply to this matter and Nicaragua's first request is admissible to that extent.

Finally, Judge Donoghue states the reasons why she disagrees with the Court's interpretation of dispositive subparagraph (3) of the 2012 Judgment.

Declaration of Judge Gaja

Delimiting the continental shelf between States with opposite or adjacent coasts is often difficult in the absence of the delineation of the outer limits of an extended continental shelf, which, under Article 76, paragraph 8, of UNCLOS, has to be effected on the basis of a recommendation of the Commission on the Limits of the Continental Shelf. Under Article 76, paragraph 10, of UNCLOS a recommendation concerning the establishment of the outer limits of the continental shelf does not prejudice the question of delimitation and may therefore be adopted irrespective of the existence of a dispute on delimitation. The Commission should modify its Rules of Procedure and consider submissions also when the delimitation is under dispute.

Declaration of Judge Bhandari

In his declaration Judge Bhandari recalls that he has joined the dissenting opinion that deals with Colombia's third preliminary objection on the issue of *res judicata*. The purpose of the present declaration is to provide some additional comments on the fifth preliminary objection dealing with the failure of Nicaragua to obtain a binding recommendation from the Commission on the Limits of the Continental Shelf ("CLCS"). In concluding that he would uphold Colombia's fifth preliminary objection, Judge Bhandari makes eight brief points. Firstly, there is no proof on record that Nicaragua has furnished all relevant information to the CLCS, which seems to be the premise of the conclusion of the majority on this issue. Secondly, since the CLCS has not yet issued a recommendation, the Court is not in a position to speculate when the CLCS might do so. Thirdly, the principle of interinstitutional comity requires deference to the CLCS. Fourthly, the CLCS is a specialized body with experts who have practical experience, tasked with making binding recommendations on continental shelf matters. Fifthly, to allow this case to proceed to the merits phase without waiting for a recommendation by the CLCS goes against the reasoning provided in the 2012 Judgment. Sixthly, as Nicaragua is a signatory of the United Nations Convention on the Law of the Sea ("UNCLOS") it is bound by its provisions. Seventhly, a nation should not be allowed to pursue a *de facto* appeal or review of a judgment that is final and binding between the parties in violation of the Statute of the Court. Lastly, allowing Nicaragua to approach this Court without a binding recommendation from the CLCS would render that body without any true authority.

Declaration of Judge Robinson

Judge Robinson has signed the joint dissent because, for the reasons set out therein, he is of the opinion that Colombia's third preliminary objection should be upheld. Judge Robinson wrote this declaration to elaborate further upon a particular concern that arises from today's Judgment, in which the majority embraces and applies *dicta* contained within the 2012 Judgment in such a way as to override an elementary principle of the Law of Treaties.

Treaties are binding on States because they have so consented. This consent is an expression of the principles of sovereignty and equality between States. The obligations and rights under a treaty do not apply to non-States parties unless either the States parties intend this to be the case and the non-States parties consent, or the relevant provisions also form part of customary international law. These principles seem to have been overlooked in the majority's conclusion today.

The Court stated quite directly in paragraph 118 of the 2012 Judgment that the applicable law in the case was customary international law, as Colombia was not a State party to UNCLOS. Article 76 (8) of UNCLOS and the procedure of the CLCS set out in Annex 2 are obviously special, contractual and confined to States parties to UNCLOS.

The majority reads the 2012 Judgment as imposing a "prerequisite" or a "condition", pursuant to Article 76 (8) of UNCLOS, for the delimitation of extended continental shelf entitlements between Nicaragua and Colombia. In paragraphs 86 and 87 of today's Judgment, the majority finds that, as "Nicaragua states that on 24 June 2013 it provided the CLCS with 'final' information", the majority "accordingly considers that the condition imposed by it in its 2012 Judgment in order for it to be able to examine the claim of Nicaragua contained in the final submission I (3) has been fulfilled in the present case".

The disjointed logic of this interpretation is fully discussed in the joint dissent. Further, the result of the majority's interpretation is the application of law that is, in fact, inapplicable between the two Parties. Colombia, a non-State party, has consequently been accorded something that, in my view, is akin to a benefit under UNCLOS, since Article 76 (8) of UNCLOS, which does not mirror a rule of customary international law, has been enforced against Nicaragua in its relations with Colombia. This raises questions about the compatibility of the Court's approach with the regime envisaged by Articles 34 to 36 of the Vienna Convention on the Law of Treaties (Treaties and Third States).

Declaration of Judge *ad hoc* Brower

In his declaration, Judge *ad hoc* Brower agrees with all of the other Members of the Court in concluding that, on balance, the Court does have jurisdiction over Nicaragua's Application under the Pact of Bogotá. He has issued a declaration to explain the difficulties the Court necessarily has had in accepting Colombia's interpretation of the second paragraph of Article LVI of the Pact, particularly given the absence of useful guidance from any *travaux préparatoires*.

Judge *ad hoc* Brower notes that Nicaragua's counsel conceded in the oral proceedings that the second paragraph of Article LVI of the Pact is "superfluous, but … not ineffective". Nicaragua's alternative to acceptance of Colombia's interpretation of that paragraph is that it has no meaning whatsoever other than to make clear out of an abundance of caution what in any event would be true. The Court has agreed with Nicaragua, even though it is generally driven to attribute a meaning to each and every provision of a treaty, as required by the principle of *effet utile*.

Judge *ad hoc* Brower observes that Articles LVIII and LIX of the Pact, put alongside the entirety of Article LVI, could collectively reflect an intention of the parties to the Pact that once the Pact would be denounced by a party, then no new proceedings could be commenced. It could also be argued that the second paragraph of Article LVI had the *effet utile* of making clear what had not yet been definitively established by *Nottebohm* (*(Liechtenstein* v. *Guatemala), Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 111), that the Court's jurisdiction attaches upon the submission of an application and endures thereafter irrespective of the subsequent termination of the instrument on which such jurisdiction was based. The Court has not found any of this persuasive because of the complete absence of any indication in the very limited *travaux préparatoires* as to why that second paragraph was included.

All the Court could derive from the drafting history was that the same language was retained throughout various relevant conferences and versions of the Pact as it progressed to its conclusion. Nowhere is there any record indicating why what became the second paragraph of the Pact's Article LVI was introduced and repeatedly accepted over the course of ten years. It clearly is due to the absence of any such guidance that the Court has felt constrained to prefer the interpretation of the paragraph in question as having the, albeit superfluous, *effet utile* of an abundance of caution to the rather more difficult *a contrario* inference.

Judge *ad hoc* Brower finds that the Court's conclusion is not unreasonable and therefore he has found himself unable to dissent from it.

215. ALLEGED VIOLATIONS OF SOVEREIGN RIGHTS AND MARITIME SPACES IN THE CARIBBEAN SEA (NICARAGUA *v.* COLOMBIA) [PRELIMINARY OBJECTIONS]

Judgment of 17 March 2016

On 17 March 2016, the International Court of Justice delivered its Judgment regarding the preliminary objections raised by the Republic of Colombia in the case concerning the *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*.

The Court was composed as follows: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian; Judges *ad hoc* Daudet, Caron; Registrar Couvreur.

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The operative paragraph of the Judgment (para. 111) reads as follows:

"…

The Court,

(1) *(a)* Unanimously,

Rejects the first preliminary objection raised by the Republic of Colombia;

(b) By fifteen votes to one,

Rejects the second preliminary objection raised by the Republic of Colombia in so far as it concerns the existence of a dispute regarding the alleged violations by Colombia of Nicaragua's rights in the maritime zones which, according to Nicaragua, the Court declared in its 2012 Judgment appertain to Nicaragua;

In favour: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian; Judge *ad hoc* Daudet;

Against: Judge *ad hoc* Caron;

(c) Unanimously,

Upholds the second preliminary objection raised by the Republic of Colombia in so far as it concerns the existence of a dispute regarding alleged violations by Colombia of its obligation not to use force or threaten to use force;

(d) By fifteen votes to one,

Rejects the third preliminary objection raised by the Republic of Colombia;

In favour: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian; Judge *ad hoc* Daudet;

Against: Judge *ad hoc* Caron;

(e) Unanimously,

Finds that there is no ground to rule upon the fourth preliminary objection raised by the Republic of Colombia;

(f) By fifteen votes to one,

Rejects the fifth preliminary objection raised by the Republic of Colombia;

In favour: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Robinson, Gevorgian; Judges *ad hoc* Daudet, Caron;

Against: Judge Bhandari;

(2) By fourteen votes to two,

Finds that it has jurisdiction, on the basis of Article XXXI of the Pact of Bogotá, to adjudicate upon the dispute between the Republic of Nicaragua and the Republic of Colombia referred to in subparagraph 1 *(b)* above.

In favour: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Robinson, Gevorgian; Judge *ad hoc* Daudet;

Against: Judge Bhandari; Judge *ad hoc* Caron."

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Judge Cançado Trindade appended a separate opinion to the Judgment of the Court; Judge Bhandari appended a declaration to the Judgment of the Court; Judge *ad hoc* Caron appended a dissenting opinion to the Judgment of the Court.

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I. Introduction

The Court recalls that, in the present proceedings, Nicaragua seeks to found the Court's jurisdiction on Article XXXI of the Pact of Bogotá. According to this provision, the parties to the Pact recognize the Court's jurisdiction as compulsory in "all disputes of a juridical nature". Alternatively, Nicaragua maintains that the Court has an inherent jurisdiction to entertain disputes regarding non-compliance with its judgments and that, in the present proceedings, such an inherent jurisdiction exists, given that the current dispute arises from non-compliance by Colombia with its Judgment of 19 November 2012 in the case concerning *Territorial and Maritime Dispute (Nicaragua* v. *Colombia) (I.C.J. Reports 2012 (II)*, p. 624) (hereinafter the "2012 Judgment").

The Court notes that Colombia has raised five preliminary objections to its jurisdiction. In its written observations and final submissions during the oral proceedings, Nicaragua requested the Court to reject Colombia's preliminary objections in their entirety.

II. First preliminary objection

In its first preliminary objection, Colombia argues that the Court lacks jurisdiction *ratione temporis* under the Pact of Bogotá, because the proceedings were instituted by Nicaragua

on 26 November 2013, after Colombia's notice of denunciation of the Pact on 27 November 2012.

The Court recalls that, in Colombia's denunciation of the Pact of Bogotá, it is stated that the denunciation "takes effect as of today with regard to procedures that are initiated after the present notice, in conformity with [the] second paragraph of Article LVI", which stipulates that the denunciation shall have no effect with respect to pending procedures initiated prior to the transmission of the particular notification. The Court notes that Nicaragua's Application was submitted to it after the transmission of Colombia's notification of denunciation but before the one-year period referred to in the first paragraph of Article LVI had elapsed. According to that provision, at the end of the notice period in question, the Pact shall cease to be in force with respect to the State denouncing it, but shall continue in force for the remaining signatories.

Colombia contends that the natural implication of the express provision in the second paragraph of Article LVI of the Pact is that denunciation is effective with regard to procedures initiated after the transmission of a notification. It refutes the suggestion that its interpretation of the second paragraph of Article LVI would deny *effet utile* to the first paragraph of that provision. Even though Colombia accepts that its interpretation would mean that none of the different procedures provided for in Chapters Two to Five of the Pact could be initiated by, or against, a State which had given notification of denunciation during the year that the treaty remained in force in accordance with the first paragraph of Article LVI, it maintains that important substantive obligations contained in the other Chapters of the Pact would nevertheless remain in force during the one-year period, so that the first paragraph of Article LVI would have a clear effect. Colombia argues that its interpretation of Article LVI is confirmed by the fact that if the parties to the Pact had wanted to provide that denunciation would not affect any procedures initiated during the one-year period of notice, they could easily have said so expressly, namely by adopting a wording similar to provisions in other treaties. Finally, it maintains that its interpretation is "also consistent with the State practice of the parties to the Pact" and the *travaux préparatoires*.

Nicaragua contends that the jurisdiction of the Court is determined by Article XXXI of the Pact of Bogotá, according to which Colombia and Nicaragua had each recognized the jurisdiction of the Court "so long as the present Treaty is in force". How long the treaty remains in force is determined by the first paragraph of Article LVI, which provides that the Pact remains in force for a State which has given notification of denunciation for one year from the date of that notification. Since the date on which the jurisdiction of the Court has to be established is that on which the Application is filed, and since Nicaragua's Application was filed less than one year after Colombia gave notification of its denunciation of the Pact, it follows—according to Nicaragua—that the Court has jurisdiction in the present case. Nicaragua adds that the Colombian interpretation would remove from the effect of the first paragraph of Article LVI all of the procedures for good offices and mediation (Chapter Two of the Pact), investigation and conciliation (Chapter Three), judicial settlement (Chapter Four) and arbitration (Chapter Five), which together comprise forty-one of the sixty articles of the Pact. Of the remaining provisions, several are provisions which have entirely served their purpose and would fulfil no function during the one-year period of notice, while others are inextricably linked to the procedures in Chapters Two to Five and impose no obligations independent of those procedures. Finally, Nicaragua denies that the practice of the parties to the Pact of Bogotá or the *travaux préparatoires* support Colombia's interpretation.

The Court recalls that the date at which its jurisdiction has to be established is the date on which the application is filed with the Court. By Article XXXI of the Pact of Bogotá, the Parties recognize as compulsory the jurisdiction of the Court, "so long as the present Treaty is in force". The first paragraph of Article LVI provides that, following the denunciation of the Pact by a State party, the Pact shall remain in force between the denouncing State and the other parties for a period of one year following the notification of denunciation. The Court is of the opinion that it is not disputed that, if these provisions stood alone, they would be sufficient to confer jurisdiction in the present case. The Pact was still in force between Colombia and Nicaragua on the date that the Application was filed, and the fact that the Pact subsequently ceased to be in force between them would not affect that jurisdiction. The only question raised by Colombia's first preliminary objection, therefore, is whether the second paragraph of Article LVI, which stipulates that "[t]he denunciation shall have no effect with respect to pending procedures initiated prior to the transmission of the particular notification", may be subject to an *a contrario* reading, countering what would otherwise have been the effect of the first paragraph as to require the conclusion that the Court lacks jurisdiction in respect of the proceedings, notwithstanding that those proceedings were instituted while the Pact was still in force between Nicaragua and Colombia. That question has to be answered by the application to the relevant provisions of the Pact of Bogotá of the rules on treaty interpretation enshrined in Articles 31 to 33 of the Vienna Convention, which reflect rules of customary international law.

The Court observes that it is not the denunciation *per se* that is capable of having an effect upon the jurisdiction of the Court under Article XXXI, but the termination of the treaty (as between the denouncing State and the other parties) which results from the denunciation. That follows both from the terms of Article XXXI and from the ordinary meaning of the words used in Article LVI. The first paragraph of Article LVI provides that the treaty may be terminated by denunciation, but that termination will occur only after a period of one year from the notification of denunciation. It is, therefore, this first paragraph which determines the effects of denunciation. The second paragraph confirms that procedures instituted before the transmission of the notification of denunciation can continue irrespective of the denunciation and thus that their continuation is ensured irrespective of the provisions of the first paragraph on the effects of denunciation as a whole.

The Court considers that Colombia's interpretation of the second paragraph of Article LVI runs counter to the language of Article XXXI. It is of the view that the second paragraph of Article LVI is open to another interpretation—one which is compatible with Article XXXI—according to which,

whereas proceedings instituted before transmission of notification of denunciation can continue in any event and are thus not subject to the first paragraph of Article LVI, the effect of denunciation on proceedings instituted after that date is governed by the first paragraph. Since the first paragraph provides that denunciation terminates the treaty for the denouncing State only after a period of one year has elapsed, proceedings instituted during that year are instituted while the Pact is still in force. They are thus within the scope of the jurisdiction conferred by Article XXXI. The Court adds that the result of Colombia's proposed interpretation of the second paragraph of Article LVI would be that, during the year following notification of denunciation, most of the Articles of the Pact, containing its most important provisions, would not apply between the denouncing State and the other parties. Such a result is difficult to reconcile with the express terms of the first paragraph of Article LVI, which provides that "the present Treaty" shall remain in force during the one-year period without distinguishing between different parts of the Pact as Colombia seeks to do. The Court further observes that Colombia's interpretation is not compatible with the object and purpose of the Pact of Bogotá, which is to further the peaceful settlement of disputes through the procedures provided for in the Pact. Although Colombia argues that the reference to "regional … procedures" in the first paragraph of Article II is not confined to the procedures set out in the Pact, Article II has to be interpreted as a whole. It is clear from the use of the word "consequently" at the beginning of the second paragraph of Article II that the obligation to resort to regional procedures, which the parties "recognize" in the first paragraph, is to be given effect by employing the procedures laid down in Chapters Two to Five of the Pact.

The Court remains unconvinced by Colombia's argument that, had the parties to the Pact of Bogotá wished to provide that proceedings instituted at any time before the expiry of the one-year period stipulated by the first paragraph of Article LVI would be unaffected, they could easily have made express provision to that effect. Colombia's argument regarding State practice in the form of the denunciation of the Pact by El Salvador in 1973 and Colombia itself in 2012, together with what Colombia describes as the absence of any reaction to the notification of those denunciations, does not shed any light on the question currently before the Court. As for *the travaux préparatoires*, they give no indication as to the precise purpose behind the addition of what became the second paragraph of Article LVI.

For all of these reasons, the Court considers that Colombia's interpretation of Article LVI cannot be accepted. Taking Article LVI as a whole, and in light of its context and the object and purpose of the Pact, the Court concludes that Article XXXI conferring jurisdiction upon the Court remained in force between the Parties on the date that the Application in the present case was filed. The subsequent termination of the Pact as between Nicaragua and Colombia does not affect the jurisdiction which existed on the date that the proceedings were instituted. Colombia's first preliminary objection must therefore be rejected.

III. Second preliminary objection

In its second objection, Colombia argues that, even if the Court does not uphold the first objection, the Court still has no jurisdiction under the Pact of Bogotá, because there was no dispute between the Parties as at 26 November 2013, the date when the Application was filed.

The Court notes that the existence of a dispute between the parties is a condition of the Court's jurisdiction. Such a dispute, according to the established case law of the Court, is "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons". It does not matter which one of them advances a claim and which one opposes it. What matters is that "the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain" international obligations. The Court further recalls that "[w]hether there exists an international dispute is a matter for objective determination" by the Court. "The Court's determination must turn on an examination of the facts. The matter is one of substance, not of form." In principle, the critical date for determining the existence of a dispute is the date on which the application is submitted to the Court.

The Court recalls that Nicaragua makes two distinct claims—one that Colombia has violated Nicaragua's sovereign rights in its maritime zones, and the other that Colombia has breached its obligation not to use or threaten to use force. It examines these two claims separately in order to determine, with respect to each of them, whether there existed a dispute at the date of filing of the Application.

With regard to Nicaragua's first claim, the Court pays particular attention to the views expressed by the two States in the declarations and statements made by their senior officials on the question of their respective rights in the maritime areas covered by the 2012 Judgment; the incidents at sea involving Colombian vessels or aircraft alleged to have taken place in those areas; and the Parties' positions on the implications, in terms of the extent of their maritime spaces, of Colombia's Decree on the establishment of an "Integral Contiguous Zone".

Considering, first, the declarations and statements of the senior officials of the two States, the Court observes that, following the delivery of the 2012 Judgment, the President of Colombia proposed to Nicaragua to negotiate a treaty concerning the effects of that Judgment, while the Nicaraguan President, on a number of occasions, expressed a willingness to enter into negotiations for the conclusion of a treaty to give effect to the Judgment, by addressing Colombia's concerns in relation to fishing, environmental protection and drug trafficking. The Court considers that the fact that the Parties remained open to a dialogue does not by itself prove that, at the date of the filing of the Application, there existed no dispute between them concerning the subject-matter of Nicaragua's first allegation. The Court notes that Colombia took the view that its rights were "infringed" as a result of the maritime delimitation by the 2012 Judgment. Nicaragua, for its part, insisted that the maritime zones declared by the Court in the 2012 Judgment must be respected. The Court holds that it is apparent from these statements that the Parties held opposing

views on the question of their respective rights in the maritime areas covered by the 2012 Judgment.

With regard to Colombia's proclamation of an "Integral Contiguous Zone", the Court notes that the Parties took different positions on the legal implications of such action in international law. While Colombia maintained that it was entitled to such a contiguous zone as defined by Decree 1946 under customary international law, Nicaragua contended that Decree 1946 violated its "sovereign rights and maritime zones" as adjudged by the Court in the 2012 Judgment.

Regarding the incidents at sea involving vessels or aircraft of Colombia alleged to have taken place before the critical date, the Court considers that, although Colombia rejects Nicaragua's characterization of what happened at sea as "incidents", it does not rebut Nicaragua's allegation that it continued exercising jurisdiction in the maritime spaces that Nicaragua claimed as its own on the basis of the 2012 Judgment.

Finally, the Court notes that, although Nicaragua did not send its formal diplomatic Note to Colombia in protest at the latter's alleged violations of its maritime rights at sea until 13 September 2014, almost ten months after the filing of the Application, in the specific circumstances of the present case, the evidence clearly indicates that, at the time when the Application was filed, Colombia was aware that its enactment of Decree 1946 and its conduct in the maritime areas declared by the 2012 Judgment to belong to Nicaragua were positively opposed by Nicaragua. Given the public statements made by the highest representatives of the Parties, Colombia could not have misunderstood the position of Nicaragua over such differences.

Based on the evidence examined above, the Court finds that, at the date on which the Application was filed, there existed a dispute concerning the alleged violations by Colombia of Nicaragua's rights in the maritime zones which, according to Nicaragua, the Court declared in its 2012 Judgment appertain to Nicaragua.

The Court then turns to the question of the existence of a dispute with regard to Nicaragua's second allegation, namely that Colombia, by its conduct, has breached its obligation not to use or threaten to use force under Article 2, paragraph 4, of the Charter of the United Nations and customary international law.

Although Nicaragua refers to a number of incidents which allegedly occurred at sea, the Court observes that, with regard to those which allegedly occurred before the critical date, nothing in the evidence suggests that Nicaragua had indicated that Colombia had violated its obligations under Article 2, paragraph 4, of the Charter of the United Nations or under customary international law regarding the threat or use of force. On the contrary, members of Nicaragua's executive and military authorities confirmed that the situation at sea was calm and stable. Furthermore, the Court observes that the alleged incidents that were said to have occurred before Nicaragua filed its Application relate to Nicaragua's first claim rather than a claim concerning a threat of use of force under Article 2, paragraph 4, of the Charter of the United Nations and customary international law. Given these facts, the Court considers that, at the date on which the Application was filed, the dispute that existed between Colombia and Nicaragua did not concern Colombia's possible violations of Article 2, paragraph 4, of the Charter of the United Nations and customary international law prohibiting the use or threat of use of force.

In light of the foregoing considerations, the Court concludes that, at the time Nicaragua filed its Application, there existed a dispute concerning the alleged violations by Colombia of Nicaragua's rights in the maritime zones which, according to Nicaragua, the Court declared in its 2012 Judgment appertain to Nicaragua. Consequently, Colombia's second preliminary objection must be rejected with regard to Nicaragua's first claim and upheld with regard to its second claim.

IV. Third preliminary objection

Colombia contends in its third objection that the Court does not have jurisdiction under the Pact of Bogotá, because, at the time of the filing of the Application, the Parties were not of the opinion that the purported controversy "[could not] be settled by direct negotiations through the usual diplomatic channels", as is required, in Colombia's view, by Article II of the Pact of Bogotá, before resorting to the dispute resolution procedures of the Pact.

Referring to the 1988 Judgment in the *Border and Transborder Armed Actions (Nicaragua* v. *Honduras)* case, Colombia claims that recourse to the pacific procedures of the Pact would be in conformity with Article II only if an attempt at negotiating a settlement had been made in good faith, and it is clear, after reasonable efforts, that a deadlock had been reached and that there was no likelihood of resolving the dispute by such means. Colombia asserts that, contrary to what Nicaragua claims, the term "in the opinion of the parties" in Article II should refer to the opinion of both parties, as stated in the English, Portuguese and Spanish versions of the Pact, rather than the opinion of one of the parties. Colombia contends that, based on the conduct of both itself and Nicaragua, it could not be concluded that the alleged controversy, in the opinion of the Parties, could not be settled by direct negotiations through the usual diplomatic channels at the time of Nicaragua's filing of the Application.

For its part, Nicaragua rejects the interpretation of Article II advanced by Colombia, maintaining that Colombia misreads the Court's 1988 Judgment. Relying on the French version of the Pact, Nicaragua argues that Article II of the Pact requires the Court to determine whether, from an objective standpoint, one of the parties was of the opinion that the dispute could not be settled by direct negotiations.

The Court recalls that in the 1988 Judgment, it decided that, for the purpose of determining the application of Article II of the Pact, it was not "bound by the mere assertion of the one [p]arty or the other that its opinion [was] to a particular effect". The Court emphasized that "it must, in the exercise of its judicial function, be free to make its own determination of that question on the basis of such evidence as is available to it". The Court made clear that the parties are expected to provide substantive evidence to demonstrate that they considered in good faith that their dispute could or

could not be settled by direct negotiations through the usual diplomatic channels. The critical date at which "the opinion of the parties" has to be ascertained for the application of Article II of the Pact is the date on which proceedings are instituted. Moreover, the Court took note of the discrepancy between the French text and the other three official texts (English, Portuguese and Spanish) of Article II; the former refers to the opinion of one of the parties ("de l'avis de l'une des parties"), while the latter three refer to the opinion of both parties. The Court, however, did not consider it necessary to resolve the problem posed by that textual discrepancy before proceeding to the consideration of the application of Article II of the Pact in that case. It proceeded on the basis that it would consider whether the "opinion" of both parties was that it was not possible to settle the dispute by negotiation, subject to demonstration of evidence by the parties. Consequently, in the present proceedings, the Court will begin by determining whether the evidence provided demonstrates that, at the date of Nicaragua's filing of the Application, neither of the Parties could plausibly maintain that the dispute between them could be settled by direct negotiations through the usual diplomatic channels.

The Court observes that, through various communications between the Heads of State of the two countries since the delivery of the 2012 Judgment, each Party had indicated that it was open to dialogue to address some issues raised by Colombia as a result of the Judgment. The Court notes, however, that the subject-matter for negotiation is different from the subject-matter of the dispute between the Parties. According to Nicaragua, negotiations between the Parties should have been conducted on the basis that the prospective treaty would not affect the maritime zones as declared by the 2012 Judgment. In other words, for Nicaragua, such negotiations had to be restricted to the modalities or mechanisms for the implementation of the said Judgment. Colombia did not define the subject-matter of the negotiations in the same way. In the words of its Foreign Minister, it intended to "sign *a treaty that establishes the boundaries* and a legal regime that contributes to the security and stability in the region".

The Court notes that the Parties do not dispute that the situation at sea was "calm" and "stable" throughout the relevant period. That fact, nevertheless, is not necessarily indicative that, in the opinion of the Parties, the dispute in the present case could be settled by negotiations. From the inception of the events following the delivery of the 2012 Judgment, Nicaragua was firmly opposed to Colombia's conduct in the areas that the 2012 Judgment declared appertain to Nicaragua. Colombia's position on the negotiation of a treaty was equally firm during the entire course of its communications with Nicaragua. No evidence submitted to the Court indicates that, on the date of Nicaragua's filing of the Application, the Parties had contemplated, or were in a position to hold, negotiations to settle the dispute concerning the alleged violations by Colombia of Nicaragua's rights in the maritime zones which, according to Nicaragua, the Court declared in its 2012 Judgment appertain to Nicaragua.

Given the above considerations, the Court concludes that, at the date on which Nicaragua filed its Application, the condition set out in Article II was met. Therefore, Colombia's third preliminary objection must be rejected.

V. Fourth preliminary objection

The Court recalls that Nicaragua claims two bases for the jurisdiction of the Court. It states that, should the Court find that it has no jurisdiction under Article XXXI of the Pact of Bogotá, its jurisdiction could be founded on "its inherent power to pronounce on the actions required by its Judgment". In its fourth preliminary objection, Colombia contends that the Court has no "inherent jurisdiction" upon which Nicaragua can rely and that Nicaragua's claim can find no support either in the Statute of the Court or in its case law.

The Court notes that the "inherent jurisdiction" claimed by Nicaragua is an alternative ground that it invokes for the establishment of the Court's jurisdiction in the present case. Nicaragua's argument, could, in any event, apply only to the dispute that existed at the time of filing of the Application. Since the Court has founded its jurisdiction with regard to that dispute on the basis of Article XXXI of the Pact of Bogotá, it considers that there is no need to deal with Nicaragua's claim of "inherent jurisdiction", and therefore will not take any position on it. Consequently, there is no ground for the Court to rule upon Colombia's fourth preliminary objection.

VI. Fifth preliminary objection

According to Colombia's fifth objection, the Court has no jurisdiction with regard to compliance with a prior judgment.

The Court notes that Colombia's fifth preliminary objection is directed first at Nicaragua's alternative argument that the Court has an inherent jurisdiction in relation to the present case. Colombia submits that, even if the Court were to find—contrary to Colombia's fourth preliminary objection—that it possesses an inherent jurisdiction, such "inherent jurisdiction" does not extend to a post-adjudicative enforcement jurisdiction. The Court has already held that it does not need to determine whether it possesses an inherent jurisdiction, because of its finding that its jurisdiction is founded upon Article XXXI of the Pact of Bogotá. Accordingly, it is unnecessary to rule on Colombia's fifth preliminary objection in so far as it relates to inherent jurisdiction. Nevertheless, Colombia indicated in its pleadings that its fifth preliminary objection was also raised as an objection to the jurisdiction of the Court under Article XXXI of the Pact of Bogotá. Colombia argues that "[e]ven assuming … that the Court still has jurisdiction in the instant case under Article XXXI of the Pact of Bogotá, such jurisdiction … would not extend to Nicaragua's claims for enforcement by the Court premised on Colombia's alleged non-compliance with the Judgment of 2012". Since the Court has concluded that it has jurisdiction under Article XXXI, the fifth preliminary objection must be addressed in so far as it relates to jurisdiction under the Pact of Bogotá.

Colombia's fifth preliminary objection rests on the premise that the Court is being asked to enforce its 2012 Judgment. The Court agrees with Colombia that it is for the Court, not Nicaragua, to decide the real character of the dispute before it. Nevertheless, as the Court has held, the dispute before it in the present proceedings concerns the alleged violations

by Colombia of Nicaragua's rights in the maritime zones which, according to Nicaragua, the Court declared in its 2012 Judgment appertain to Nicaragua. As between Nicaragua and Colombia, those rights are derived from customary international law. The 2012 Judgment of the Court is undoubtedly relevant to that dispute in that it determines the maritime boundary between the Parties and, consequently, which of the Parties possesses sovereign rights under customary international law in the maritime areas with which the present case is concerned. In the present case, however, Nicaragua asks the Court to adjudge and declare that Colombia has breached "its obligation not to violate Nicaragua's maritime zones as delimited in paragraph 251 of the Court['s] Judgment of 19 November 2012 as well as Nicaragua's sovereign rights and jurisdiction in these zones" and "that, consequently, Colombia has the obligation to wipe out the legal and material consequences of its internationally wrongful acts, and make full reparation for the harm caused by those acts". Nicaragua does not seek to enforce the 2012 Judgment as such. The Court is not, therefore, called upon to consider the respective roles accorded to the Meeting of Consultation of Ministers of Foreign Affairs (by Article L of the Pact of Bogotá), the Security Council (by Article 94, paragraph 2, of the Charter) and the Court.

Colombia's fifth preliminary objection must therefore be rejected.

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Separate opinion of Judge Cançado Trindade

1. In his Separate opinion, composed of eleven parts, Judge Cançado Trindade presents the foundations of his personal position on one issue raised by the contending parties, Nicaragua and Colombia, before the International Court of Justice (ICJ), in the course of the proceedings (written and oral phases) in the present case of *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*. The issue, concerning the fourth preliminary objection raised by Colombia, concerns the inherent powers or *facultés* of contemporary international tribunals, the case-law of which was invoked by both contending parties before the ICJ.

2. Judge Cançado Trindade begins by observing (part I) that, in the present Judgment, the ICJ, having found that it has jurisdiction under the Pact of Bogotá, dismissing Colombia's first preliminary objection, could and should have shed some light on the points at issue made by the contending parties,—Nicaragua's claim of "inherent jurisdiction" and Colombia's fourth preliminary objection,—even if for dismissing this latter as well, rather than, in a minimalist posture, elliptically saying that "there is no ground" for it to deal with the issue (para. 104 of the Judgment).

3. Given the importance that he attaches to this particular issue, recurrent in the practice of international tribunals, and given the fact that it was brought to the attention of the ICJ in the *cas d'espèce*, he felt obliged to leave on the records, first, the positions of the parties and the treatment dispensed to it (parts II–III), and, in sequence, the foundations of his own personal position on it, in its interrelated aspects (parts IV–X), namely: *a*) inherent powers beyond State consent; *b*) the teleological interpretation (*ut res magis valeat quam pereat*) beyond State consent; *c*) *compétence de la compétence* / *Kompetenz Kompetenz* beyond State consent; *d*) *recta ratio* above *voluntas*, human conscience above the "will"; *e*) inherent powers overcoming lacunae, and the relevance of general principles; *f*) inherent powers and *juris dictio*, beyond transactional justice; and *g*) inherent powers and supervision of compliance with judgments.

4. Judge Cançado Trindade contends that this is a matter which cannot simply be eluded, being "of relevance to the operation of contemporary international tribunals, in their common mission of the realization of justice" (para. 4). After recalling the written submissions of both parties, as well as the responses given by Nicaragua and Colombia to the three questions he put to both of them in the public sitting of the Court of 02 October 2015 (paras. 5–12), he points out the broader scope of inherent powers sustained by Nicaragua (para. 13). The ICJ, in his view, should have pronounced upon the issue (the distinct outlooks to it), rather than having "abstained from doing so" in a "rather minimalist outlook",—which he does not share,—of the exercise of the international judicial function (para. 15).

5. Judge Cançado Trindade stresses that the issue of inherent powers or *facultés* has, in effect, been raised time and time again before international tribunals (para. 16). He refers to his own previous Separate and Dissenting Opinions dealing with it (paras. 16–18, 20–22, and 24–26)—both in the ICJ and, earlier on, in the Inter-American Court of Human Rights (IACtHR)—in its distinct aspects, and remarks that inherent powers and beyond State consent: "Even in the absence of an express provision thereon, international tribunals are entitled to exercise their inherent powers in order to secure the sound administration of justice" (para. 19).

6. This brings him to the question of the teleological interpretation, pursuant to the principle of *effet utile*, or *ut res magis valeat quam pereat*. In his understanding, the teleological interpretation, which he supports, "covers not only material or substantive law (e.g., the rights vindicated and to be protected) but also jurisdictional issues and procedural law as well" (para. 22), as shown by the relevant case-law of both the European Court of Human Rights (ECtHR) and the IACtHR (paras. 23–26).

7. After disclosing the pitfalls of State voluntarism in judicial settlement of international disputes, he stressed that, in his understanding,

> "unlike what the ICJ has usually assumed, State consent is not at all a 'fundamental principle', it is not even a 'principle'; it is at most a rule (embodying a prerogative or concession to States) to be observed as the *initial* act of undertaking an international obligation. It is surely not an element of treaty interpretation. Once that initial act is performed, it does not condition the exercise of a tribunal's compulsory jurisdiction, which preexisted it and continues to operate unaffected by it" (para. 27).

8. Moving to another aspect, at epistemological level, Judge Cançado Trindade then states that the understanding,

which he sustains, that *recta ratio* stands above *voluntas*, human conscience above the "will", is in line with jusnaturalist thinking, going back to the lessons of the "founding fathers" of the law of nations (as from the Sixteenth-century lessons of Francisco de Vitoria), based on a *lex praeceptiva*, apprehended by human reason, and certainly not derived from the "will" of subjects of law (States and others) themselves. And he adds that

> "The way was thus paved for the apprehension of a true *jus necessarium*, transcending the limitations of the *jus voluntarium*. The lessons of the 'founding fathers' of our discipline are perennial, are endowed with an impressive topicality. (…)
>
> Contrariwise, the voluntarist conception, obsessed with State consent or 'will', has proven flawed, not only in the domain of law, but also in the realms of other branches of human knowledge. The attachment to power, oblivious of values, leads nowhere. As to international law, if,—as voluntarist positivists argue,—it is by the 'will' of States that obligations are created, it is also by their 'will' that they are violated, and one ends up revolving in vicious circles which are unable to explain the nature of international obligations" (paras. 28–29).

9. Judge Cançado Trindade then reviews the international legal doctrine in this line of thinking (paras. 30–37),—which is his own,—as well as his Separate and Dissenting Opinions within the ICJ to this effect (paras. 38–40), and then adds:

> "It seems most regrettable that, still in our days, the obsession with reliance on State consent remains present in legal practice and international adjudication, apparently by force of mental inertia. In my perception, it is hard to avoid the impression that, if one still keeps on giving pride of place to State voluntarism, we will not move beyond the pre-history of judicial settlement of disputes between States, in which we still live. May I here reiterate that *recta ratio* stands above *voluntas*, human conscience stands above the 'will'" (para. 41).

10. Moving to the issue of the *compétence de la compétence* (*Kompetenz Kompetenz*) beyond State consent, Judge Cançado Trindade pointed out that international human rights tribunals (like the IACtHR and the ECtHR), in particular,—the case-law of which has been invoked by the contending parties in the course of the proceedings before the ICJ in the present case of *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*,—have succeeded in

> "liberating themselves from the chains of State consent, and have thereby succeeded in preserving the integrity of their respective jurisdictions. They have consistently pursued a teleological interpretation, have asserted their *compétence de la compétence*, and have exercised their inherent powers.
>
> (…) They rightly understood that their *compétence de la compétence*, and their inherent powers, are not constrained by State consent; otherwise, they would simply not be able to impart justice.
>
> Those two international tribunals opposed the voluntarist posture, and insisted on their *compétence de la compétence*, as guardians and masters of their respective jurisdictions. The ECtHR and the IACtHR contributed to the primacy of considerations of *ordre public* over the subjective voluntarism of States. (…) In sum, for taking such position of principle, the IACtHR and the ECtHR rightly found that conscience stands above the will" (paras. 43–45).

11. As to international criminal tribunals,—he proceeds,—the *ad hoc* International Criminal Tribunal for the Former Yugoslavia (ICTY) has likewise relied on its own *compétence de la compétence* (paras. 46–47). Moreover, international tribunals have made use of their inherent powers or *facultés* in distinct situations (paras. 48–55), such as in filling *lacunae* of their *interna corporis* (para. 56). There seems, in effect, to be general acknowledgment nowadays of the multiplicity of possible situations of the use of inherent powers by international tribunals, keeping in mind in particular the distinct functions proper to each international tribunal. In sum,

> "contemporary international tribunals have resorted to the inherent powers which appear to them necessary to the proper exercise of their respective judicial functions. They have shown their preparedness to make use of their inherent powers (in deciding on matters of jurisdiction, or handling of evidence, or else merits and reparations), and have not seldom made use of them, in distinct situations, in order to secure a proper and sound administration of justice" (para. 58).

12. In Judge Cançado Trindade's perception, the concern of international tribunals is "to endow their own respective judicial functions with the inherent powers needed to ensure the proper and sound administration of justice" (paras. 59–60). It is their understanding that "their task goes beyond peaceful settlement of disputes, as they also *say what the Law is* (*juris dictio*)" (paras. 61–62). They have gone beyond traditional transactional justice. There is support for their larger conception of saying what the Law is (*juris dictio*),—thus contributing also to the progressive development of international law,—e.g., in the relevant case-law of international human rights tribunals and international criminal tribunals (para. 63). It is also implicit in the notion of "pilot judgments/*arrêts pilotes*" in the work specifically of the ECtHR (para. 66).

13. As to the remaining aspect of inherent powers and supervision of compliance with Judgments (a point raised by the two contending parties, on distinct grounds, before the ICJ), Judge Cançado Trindade ponders that the fact that an international tribunal can count on the assistance of another supervisory organ for seeking compliance with its own judgments and decisions, in his view does not at all mean that, once it renders its judgment or decision, it can remain indifferent as to its compliance (para. 67).

14. The fact, for example, that Article 94 (2) of the United Nations Charter entrusts the Security Council with the enforcement of ICJ judgments and decisions, in his view, "does not mean that compliance with them ceases to be a concern of the Court. Not at all. Moreover, the Security Council has, in practice, very seldom done anything at all in that respect." It is important to avoid the additional breach of non-compliance; this "remains a concern of the ICJ as well as of all other international tribunals" (para. 68).

15. In the case of the ICJ in particular, it has been mistakenly assumed that it is not the Court's business to secure compliance with its own judgments and decisions. Article 94 (2) of the United Nations Charter does *not* confer an *exclusive* authority to the Security Council to secure that compliance, and a closer look at some provisions of the Statute[1] shows that "the Court is entitled to occupy itself with compliance with its own judgments and decisions" (para. 69). Judge Cançado Trindade considers that what is thus to be criticized "is not judicial law-making (as often said without reflection), but rather judicial inactivism or absenteeism,—in particular in respect of ensuring compliance with judgments and decisions" (para. 70).

16. He then observes that, for their part, ECtHR counts on the assistance of the Committee of Ministers, and the IACtHR has resorted to post-adjudicative hearings (para. 71). The powers of the Committee of Ministers to supervise the execution of the ECtHR's judgments are not exclusive either; the Court can be concerned with it, as the ECtHR itself has expressly acknowledged. In sum, in his understanding, "no international tribunal can remain indifferent to non-compliance with its own judgments. The inherent powers of international tribunals extend to this domain as well, so as to ensure that their judgments and decisions are duly complied with" (para. 72). And he adds:

> "In doing so, international tribunals are preserving the integrity of their own respective jurisdictions. Surprisingly, international legal doctrine has not yet dedicated sufficient attention to this particular issue. This is regrettable, as compliance with judgments and decisions of international tribunals is a key factor to foster the rule of law in the international community. And, from 2006 onwards, the topic of '*the rule of law at the national and international levels*' has remained present in the agenda of the United Nations General Assembly[2], and has been attracting increasing attention of member States, year after year.
>
> (…) The path to justice is a long one, and not much has been achieved to date as to the proper conceptualization of the supervision of compliance with judgments and decisions of international tribunals. Instead, the force of mental inertia has persisted throughout decades. It is time to overcome this absenteeism and passiveness. Supervision of such compliance is, after all, a jurisdictional issue. An international tribunal cannot at all remain indifferent as to compliance with its own judgments and decisions" (paras. 73 and 75).

17. Last but not least, coming to his brief epilogue, Judge Cançado Trindade notes that, the handling by the Court, in the present case, of "the question raised by the fourth preliminary objection of Colombia does not reflect the richness of the proceedings in the *cas d'espèce*, and of the arguments presented before the ICJ (in the written and oral phases) by both Nicaragua and Colombia" (para. 76).

18. Their submissions should, in his view, "have been fully taken into account expressly in the present Judgment, even if likewise to dismiss the fourth preliminary objection at the end. After all, the parties' submissions in the present case of *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, raise an important question, recurrently put before the Court, which continues to require our reflection so as to endeavour to enhance the realization of justice at international level" (para. 77).

19. The fact that the Court has found, in the present Judgment, that it has jurisdiction under the Pact of Bogotá (dismissing Colombia's first preliminary objection), in Judge Cançado Trindade's view "did not preclude it from having considered the arguments of the two contending parties on such an important issue as its inherent powers or *facultés* (to pronounce on the alleged non-compliance with its 2012 Judgment)[3]" (para. 78). He feels obliged to do so, even if considering that the fourth preliminary objection is unsustainable and was thus to be likewise dismissed, rather than having simply said—as the Court has done, "in an elusive way",—that "there is no ground" to pronounce upon it[4].

20. The consideration of the use of inherent powers or *facultés* by contemporary international tribunals beyond State consent, has prompted Judge Cançado Trindade, in the present Separate opinion, to bring to the fore his understanding that

> "*recta ratio* stands above *voluntas*. There is need to overcome the voluntarist conception of international law. There is need of a greater awareness of the primacy of conscience above the 'will', and of a constant attention to fundamental human values, so as to secure the progressive development of international law, and, ultimately, to foster the realization of justice at international level" (para. 82).

Declaration of Judge Bhandari

In his declaration Judge Bhandari recalls that he has joined the majority with respect to the first four preliminary objections raised by Colombia. However, he differs from the majority in that he would uphold Colombia's fifth preliminary objection and thus refuse to allow the present case to proceed to the merits phase. Judge Bhandari recalls that according to the fifth preliminary objection, Nicaragua's claim constitutes an improper attempt to have the Court enforce one of its prior judgments. According to Article 94 (2) of the United Nations Charter and Article L of the Pact of Bogotá, it is clear that the appropriate avenue for an aggrieved party to seek enforcement of an ICJ judgment is the United Nations Security Council. Though both Nicaragua and Colombia have clearly framed this case as a request to enforce the 2012 Judgment, the Court has nevertheless declared in the present Judgment that the real character of the dispute involves alleged violations of customary international law by Colombia. Though it is correct, as a matter of law, that it is for the Court—not the Parties—to ultimately determine the true essence of the dispute, Judge Bhandari disagrees with the majority's factual conclusion

[1] Articles 41, 57, 60 and 61 (3).

[2] Cf. General Assembly resolutions 61/39, of 18 December 2006; 62/70, of 06 December 2007; 63/128, of 11 December 2008; 64/116, of 16 December 2009; 65/32, of 6 December 2010; 66/102, of 09 December 2011; 67/97, of 14 December 2012; 68/116, of 16 December 2013; 69/123, of 10 December 2014; and 70/118, of 14 December 2015.

[3] Cf. paras. 17 and 102 of the present Judgment.

[4] Cf. para. 104 and resolutory point 1 (*e*) of the *dispositif* of the present Judgment.

that Nicaragua's present claim does not seek to enforce the 2012 Judgment. The majority cites paragraph 79 of the present Judgment in support of its conclusion that the dispute does not arise directly out of the 2012 Judgment. However, paragraph 79 and the analysis preceding it deal with the Court's analysis of a completely separate issue underpinning an altogether different preliminary objection raised by Colombia—namely, whether there existed a dispute between the Parties when Nicaragua filed its Application—which has no bearing on the present inquiry. Moreover, there is abundant evidence on record, which the majority has not sufficiently accounted for, clearly demonstrating that Nicaragua's present claim is an obvious attempt to enforce the 2012 Judgment.

Dissenting opinion of Judge *ad hoc* Caron

Judge Caron dissents in respect of the Court's finding on Colombia's second and third preliminary objections inasmuch as the Court's reasoning departs from its own jurisprudence and is not supported by the evidence before it. Beyond the particulars of this case, it is of great concern to Judge Caron that in finding that it possesses jurisdiction, the Court's reasoning undermines in his opinion broader concepts underlying the peaceful settlement of disputes.

Judge Caron recalls that the full title of the Pact of Bogotá is the "American Treaty on Pacific Settlement" and observes that although there may not be a regimented staircase of procedures in the Pact of Bogotá, peaceful settlement within the scheme of the Pact carefully climbs from dialogue in which each State's concerns are voiced to each other, upwards to the various means by which settlement may be negotiated and finally to the power of the Court or a tribunal to decide "disputes of a juridical nature". A disagreement is more than a pattern of conduct that might imply a difference in views. As the Pact recognizes, communication is essential because a disagreement cannot be settled unless there is a dialogue that defines what is in dispute. Indeed, unless a dispute in this sense "exists", then it is difficult to envision what is to be negotiated.

Judge Caron dissents from the Court's Judgment because it fundamentally weakens this scheme, reducing the complexity of the scheme for the settlement of disputes set out in the Pact of Bogotá into essentially a simple acceptance of the Court's jurisdiction. The Judgment, in profoundly shifting the requirement that there be a dispute, holds that an applicant to the Court need not have engaged in dialogue, and need not have expressed its concerns to the other State. Without such dialogue, the parties will not have had the opportunity to define the dispute, refine the dispute, and—one can hope—narrow or even settle the dispute. As critically, if the applicant need not have engaged in dialogue with the other party, then any duty to negotiate as a practical matter is substantially weakened. International disputes are complex and boundary disputes are amongst the most difficult to resolve. The law gives answers, but not necessarily the most nuanced answers, in such complex situations. It is essential that the Court or a tribunal possess the jurisdiction to give the answer to a dispute when necessary or when called upon by both parties. But it is only necessary, pursuant to the Pact of Bogotá, when the dispute between two States "cannot be settled by direct negotiations"—language in Article II of the Pact that the Court's jurisprudence holds to be a precondition to jurisdiction under the Pact. It is regrettable, in Judge Caron's opinion, that the present Judgment in its holdings regarding the second and third preliminary objections formally reaffirms, yet substantively negates, the requirement that a dispute exists and the obligation to pursue negotiations.

More specifically as to the second preliminary objection, Judge Caron, applying the Court's previous jurisprudence as to the meaning and existence of a dispute, is unable to see how a "dispute" as to the subject-matter invoked by Nicaragua in its Application existed at the requisite date. In the present proceedings, Colombia's second preliminary objection does not reach the point of arguing that it did not positively oppose a claim of Nicaragua. Colombia's second preliminary objection argues a more fundamental point, namely, that Nicaragua never made a claim which Colombia could oppose. This significant difference is not addressed by the Judgment. It can be appropriate for the Court to infer positive opposition to a claim. It is not, in Judge Caron's view, appropriate to infer the assertion of the claim.

Judge Caron concludes from a full review of the factual record that, prior to filing its Application, Nicaragua made no claim that Colombia had breached its sovereign rights or maritime spaces or had unlawfully threatened the use of force. In its analysis, the Court turns on its head its jurisprudence as to the requirement that a dispute exist at the time an application is filed. In this case, the Court does not ask whether the Applicant—Nicaragua—made in any form a claim of legal violation prior to the lodgment of the Application. Rather, it infers that the Respondent must have been "aware" that the Applicant positively opposed actions that the Respondent had taken. According to Judge Caron, this reasoning misapprehends the Court's jurisprudence regarding the requirement that a dispute exist. This holding in practice signals the end of the application of a reasoned requirement that a dispute exist.

More specifically as to the third preliminary objection, Judge Caron observes that the Court in its Judgment proceeds from the basis of its 1988 holding that the reference to direct negotiations in Article II of the Pact "constitutes … a condition precedent to recourse to the pacific procedures of the Pact in all cases" (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 94, para. 62). In so proceeding, the Court holds that the test for determining whether settlement is not possible is "whether the evidence provided demonstrates that, at the date of Nicaragua's filing of the Application, neither of the Parties could plausibly maintain that the dispute between them could be settled by direct negotiations through the usual diplomatic channels".

Judge Caron dissents from the Court finding that "no evidence submitted to the Court indicates that, on the date of Nicaragua's filing of the Application, the Parties had contemplated, or were in a position, to hold negotiations to settle the dispute concerning the alleged violations by Colombia of Nicaragua's rights in the maritime zones" and on that basis rejecting Colombia's third preliminary objection. In Judge Caron's opinion, the Court's conclusion is not only not

supported by the evidence, it is *contradicted* by the specific evidence cited by the Court.

Judge Caron's concluding observation is that the Court, in objectively determining the subject-matter of the disputes before it, can be called upon to make fine distinctions. In the present case, Judge Caron notes that the Court has distinguished very finely between a claim for non-compliance with a judgment of the Court and a claim for violation of the rights granted by such judgment. The Judgment, however, in Judge Caron's opinion makes clear that the Court is not nearly as adept at distinguishing whether a certain piece of evidence bears on non-compliance with the 2012 Judgment or on a violation of sovereign rights and maritime spaces as defined in the 2012 Judgment. The ease with which these two claims overlap and the difficulty the Court has in assessing the evidence will likely complicate the Court's task at the merits phase of this case.

216. OBLIGATIONS CONCERNING NEGOTIATIONS RELATING TO CESSATION OF THE NUCLEAR ARMS RACE AND TO NUCLEAR DISARMAMENT (MARSHALL ISLANDS *v.* INDIA) [JURISDICTION AND ADMISSIBILITY]

Judgment of 5 October 2016

On 5 October 2016, the International Court of Justice rendered its Judgment on the preliminary objections raised by India on the jurisdiction of the Court and on the admissibility of the Application in the case regarding *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *India)*. The Court upheld the preliminary objection on jurisdiction and found that it could not proceed to the merits of the case.

The Court was composed as follows: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian; Judge *ad hoc* Bedjaoui; Registrar Couvreur.

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The operative paragraph of the Judgment (para. 56) reads as follows:

"…

The Court,

(1) By nine votes to seven,

Upholds the objection to jurisdiction raised by India, based on the absence of a dispute between the Parties;

In favour: President Abraham; Vice-President Yusuf; Judges Owada, Greenwood, Xue, Donoghue, Gaja, Bhandari, Gevorgian;

Against: Judges Tomka, Bennouna, Cançado Trindade, Sebutinde, Robinson, Crawford; Judge *ad hoc* Bedjaoui;

(2) By ten votes to six,

Finds that it cannot proceed to the merits of the case.

In favour: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Greenwood, Xue, Donoghue, Gaja, Bhandari, Gevorgian;

Against: Judges Bennouna, Cançado Trindade, Sebutinde, Robinson, Crawford; Judge ad hoc Bedjaoui."

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President Abraham and Vice-President Yusuf appended declarations to the Judgment of the Court; Judges Owada and Tomka appended separate opinions to the Judgment of the Court; Judges Bennouna and Cançado Trindade appended dissenting opinions to the Judgment of the Court; Judges Xue, Donoghue and Gaja appended declarations to the Judgment of the Court; Judges Sebutinde and Bhandari appended separate opinions to the Judgment of the Court; Judges Robinson and Crawford appended dissenting opinions to the Judgment of the Court; Judge *ad hoc* Bedjaoui appended a dissenting opinion to the Judgment of the Court.

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Procedural background (paras. 1–13)

The Court recalls that, on 24 April 2014, the Republic of the Marshall Islands (hereinafter the "Marshall Islands" or the "Applicant") filed an Application instituting proceedings against the Republic of India (hereinafter "India" or the "Respondent"), in which it claimed that India breached customary international law obligations concerning negotiations relating to cessation of the nuclear arms race and to nuclear disarmament. The Marshall Islands seeks to found the Court's jurisdiction on the declarations made by the Parties pursuant to Article 36, paragraph 2, of its Statute.

The Court further recalls that, by a letter dated 6 June 2014, India indicated that it considered that the Court did not have jurisdiction in the alleged dispute. By an Order of 16 June 2014, the Court held, pursuant to Article 79, paragraph 2, of its Rules, that, in the circumstances of the case, it was necessary first of all to resolve the question of its jurisdiction, and that this question should accordingly be separately determined before any proceedings on the merits; to that end, it decided that the written pleadings should first be addressed to the said question. The Parties filed such pleadings within the time-limits set by the Court, and public hearings on the questions of the jurisdiction of the Court and the admissibility of the Application were held from Monday 7 to Wednesday 16 March 2016.

I. Introduction (paras. 14–24)

A. Historical Background (paras. 14–20)

The Court provides a brief historical background to the case, in particular in relation to the nuclear disarmament activities of the United Nations.

B. Proceedings brought before the Court (paras. 21–24)

The Court notes the other proceedings brought by the Marshall Islands at the same time as the present case. It then outlines India's objections to jurisdiction and admissibility. It announces that it will first consider the objection that the Marshall Islands has failed to show that there was, at the time of the filing of the Application, a legal dispute between the Parties.

II. The objection based on the absence of a dispute (paras. 25–55)

After outlining the Parties' arguments, the Court recalls the applicable law on this question. It explains that the existence of a dispute between the Parties is a condition of its jurisdiction. In order for a dispute to exist, it must be shown that the claim of one party is positively opposed by the other; the two sides must hold clearly opposite views concerning the question of the performance or non-performance of certain international obligations. The Court's determination of the

existence of a dispute is a matter of substance, and not a question of form or procedure. Prior negotiations are not required where the Court has been seised on the basis of declarations made pursuant to Article 36, paragraph 2, of its Statute, unless one of the relevant declarations so provides. Moreover, although a formal diplomatic protest may be an important step to bring a claim of one party to the attention of the other, such a formal protest is not a necessary condition for the existence of a dispute. Similarly, notice of an intention to file a case is not required as a condition for the seisin of the Court.

The Court continues by underlining that whether a dispute exists is a matter for objective determination by the Court which must turn on an examination of the facts. For that purpose, the Court takes into account in particular any statements or documents exchanged between the parties, as well as any exchanges made in multilateral settings. In so doing, it pays special attention to the author of the statement or document, their intended or actual addressee, and their content. The conduct of the parties may also be relevant, especially when there have been no diplomatic exchanges. In particular, the Court has previously held that the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for. The evidence must show that the parties "hold clearly opposite views" with respect to the issue brought before the Court. As reflected in previous decisions of the Court in which the existence of a dispute was under consideration, a dispute exists when it is demonstrated, on the basis of the evidence, that the respondent was aware, or could not have been unaware, that its views were "positively opposed" by the applicant.

The Court further explains that, in principle, the date for determining the existence of a dispute is the date on which the application is submitted to the Court. Conduct subsequent to the application (or the application itself) may be relevant for various purposes, in particular to confirm the existence of a dispute, to clarify its subject-matter or to determine whether the dispute has disappeared as of the time when the Court makes its decision. However, neither the application nor the parties' subsequent conduct and statements made during the judicial proceedings can enable the Court to find that the condition of the existence of a dispute has been fulfilled in the same proceedings. If the Court had jurisdiction with regard to disputes resulting from exchanges in the proceedings before it, a respondent would be deprived of the opportunity to react before the institution of proceedings to the claim made against its own conduct. Furthermore, the rule that the dispute must in principle exist prior to the filing of the application would be subverted.

* *

The Court then turns to the case at hand, noting at the outset that the Marshall Islands, by virtue of the suffering which its people endured as a result of it being used as a site for extensive nuclear testing programs, has special reasons for concern about nuclear disarmament. But that fact does not remove the need to establish that the conditions for the Court's jurisdiction are met. While it is a legal matter for the Court to determine whether it has jurisdiction, it remains for the Applicant to demonstrate the facts underlying its case that a dispute exists.

The Court observes that India relies on the fact that the Marshall Islands did not commence negotiations or give notice to it of the claim that is the subject of the Application to support its contention that there is no dispute between the Parties. India refers to Article 43 of the International Law Commission's ("ILC") Articles on State Responsibility, which requires an injured State to "give notice of its claim" to the allegedly responsible State. Article 48, paragraph 3, applies that requirement *mutatis mutandis* to a State other than an injured State which invokes responsibility. However, the Court notes that the ILC's commentary specifies that the Articles "are not concerned with questions of the jurisdiction of international courts and tribunals, or in general with the conditions for the admissibility of cases brought before such courts or tribunals". Moreover, the Court has rejected the view that notice or prior negotiations are required where it has been seised on the basis of declarations made pursuant to Article 36, paragraph 2, of the Statute, unless one of those declarations so provides. The Court's jurisprudence treats the question of the existence of a dispute as a jurisdictional one that turns on whether there is, in substance, a dispute, not on what form that dispute takes or whether the respondent has been notified.

The Court next examines the Marshall Islands' arguments in support of its contention that it had a dispute with India.

First, the Court notes that the Marshall Islands refers to two statements made in multilateral fora before the date of the filing of its Application which, in its view, suffice to establish the existence of a dispute. The Marshall Islands relies on the statement made at the High-level Meeting of the General Assembly on Nuclear Disarmament, on 26 September 2013 by its Minister for Foreign Affairs, "urg[ing] all nuclear weapons states to intensify efforts to address their responsibilities in moving towards an effective and secure disarmament". However, the Court considers that this statement is formulated in hortatory terms and cannot be understood as an allegation that India (or any other nuclear power) was in breach of any of its legal obligations. It does not mention the obligation to negotiate, nor does it say that the nuclear-weapon States are failing to meet their obligations in this regard. It suggests that they are making "efforts" to address their responsibilities, and calls for an intensification of those efforts, rather than deploring a failure to act. The Court adds that a statement can give rise to a dispute only if it refers to the subject-matter of a claim with sufficient clarity to enable the State against which that claim is made to identify that there is, or may be, a dispute with regard to that subject-matter. The 2013 statement relied upon by the Marshall Islands does not meet these requirements. The Court observes that the statement made by the Marshall Islands at the Nayarit conference on 13 February 2014 goes further than the 2013 statement, in that it contains a sentence asserting that "States possessing nuclear arsenals are failing to fulfil their legal obligations" under Article VI of the NPT and customary international law. India was present at the Nayarit conference. However, the subject of the conference was not specifically the question of negotiations with a view to nuclear disarmament, but the broader question of the humanitarian

impact of nuclear weapons, and while this statement contains a general criticism of the conduct of all nuclear-weapon States, it does not specify the conduct of India that gave rise to the alleged breach. For the Court, such a specification would have been particularly necessary if, as the Marshall Islands contends, the Nayarit statement was aimed at invoking the international responsibility of the Respondent on the grounds of a course of conduct which had remained unchanged for many years. Given its very general content and the context in which it was made, that statement did not call for a specific reaction by India. Accordingly, no opposition of views can be inferred from the absence of any such reaction. The Nayarit statement is insufficient to bring into existence, between the Marshall Islands and India, a specific dispute as to the existence or scope of the asserted customary international law obligations to pursue in good faith, and to bring to a conclusion, negotiations leading to nuclear disarmament in all its aspects under strict and effective international control, as well as to cease the nuclear arms race at an early date, or as to India's compliance with any such obligations. The Court concludes that, in all the circumstances, on the basis of those statements—whether taken individually or together—it cannot be said that India was aware, or could not have been unaware, that the Marshall Islands was making an allegation that India was in breach of its obligations.

Secondly, the Court considers the Marshall Islands' argument that the very filing of the Application and statements made in the course of the proceedings by both Parties suffice to establish the existence of a dispute. The Court deems that the case law invoked by the Marshall Islands does not support this contention. In the case concerning *Certain Property*, the existence of a dispute was clearly referenced by bilateral exchanges between the parties prior to the date of the application (*Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 19, para. 25). The reference to subsequent materials in the *Cameroon* v. *Nigeria* case related to the scope of the dispute, not to its existence (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 317, para. 93). Moreover, while it is true that the Court did not explicitly reference any evidence before the filing of the application demonstrating the existence of a dispute in its Judgment in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia*), in the particular context of that case, which involved an ongoing armed conflict, the prior conduct of the parties was sufficient to establish the existence of a dispute (*Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 614, paras. 27–29). Instead, the issues the Court focused on in that case were not the date when the dispute arose but the proper subject-matter of that dispute, whether it fell within the scope of the relevant compromissory clause, and whether it "persist[ed]" at the date of the Court's decision. The Court reiterates that, although statements made or claims advanced in or even subsequently to the Application may be relevant for various purposes—notably in clarifying the scope of the dispute submitted—they cannot create a dispute *de novo*, one that does not already exist.

Thirdly, the Court assesses the Marshall Islands argument that the conduct of India in maintaining and upgrading its nuclear arsenal, and in failing to co-operate with certain diplomatic initiatives, shows the existence of a dispute between the Parties. The Court recalls that the question whether there is a dispute in a particular contentious case turns on the evidence of opposition of views. In this regard, the conduct of a respondent can contribute to a finding by the Court that the views of the parties are in opposition. However, as the Court has previously concluded, in the present case neither of the statements that were made in a multilateral context by the Marshall Islands offered any particulars regarding India's conduct. On the basis of such statements, it cannot be said that India was aware, or could not have been unaware, that the Marshall Islands was making an allegation that India was in breach of its obligations. In this context, the conduct of India does not provide a basis for finding a dispute between the two States before the Court.

* *

The Court therefore concludes that the first objection made by India must be upheld. It follows that the Court does not have jurisdiction under Article 36, paragraph 2, of its Statute. Consequently, it is not necessary for the Court to deal with the other objections raised by India. The questions of the existence of and extent of customary international law obligations in the field of nuclear disarmament, and India's compliance with such obligations, pertain to the merits. But the Court has found that no dispute existed between the Parties prior to the filing of the Application, and consequently it lacks jurisdiction to consider these questions.

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Declaration of President Abraham

In his declaration, President Abraham explains that he voted in favour of the Judgment because he considers the Court's decision to be fully consistent with its recent jurisprudence relating to the requirement for a "dispute" to exist between the parties, as established by a series of Judgments handed down over the past five years, in particular the Judgment of 1 April 2011 in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)*, the Judgment of 20 July 2012 in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* and the Judgment of 17 March 2016 in the case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*. It is apparent from these Judgments, he explains, that, in order to determine whether the condition relating to the existence of a dispute has been met, the date to be referred to is the date of the institution of the proceedings, and that the Court can only find that it has jurisdiction to entertain a case where each party was—or must have been—aware on that date that the views of the other party were opposed to its own.

President Abraham explains that, even though he expressed reservations at the time the Court established this

jurisprudence, he nevertheless considers himself to be bound by such jurisprudence and therefore voted in conformity with it.

Declaration of Vice-President Yusuf

1. Whilst agreeing with the conclusion of the Court in *Marshall Islands* v. *India*, Vice-President Yusuf sets forth in his declaration his disagreement with two aspects of the Judgment. First, he rejects the criterion of "awareness" as the condition for the existence of a dispute. Second, he criticizes the one-size-fits-all approach taken to the three distinct cases argued before the Court by the Parties (*Marshall Islands* v. *India*, *Marshall Islands* v. *United Kingdom*, *Marshall Islands* v. *Pakistan*).

2. As the Judgment recognizes, "[a] dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J. Series A, No. 2*, p. 11). It is for the Court to determine the existence of a dispute objectively (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, I.C.J. Reports 1950*, p. 74), which is a matter "of substance, not of form" (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, I.C.J. Reports 2011 (I)*, para. 30).

3. In the present Judgment, the Court states that "a dispute exists when it is demonstrated, on the basis of the evidence, that the respondent was aware, or could not have been unaware, that its views were 'positively opposed' by the applicant" (paragraph 38). The two Judgments that it invokes as authority for this statement—namely the Judgments on preliminary objections in the cases of *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*, and the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)*—do not provide support for the "awareness" criterion expounded by the Court. In both those cases, the Court simply noted that as a matter of fact the respondent State was aware of the position of the applicant; it did not identify "awareness" as a requirement for the existence of a dispute at any point nor was this implicit in the Court's reasoning.

4. Vice-President Yusuf notes that the introduction of the "awareness" criterion conflicts with the Court's established jurisprudence that the existence of a dispute is for objective determination. Moreover, such an approach also undermines judicial economy and the sound administration of justice by inviting submissions of second applications on the same dispute.

5. The Court could have come to the same conclusions reached in the present Judgment by applying the criteria traditionally used by it in the determination of the existence of a dispute. On the basis of the evidence placed before it in this case, the Court could have concluded that the Parties did not hold positively opposed views prior to the submission of the Application by the Republic of the Marshall Islands. There was no need to introduce a new criterion of "awareness" in order to justify those conclusions.

6. The conclusions of the Judgment on the absence of a dispute between the Republic of the Marshall Islands and India should have been based on an analysis of the facts presented to the Court regarding the positions of the Parties on the subject-matter of the alleged dispute, referring in particular to the articulation of those positions in multilateral settings.

7. In particular, reference should have been made to: *(a)* the resolutions adopted by the United Nations General Assembly calling upon States to pursue multilateral negotiations on nuclear disarmament and the voting patterns of the Republic of the Marshall Islands and India on such resolutions; and *(b)* statements made by the Parties on the subject-matter of the alleged dispute in multilateral forums.

8. As regards the United Nations General Assembly resolutions, India has consistently voted in favour of the United Nations General Assembly resolutions that call upon States to negotiate a comprehensive nuclear disarmament treaty. There is no doubt that such a voting record has an evidentiary value with regard to the course of conduct of India on the matter at issue in this case: the immediate commencement of negotiations and conclusion of a general convention on nuclear disarmament.

9. Furthermore, India, as a member of the Non-Aligned Movement (NAM), has consistently subscribed to statements made by this group of States that express willingness to engage in multilateral negotiations leading to nuclear disarmament.

10. In addition to its voting record on United Nations General Assembly and Non-Aligned Movement resolutions, India's consistent support for the commencement and conclusion of negotiations leading to nuclear disarmament is substantiated by the statements of its Head of State and Ministers in multilateral forums or official documents.

11. Thus, Vice-President Yusuf considers that there is no evidence in the record that positively opposed views were held by India and the Republic of the Marshall Islands, prior to the submission of the Application of the Republic of the Marshall Islands, on the obligation to pursue and conclude negotiations on nuclear disarmament, assuming that such an obligation exists in customary international law.

12. The record shows instead that both States have been advocating in various multilateral forums, including at the Nayarit conference, but most of all at the United Nations General Assembly (at least since 2013 in the case of the Republic of the Marshall Islands), the necessity for all States, including nuclear-weapons States, to pursue in good faith and to conclude negotiations on nuclear disarmament. Rather than positive opposition or conflict of legal views on the subject-matter of the alleged dispute, the evidence appears to point towards a convergence of views between the Parties on the negotiation and conclusion of a comprehensive convention on nuclear disarmament.

Separate opinion of Judge Owada

Judge Owada recognizes that the history of the Marshall Islands (hereinafter the "RMI") has created reasons for special concern about nuclear disarmament, and particularly

the obligation of the nuclear-weapon States under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons (hereinafter the "NPT"). Yet the evidence must demonstrate the existence of a concrete legal dispute in order for this Court to have jurisdiction. For this reason, Judge Owada concurs with the reasoning of the Court, but has appended a separate opinion to clarify the reasoning of the Court with respect to three issues in this legal, though politically charged, context.

The first point relates to the legal standard applied by the Court in determining whether or not a dispute existed at the time of the filing of the Application by the RMI. Judge Owada recalls that, for the purpose of establishing the existence of a dispute, it must be shown that the claim of one party is positively opposed by the other. It is important to recognize that this requirement is not a mere formality, but a matter of cardinal significance as an *indispensable precondition* for the seisin of the Court by the Applicant. For this reason, the absence of an alleged dispute at the time of the filing of an application is not a procedural technicality that can be cured by a subsequent act, as was the case in the *Mavrommatis Palestine Concessions* case. In this context, a legal dispute must be distinguished from a mere divergence of positions. The jurisprudence of the Court reflects this principle, though it has examined this issue in diverse factual and legal circumstances and in doing so has assessed a variety of different factors. It might be tempting to conclude that the Court's reliance on such factors evidences a certain threshold for establishing the existence of a dispute, but in Judge Owada's view the jurisprudence of the Court is not quite so linear. These Judgments instead represent case-specific instances in which the evidence was adjudged to be sufficient or insufficient. This point must be borne in mind when appreciating the true meaning of the respondent's awareness, as introduced by the present Judgment. Although the Judgment might appear to introduce this element of "awareness" out of the blue, the reality is that the element of awareness is the common denominator running through the case law. The awareness of the respondent demonstrates the transformation of a mere disagreement into a true legal dispute and is thus an essential minimum common to all cases.

The second point relates to the time at which a dispute must be shown to exist. The RMI argued that the Judgments of the Court in several previous cases support its contention that statements made *during* the proceedings may serve as evidence of the existence of a dispute. The Court correctly explained the meaning of these precedents in the Judgment, but Judge Owada wished to provide a more detailed explanation of the correct interpretation of the case concerning the *Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*. The unique circumstances and mixed questions of law and fact tied to the merits of that case made the question to be decided by the Court very different from the question at issue in the present proceedings and, as such, the Court's reliance on statements made during the proceedings in that case should not be taken as signalling a departure from the Court's consistent jurisprudence on the subject.

Finally, Judge Owada wishes to elaborate upon the treatment of the evidence by the Court in the present Judgment. Some may feel that the Court adopted a piecemeal approach by rejecting each category of evidence individually, whereas the RMI argued that the evidence must be taken as a whole. It is Judge Owada's view that the Court examined all of the evidence and correctly determined that this evidence—*even when taken as a whole*—was not sufficient to demonstrate the existence of a dispute.

Having stated this, Judge Owada adds that a new legal situation might have emerged as a result of the present proceedings before the Court. To the extent that the present Judgment reflects the position of the Court with respect to the legal situation that existed at the time of the filing of the present Application, a new application might not be subject to the same preliminary objection to jurisdiction. The viability of such a new application would remain an open question and its fate would depend upon the Court's examination of *all* of the objections to jurisdiction and admissibility.

Separate opinion of Judge Tomka

Judge Tomka is not convinced by the approach taken by the Court in relation to the existence of a dispute in this case, and does not consider that it is warranted by the Court's previous jurisprudence. He is therefore regrettably unable to support the Court's conclusions in this regard.

Judge Tomka begins by outlining the claims made by the Marshall Islands in this case, relating to India's alleged breach of obligations relating to nuclear disarmament said to exist under customary international law. He observes that India has denied those claims.

He recalls that the Marshall Islands has invoked the Article 36 (2) declarations of the Parties as the basis for jurisdiction in this case. Judge Tomka observes that, when analysing issues of jurisdiction, caution should be taken in relying on different pronouncements of the Court which may have been made in the context of particular Article 36 (2) declarations or compromissory clauses which set preconditions for the seising of the Court. He notes that the Court in this Judgment reiterates its previous view that there is no requirement that a State negotiate before seising the Court or give notice of its claim before instituting proceedings, unless there is such a condition in the relevant basis of jurisdiction.

Judge Tomka observes that, although the Court has often stated that the existence of a dispute is a condition for its jurisdiction, it is, in his view, more properly characterized as a condition for the exercise of the Court's jurisdiction. He observes in this respect that, in relation to States which have made declarations under Article 36 (2) of the Statute, the Court's jurisdiction is established from the moment the declaration is deposited with the Secretary-General of the United Nations. Thus, in Judge Tomka's view, it is not the emergence of a dispute which establishes the Court's jurisdiction or perfects it. Rather, the emergence of a dispute is a necessary condition for the Court to exercise its jurisdiction. The disappearance of the dispute during the proceedings does not deprive the Court of its jurisdiction, but the Court in such situation will not give any judgment on the merits, as there is nothing upon which to decide.

Judge Tomka notes the function of the Court, as the principal judicial organ of the United Nations, "is to decide in accordance with international law such disputes as are submitted to it" (Article 38, paragraph 1, of the Statute). He observes that, in order to discharge that function, the dispute must still exist when the Court decides on its merits. However, even though the formulation of Article 38, paragraph 1, implies that the dispute will already exist when proceedings before the Court are instituted, the phrase about the Court's function was not intended to constitute a condition for the Court's jurisdiction and should not be determinative in respect thereof.

Judge Tomka highlights that the Court's jurisprudence requires that a dispute exist *in principle* at the time of the application. He considers that, even though the Court repeats this general rule in this Judgment, it has here adopted rather a very strict requirement that the dispute *must* have existed prior to the filing of the Marshall Islands' Application.

He outlines that, in some cases, circumstances will dictate that the dispute must indeed exist as at the date of the application. This may be because of the subsequent expiry of the acceptance of the Court's jurisdiction by one of the States, as in the recent case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections*, Judgment of 17 March 2016. It may also be because, as in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 70, the compromissory clause at issue requires prior negotiations before the filing of the Application, from which it logically follows that a dispute relating to the subject-matter of the relevant Convention should have arisen prior to instituting the proceedings. Judge Tomka cannot agree with those who consider that the *Georgia* v. *Russia* case indicates the beginning of a more formalistic approach to the existence of a dispute in the Court's jurisprudence.

Judge Tomka observes that where there are no circumstances requiring that the dispute exist by a particular date, the Court has been flexible in not limiting itself only to the period prior to the filing of the application in order to ascertain whether a dispute existed between the parties before it. He highlights in this respect the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 595.

Moreover, Judge Tomka observes that the Court, and its predecessor, have always shown a reasonable amount of flexibility, not being overly formalistic, when it comes to the timing at which jurisdictional requirements are to be met. He discusses, *inter alia*, *Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 595, and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 412. The Court observed, in the latter case, *inter alia*, that

> "What matters is that, at the latest by the date when the Court decides on its jurisdiction, the applicant must be entitled, if it so wishes, to bring fresh proceedings in which the initially unmet condition would be fulfilled. In such a situation, it is not in the interests of the sound administration of justice to compel the applicant to begin the proceedings anew—or to initiate fresh proceedings—and it is preferable, except in special circumstances, to conclude that the condition has, from that point on, been fulfilled" (*ibid*., p. 441, para. 85).

Judge Tomka considers that there is no compelling reason why this principle cannot be applied to the existence of a dispute. He cannot agree with the view that the Judgment in *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 422, represents a departure in the Court's jurisprudence in this regard.

While Judge Tomka accepts that the Marshall Islands had, for some time, not taken a particularly active position on nuclear disarmament in multilateral fora, he observes that it has, since at least 2013, voiced its dissatisfaction about the compliance, or rather lack thereof, with obligations relating to nuclear disarmament alleged to exist under, *inter alia*, customary international law by nuclear powers, among them India. He does not consider that a State is required, under international law, to give notice to another State of its intention to institute proceedings before the Court, but takes the view that a State can formulate its claim in the application seising the Court. He observes that to require a State to give prior notice may entail, in the present optional clause system of the Court's compulsory jurisdiction, a risk that the Court will be deprived of its jurisdiction prior to receiving an application.

Judge Tomka concludes on this point that the proceedings before the Court in this case have clarified that there is a dispute between the Marshall Islands and India about the latter's performance of obligations relating to nuclear disarmament and alleged to exist under customary international law. In his view, the conclusion that the Court has no jurisdiction in the absence of a dispute is not justified in the case at hand.

Nonetheless, Judge Tomka takes the view that the nature of any obligations that may exist in the field of nuclear disarmament renders the Marshall Islands' Application inadmissible. He discusses Article VI of the NPT, which is in similar terms to the obligations the Marshall Islands alleges to exist under customary international law in this case, and the way the obligation thereunder was characterized by the Court in *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 226. He observes, with reference to the literature on this point, that disarmament requires co-operation and performance by all States. He outlines that disarmament can realistically be achieved only through balancing the security interests of the States concerned, in particular all nuclear powers and other countries with significant military capabilities. Judge Tomka considers that enquiry into the compliance by one nuclear power with its obligations relating to nuclear disarmament, including any

obligation to negotiate in good faith, invites consideration of the position taken by all other nuclear powers in relation to the same obligations which are or may be binding on them. He observes that it is only with an understanding of the positions taken by other States that the Court can stand on safe ground in considering the conduct of any one State alone, which necessarily is influenced by the positions of those other States, and whether that one State alone is open to achieving the goal of nuclear disarmament through *bona fide* negotiations. He emphasizes that this is not a question of ruling on the responsibility of those other States as a precondition for ruling on the responsibility of the Respondent such that the *Monetary Gold* principle would apply. It is, in his view, rather a question of whether it is possible for the Court, in this context, to undertake consideration of a single State's conduct without considering and understanding the positions taken by the other States with which that State (the Respondent in the case at hand) would need to have negotiated, and with which it would need to agree on the steps and measures to be taken by all concerned in order to achieve the overall goal of nuclear disarmament.

Judge Tomka concludes that the issues raised in the present proceedings are not of a bilateral nature between the Marshall Islands and India. He is convinced that the Court cannot meaningfully engage in a consideration of India's conduct when other States are not present before the Court to explain their positions and actions. This case illustrates, in his view, the limits of the Court's function, focused as it is on bilateral disputes. Had the Court been endowed with universal compulsory jurisdiction, all Members of the United Nations would have been subject to its jurisdiction. There would not have then existed obstacles to the Court's exercising its jurisdiction fully and thus contributing to the achievement of the purposes and goals of that Organization.

To his sincere and profound regret, Judge Tomka concludes that the absence of other nuclear powers in the proceedings prevents the Court from considering the Marshall Islands' claims in their proper multilateral context. Therefore, he considers that the Application is inadmissible and that the Court cannot proceed to the merits of the case.

Dissenting opinion of Judge Bennouna

In the three cases brought by the Marshall Islands concerning the obligation to negotiate pursuant to Article VI of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons and under customary international law, the Court has declared that it lacks jurisdiction on the grounds of the non-existence of a dispute between the Parties. In doing so, the Court has preferred an exercise in pure formalism to the realism and flexibility expressed in its previous and consistent jurisprudence. Hence, whereas the existence of a dispute had until now been determined objectively, the Court has introduced a new subjective element in its three Judgments. By stopping the time of law and analysis at the date of submission of the Marshall Islands' Application and requiring that the Respondent must have been aware or could not have been "unaware that its views were 'positively opposed' by the applicant", the Court has shown excessive formalism at the expense of a flexible approach that favours the sound administration of justice.

Dissenting opinion of Judge Cançado Trindade

1. In his Dissenting Opinion, composed of 21 parts, in the present case of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (Marshall Islands *versus* India), Judge Cançado Trindade presents the foundations of his personal dissenting position, pertaining to the Court's decision, encompassing the approach pursued, the whole reasoning as well as the resolutory points. In doing so, Judge Cançado Trindade distances himself as much as he can from the position of the Court's majority.

2. In analysing, first of all, the issue of the existence of a dispute before the Hague Court, Judge Cançado Trindade examines in detail the *jurisprudence constante* of the Hague Court (PCIJ and ICJ), whereby a dispute exists when there is "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (not necessarily stated *expressis verbis*). Whether there exists a dispute is a matter for *"objective determination" by the Court*, and the mere denial of the existence of a dispute does not prove its non-existence.

3. Such has been the position of the Hague Court—both the PCIJ, as from the case of *Mavrommatis Palestine Concessions* (Judgment of 30 August 1924), and the ICJ, as from the Advisory Opinion (of 30 March 1950) on the *Interpretation of Peace Treaties*. Even along the last decade—he recalls—the Hague Court has deemed it fit to insist on its own faculty to proceed to the "objective determination" of the dispute, consistent with its *jurisprudence constante*, examined in detail in Judge Cançado Trindade's Dissenting Opinion (part II).

4. It was only very recently, in a passage of its Judgment on Preliminary Objections (of 1 April 2011) in the case of the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (CERD), that the ICJ at a certain moment has decided to apply to the facts of the case a higher threshold for the determination of the existence of a dispute, by proceeding to ascertain whether the applicant State had given the respondent State prior notice of its claim and whether the respondent State had opposed it. Judge Cançado Trindade warns that such new requirement "is not consistent with the PCIJ's and the ICJ's *jurisprudence constante* on the determination of the existence of a dispute" (para. 9).

5. Now, in the present cases of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, the three respondent States (India, United Kingdom and Pakistan), seek to rely on a requirement of prior notification of the claim, or - 8 - the test of prior awareness of the applicant State's claim, for a dispute to exist under the ICJ's Statute or general international law. Yet—Judge Cançado Trindade further warns—

> "nowhere can such a requirement be found in the Court's *jurisprudence constante* as to the existence of a dispute: quite on the contrary, the ICJ has made clear that the position or the attitude of a party can be established by inference [case

of *Land and Maritime Boundary between Cameroon and Nigeria*, Judgment on Preliminary Objections, of 11 June 1998]. Pursuant to the Court's approach, it is not necessary for the respondent to oppose previously the claim by an express statement, or to express acknowledgment of the existence of a dispute" (para. 10).

6. Judge Cançado Trindade next recalls that, in his earlier Dissenting Opinion (para. 161) in the Court's 2011 Judgment in the case of the *Application of the CERD Convention*, he criticized the Court's "formalistic reasoning" in determining the existence of a dispute, introducing a higher threshold that went beyond the *jurisprudence constante* of the PCIJ and the ICJ itself (paras. 11–12). There is no general requirement of prior notice of the Applicant State's intention to initiate proceedings before the ICJ. He adds that "*the purpose* of the need of determination of the existence of a dispute (and its object) before the Court is to enable this latter to exercise jurisdiction properly: it is not intended to protect the respondent State, but rather and more precisely to safeguard the proper exercise of the Court's judicial function" (para. 13).

7. Likewise, there is no such requirement of prior "exhaustion" of diplomatic negotiations (para. 14) before lodging a case with, and instituting proceedings before, the Court (case of *Land and Maritime Boundary between Cameroon and Nigeria*, Judgment on Preliminary Objections of 11 June 1998). In the present case opposing the Marshall Islands to India, there were two sustained and distinct courses of conduct of the two contending parties, evidencing their distinct legal positions, which suffice for the determination of the existence of a dispute. The subject-matter of the dispute between the parties is whether India has breached its obligation under customary international law to pursue in good faith and to conclude negotiations leading to nuclear disarmament in all its aspects under effective international control (para. 16).

8. In the present cases of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (Marshall Islands *versus* India/United Kingdom/Pakistan), the Court's majority has unduly heightened the threshold for establishing the existence of a dispute; it has laid down the "awareness" requirement, seemingly "undermining its own ability to infer the existence of a dispute from the conflicting courses of conduct of the contending parties" (para. 19).

9. In Judge Cançado Trindade's understanding, the view taken by the Court's majority in the present case "contradicts the Hague Court's (PCIJ and ICJ) own earlier case-law, in which it has taken a much less formalistic approach to the establishment of the existence of a dispute" (as to the PCIJ, cf., *inter alia*, case of *Mavrommatis Palestine Concessions*, Judgment of 30 August 1924; case of *Certain German Interests in Polish Upper Silesia*, Judgment (Jurisdiction) of 25 August 1925; case of *Interpretation of Judgments ns. 7 and 8 - Chorzów Factory*, Judgment of 16 December 1927; and, as to the ICJ, cf., *inter alia*, case of *East Timor*, Judgment of 30 June 1995; case of the *Application of the Convention against Genocide*, Preliminary Objections, Judgment of 11 July 1996; case of *Certain Property*, Preliminary Objections, Judgment of 10 February 2005) (paras. 21–22).

10. In the cases of *East Timor* (1995) of the *Application of the Convention against Genocide* (1996) and of *Certain Property* (2005), the ICJ has considered that conduct post-dating the critical date (i.e., the date of the filing of the Application) supports a finding of the existence of a dispute between the parties. In the light of this approach taken by the ICJ itself in its earlier case-law, it is clear that a dispute exists in the *cas d'espèce* (paras. 23–24).

11. Moreover, the Court's majority makes *tabula rasa* of the requirement that "in principle" the date for determining the existence of the dispute is the date of filing of the application (case of *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, Preliminary Objections, Judgment of 17 March 2016; as already seen, in its case-law the ICJ has taken into account conduct post-dating that critical date (para. 29).

12. In the present case—Judge Cançado Trindade proceeds—the Court's majority borrows the *obiter dicta* it made in the case of the *Application of the CERD Convention* (2011)—"unduly elevating the threshold for the determination of the existence of a dispute—in respect of a compromissory clause under that Convention (wrongly interpreted anyway, making abstraction of the object and purpose of the CERD Convention). In the present case, opposing the Marshall Islands to India, worse still, the Court's majority takes that higher standard out of context, and applies it herein, in a case lodged with the Court on the basis of an optional clause declaration, and concerning an obligation under customary international law" (para. 30).

13. This higher threshold is, "besides formalistic, artificial", and it does not follow from the definition of a dispute in the Court's *jurisprudence constante* (para. 31). In applying the criterion of "awareness", the Court's majority formalistically requires a specific reaction of the respondent State to the claim made by the applicant State, "even in a situation where, as in the *cas d'espèce*, there are two consistent and distinct courses of conduct on the part of the contending parties" (para. 31). Judge Cançado Trindade concludes, on this particular issue, that the formalistic raising, by the Court's majority, of the higher threshold for the determination of the existence of a dispute,

> "unduly creates a difficulty for the very *access to justice* (by applicants) at international level, in a case on a matter of concern to the whole of humankind. This is most regrettable" (para. 32).

14. In sequence, he then turns attention to the distinct series of United Nations General Assembly resolutions on nuclear weapons and *opinio juris* (part III), namely: *a*) United Nations General Assembly resolutions on Nuclear Weapons (1961–1981); *b*) United Nations General Assembly Resolutions on Freeze of Nuclear Weapons (1982–1992); *c*) United Nations General Assembly Resolutions Condemning Nuclear Weapons (1982–2015); *d*) United Nations General Assembly Resolutions Following up the ICJ's 1996 Advisory Opinion (1996–2015). He recalls, that, first, in the course of the proceedings in the present case of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, the contending parties

addressed United Nations General Assembly resolutions on the matter of nuclear disarmament (para. 33).

15. As to the *first series of United Nations General Assembly Resolutions on Nuclear Weapons (1961–1981)*, the ground-breaking General Assembly resolution 1653 (XVI), of 24 November 1961, advanced its *célèbre* "Declaration on the Prohibition of the Use of Nuclear and Thermonuclear Weapons". There followed three Disarmament Decades (para. 34). In this first period under review (1961–1981), the United Nations General Assembly continuously paid special attention to disarmament issues and to nuclear disarmament in particular (para. 35). In 1978 and 1982, the United Nations General Assembly held two Special Sessions on Nuclear Disarmament (respectively, the 10th and 12th sessions), where the question of nuclear disarmament featured prominently amongst the themes discussed; it was stressed that the most immediate goal of disarmament is the elimination of the danger of a nuclear war (para. 36).

16. Judge Cançado Trindade recalls that the General Assembly repeatedly drew attention to the dangers of the nuclear arms race for humankind and the survival of civilization and expressed apprehension concerning the harmful consequences of nuclear testing for the acceleration of such arms race. Thus, the General Assembly reiterated its condemnation of all nuclear weapon tests, in whatever environment they may be conducted, and it urged NWS to suspend nuclear weapon tests in all environments (para. 37).

17. He further recalls that, in that period, the General Assembly also emphasized that NWS bear a special responsibility for fulfilling the goal of achieving nuclear disarmament (para. 38). At the 84th plenary meeting—he adds—following the 10th Special Session on Disarmament, the General Assembly declared that the use of nuclear weapons is a "violation of the Charter of the United Nations" and "a crime against humanity", and that the use of nuclear weapons should be prohibited, pending nuclear disarmament (para. 39).

18. As to *the second series of United Nations General Assembly Resolutions on Freeze of Nuclear Weapons (1982–1992)*, every year in that period of 1982–1992 (following up on the 10th and 12th Special Sessions on Nuclear Disarmament, held in 1978 and 1982, respectively), the General Assembly adopted resolutions calling for a nuclear-weapons freeze. Such resolutions on freeze of nuclear weapons note that existing arsenals of nuclear weapons are more than sufficient to destroy all life on earth. They express the conviction that lasting world peace can be based only upon the achievement of general and complete disarmament, under effective international control. In this connection, the aforementioned General Assembly resolutions note that the highest priority objectives in the field of disarmament have to be nuclear disarmament and the elimination of all weapons of mass destruction (para. 41).

19. They at last call upon NWS to agree to reach "a freeze on nuclear weapons", which would, *inter alia*, provide for "a simultaneous total stoppage of any further production of fissionable material for weapons purposes". Such nuclear-weapons freeze was not seen as an end in itself but as the most effective first step towards the reduction of nuclear arsenals, a comprehensive test ban, the cessation of the manufacture and deployment of nuclear weapons, and the cessation of the production of fissionable material for weapons purposes (para. 42).

20. After recalling the acknowledgment of the authority and legal value of General Assembly resolutions made in the course of the pleadings of late 1995 in the advisory proceedings before the ICJ (paras. 43–45), Judge Cançado Trindade points out that those resolutions continue to grow in number ever since and until today, "clearly forming", in his perception, "an *opinio juris communis* as to nuclear disarmament" (para. 46).

21. He then turns to *the longstanding series of General Assembly resolutions condemning nuclear weapons (1982–2015)*, wherein the General Assembly moved on straightforwardly to the condemnation of nuclear weapons warning against their threat to the survival of humankind (para. 48). Those General Assembly resolutions next significantly *reaffirm*, in their preambular paragraphs, year after year, that "the use of nuclear weapons would be a violation of the Charter of the United Nations and a crime against humanity" (para. 49).

22. Last but not least, Judge Cançado Trindade surveys *the series of United Nations General Assembly resolutions following up the ICJ's 1996 Advisory Opinion (1996–2015)*, which begin by expressing the General Assembly's belief that "the continuing existence of nuclear weapons poses a threat to humanity" and that "their use would have catastrophic consequences for all life on earth", and, further, that "the only defence against a nuclear catastrophe is the total elimination of nuclear weapons and the certainty that they will never be produced again" (2nd preambular paragraph). The General Assembly resolutions reiteratedly reaffirm "the commitment of the international community to the realization of the goal of a nuclear-weapon-free world through the total elimination of nuclear weapons" (para. 54).

23. Those General Assembly significantly call upon *all States* to fulfil promptly the obligation leading to an early conclusion of a Convention prohibiting the development, production, testing, deployment, stockpiling, transfer, threat or use of nuclear weapons and providing for their elimination (para. 55). The aforementioned series of General Assembly resolutions further recognize, in recent years, "with satisfaction", in a preambular paragraph, that the Antarctic Treaty, the Treaties of Tlatelolco, Rarotonga, Bangkok and Pelindaba, and the Treaty on a Nuclear-Weapon-Free Zone in Central Asia, as well as Mongolia's nuclear-weapon-free status, are "gradually freeing the entire southern hemisphere and adjacent areas covered by those treaties from nuclear weapons" (para. 56).

24. More recent resolutions (from 2013 onwards) are significantly further expanded. They call upon all NWS to undertake concrete disarmament efforts, stressing that all States need to make special efforts to achieve and maintain a world without nuclear weapons. In their operative part, they underline the ICJ's unanimous conclusion, in its 1996 Advisory Opinion on the *Threat or Use of Nuclear Weapons*, that "there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in

all its aspects under strict and effective international control" (para. 57).

25. Those of General Assembly follow-up resolutions contain paragraphs referring to the obligation to pursue and conclude, in good faith, negotiations leading to nuclear disarmament, without any reference to the NPT or to States Parties to it; they rather refer to that obligation as a general one, not grounded on any treaty provision. *All States*, and not only States Parties to the NPT, are called upon to fulfil promptly that obligation, incumbent upon *all States*, to report (to the Secretary-General) on their compliance with the resolutions at issue. In sum, "references to *all States* are deliberate, and in the absence of any references to a treaty or other specifically-imposed international obligation, this thus points towards a customary law obligation to negotiate and achieve nuclear disarmament" (para. 58).

26. Like the United Nations General Assembly, the United Nations Security Council has also often dwelt upon the matter at issue (part IV). For example, in two of its resolutions (984/1995, of 11 April 1995; and 1887/2009 of 24 September 2009), the United Nations Security Council refers, in particular, to the obligation to pursue negotiations in good faith in relation to nuclear disarmament (para. 63). The Security Council also makes a general call, upon all United Nations member States, whether or not Parties to the NPT (para. 64). In Judge Cançado Trindade's perception,

> "the aforementioned resolutions of the Security Council, like those of the General Assembly (cf. *supra*), addressing all United Nations member States, provide significant elements of the emergence of an *opinio juris*, in support of the gradual formation of an obligation of customary international law, corresponding to the conventional obligation under Article VI of the NPT. In particular, the fact that the Security Council calls upon *all States*, and not only States Parties to the NPT, to pursue negotiations towards nuclear disarmament in good faith (or to join the NPT State Parties in this endeavour) is significant. It is an indication that the obligation is incumbent on all United Nations member States, irrespectively of their being or not Parties to the NPT" (para. 65).

27. The surveyed United Nations resolutions (of the General Assembly and the Security Council)—he adds—portray the United Nations' longstanding saga in the condemnation of nuclear weapons (part V), going back to its birth and earlier years (paras. 66–67). In 1956, the International Atomic Energy Agency (IAEA) was established. And half a decade later, in 1961, the General Assembly adopted a ground-breaking and historical resolution 1653 (XVI), of 24 November 1961, titled "Declaration on the Prohibition of the Use of Nuclear and Thermo-Nuclear Weapons", which "remains contemporary today, and, 55 years later, continues to require close attention" (para. 68).

28. Over half a century later, that lucid and poignant declaration appears endowed with permanent topicality, as the whole international community remains still awaiting for the conclusion of the propounded general Convention on the prohibition of nuclear and thermo-nuclear weapons: nuclear disarmament remains still a goal to be achieved by the United Nations today, as it was in 1961. The Comprehensive Nuclear-Test-Ban Treaty (CTBT), adopted on 24 September 1996, has not yet entered into force, although 164 States have ratified it to date (para. 69). Since the adoption of the CTBT in 1996, the Conference on Disarmament has been largely deadlocked, in the face of the invocation of divergent "security interests" (para. 75).

29. After all, in historical perspective, some advances have been attained in the last decades in respect of other weapons of mass destruction—as illustrated by the adoption of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (on 10 April 1972), as well as the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (on 13 January 1993); distinctly from the CTBT, these two Conventions have already entered into force (on 26 March 1975, and on 29 April 1997, respectively). Judge Cançado Trindade concludes, in this respect, that

> "If we look at conventional international law only, weapons of mass destruction (poisonous gases, biological and chemical weapons) have been outlawed; yet, nuclear weapons, far more destructive, have not been banned yet. This juridical absurdity nourishes the positivist myopia, or blindness, in inferring therefrom that there is no customary international obligation of nuclear disarmament. Positivists only have eyes for treaty law, for individual State consent, revolving in vicious circles, unable to see the pressing needs and aspirations of the international community as a whole, and to grasp the universality of contemporary international law—as envisaged by its 'founding fathers', already in the Sixteenth–Seventeenth centuries—with its underlying fundamental principles (…).
>
> The truth is that, in our times, the obligation of nuclear disarmament has emerged and crystallized, in both conventional and customary international law, and the United Nations has been giving a most valuable contribution to this along the decades" (paras. 77–78).

30. In their arguments before the Court in the present case, the contending parties have presented their distinct arguments on the issue of United Nations resolutions on nuclear disarmament and the emergence of *opinio juris* (part VI). Judge Cançado Trindade is of the view that, despite their distinct patterns of voting, the United Nations General Assembly resolutions reviewed in the present Dissenting Opinion, taken altogether,

> "are not at all deprived of their contribution to the conformation of opinio juris as to the formation of a customary international law obligation of nuclear denuclearization. After all, they are resolutions of the United Nations General Assembly itself (and not only of the large majority of United Nations member States which voted in their favour); they are resolutions of the United Nations Organization itself, addressing a matter of common concern of humankind as a whole" (para. 85).

31. The contending parties had the opportunity to explain further their respective positions in the *cas d'espèce*, in their written responses to the questions put to them by Judge Cançado Trindade, in the public sitting of the Court of

16 March 2016 on whether the aforementioned United Nations General Assembly resolutions are constitutive of an expression of *opinio juris*, and, if so, what is their relevance to the formation of a customary international law obligation to pursue negotiations leading to nuclear disarmament, and what is their incidence upon the question of the existence of a dispute between the parties (paras. 86–92).

32. The presence of evil has marked human existence along the centuries (part VIII). Ever since the eruption of the nuclear age in August 1945, some of the world's great thinkers have been inquiring whether humankind has a future (paras. 93–101), and have been drawing attention to the imperative of respect for life and the relevance of humanist values (paras. 102–114). Also in international legal doctrine there have been those who have been stressing the needed prevalence of human conscience, the universal juridical conscience, over State voluntarism (paras. 115–119).

33. This is the position upheld also by Judge Cançado Trindade, to whom

> "it is the universal juridical conscience that is the ultimate material source of international law. (…) one cannot face the new challenges confronting the whole international community keeping in mind only State susceptibilities; such is the case with the obligation to render the world free of nuclear weapons, an imperative of *recta ratio* and not a derivative of the 'will' of States. In effect, to keep hope alive it is necessary to bear always in mind humankind as a whole" (para. 119).

34. Within the ICJ, Judge Cançado Trindade has made this point also in his Dissenting Opinion (paras. 488–489) in the case concerning the *Application of the Convention against Genocide* (Croatia *versus* Serbia, Judgment of 03 February 2015). He further ponders that "[t]he presence of evil has accompanied and marked human existence along the centuries", with the "increasing disregard for human life"; the "tragic message of the Book of *Genesis*", in his perception, "seems perennial, as contemporary as ever, in the current nuclear age" (paras. 121–122).

35. His next line of considerations pertain to the attention of the United Nations Charter to peoples, as shown in several of its provisions, and in its attention also to the safeguarding of values common to humankind, and to the respect for life and human dignity (part IX). The new vision advanced by the United Nations Charter, and espoused by the Law of the United Nations—he proceeds—has, in his perception,

> "an incidence upon judicial settlement of international disputes. Thus, the fact that the ICJ's mechanism for the handling of contentious cases is an inter-State one, does not mean that its reasoning should also pursue a strictly inter-State dimension; that will depend on the nature and substance of the cases lodged with it. And there have been several cases lodged with the Court that required a reasoning going well beyond the inter-State dimension. Such reasoning beyond the inter-State dimension is faithful to the United Nations Charter, the ICJ being 'the principal judicial organ of the United Nations'" (para. 125).

36. Likewise, the cycle of World Conferences of the United Nations along the nineties, in a commendable endeavour of the United Nations *to go beyond and transcend the purely inter-State dimension*, imbued of a spirit of solidarity, so as to consider the challenges for the future of humankind. The common denominator in those United Nations World Conferences—Judge Cançado Trindade adds—can be found in the recognition of the legitimacy of the concern of the international community as a whole with the conditions of living of all human beings everywhere. At the end of the decade and the dawn of the new millennium, the United Nations Millennium Declaration (2000) stated the determination "to eliminate the dangers posed by weapons of mass destruction" (paras. 129–130).

37. In sum, the nature of a case before the Court may well require a reasoning going beyond the strictly inter-State outlook; the present case concerning the obligation of nuclear disarmament requires attention to be focused on peoples, in pursuance of a humanist outlook, rather than on inter-State susceptibilities. The inter-State mechanism of adjudication of contentious cases before the ICJ does not at all imply that the Court's reasoning should likewise be strictly inter-State. Nuclear disarmament is a matter of concern to humankind as a whole.

38. Contrary to the reasoning of the Court's majority, the so-called *Monetary Gold* "principle" has no place in a case like the present one, and it "does not belong to the realm of the *prima principia*, being nothing more than a concession to State consent, within an outdated State voluntarist framework". The present case, in the perception of Judge Cançado Trindade, shows

> "the need to go beyond the strict inter-State outlook. The fact that the mechanism for the adjudication of contentious cases before the ICJ is an inter-State one, does not at all imply that the Court's reasoning should likewise be strictly inter State. In the present case concerning nuclear weapons and the obligation of nuclear disarmament, it is necessary to focus attention on peoples, rather than on inter-State susceptibilities. It is imperative to keep in mind the world population, in pursuance of a humanist outlook, in the light of the *principle of humanity*" (paras. 134–135).

39. The present case of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* stresses the utmost importance of general principles of international law, such as the principle of the juridical equality of States (part XI). General principles of law (*prima principia*) rest in the foundations of any legal system. They inform and conform its norms, guide their application, and draw attention to the prevalence of *jus necessarium* over *jus voluntarium* (cf. *infra*).

40. Factual inequalities and the strategy of "deterrence" cannot be made to prevail over the juridical equality of States; "deterrence" cannot keep on overlooking the distinct series of United Nations General Assembly resolutions, expressing an *opinio juris communis* in condemnation of nuclear weapons (part XII). As also sustained by general principles of international law and international legal doctrine—Judge Cançado Trindade adds—nuclear weapons are in breach of international law, of IHL and the ILHR, of the United Nations Charter, and of *jus cogens*, for the devastating effects and sufferings they can inflict upon humankind as a whole (paras. 142–143).

41. In his understanding, the ICJ should give "far greater weight to the *raison d'humanité*", rather than to the *raison d'État* nourishing "deterrence"; it should "keep in mind the human person and the peoples, for which States were created, instead of relying only on what one assumes to be the *raison d'État*". The *raison d'humanité*, in his understanding, "prevails surely over considerations of *Realpolitik*" (para. 143). He adds that, in its 1996 Advisory Opinion, the ICJ rightly acknowledged the importance of complete nuclear disarmament (asserted in the series of General Assembly resolutions) as an obligation of result, and not of mere conduct (para. 99), but

> "did not extract the consequences of that. Had it done so, it would have reached the conclusion that nuclear disarmament cannot be hampered by the conduct of a few States—the NWS—which maintain and modernize their own arsenals of nuclear weapons, pursuant to their strategy of 'deterrence'.
>
> The strategy of 'deterrence' has a suicidal component. Nowadays, in 2016, twenty years after the 1996 ICJ Advisory Opinion, and with the subsequent reiteration of the conventional and customary international legal obligation of nuclear disarmament, there is no longer any room for ambiguity. There is an *opinio juris communis* as to the illegality of nuclear weapons, and as to the well-established obligation of nuclear disarmament, which is an obligation of result and not of mere conduct. Such *opinio juris* cannot be erased by the dogmatic positivist insistence on an express prohibition of nuclear weapons; on the contrary, that *opinio juris* discloses that the invocation of the absence of an express prohibition is nonsensical, in relying upon the destructive and suicidal strategy of 'deterrence'" (paras. 144–145).

42. Judge Cançado Trindade concludes on this point that there is here, in effect, clearly formed, an *opinio juris communis* as to the illegality and prohibition of nuclear weapons, and the survival of humankind cannot be made to depend on the "will" and the insistence on "national security interests" of a handful of privileged States; the "universal juridical conscience stands well above the 'will' of individual States" (para. 150).

43. His next line of considerations pertains to the illegality of nuclear weapons and the obligation of nuclear disarmament (part XIII), encompassing: *a*) the condemnation of all weapons of mass destruction; *b*) the prohibition of nuclear weapons (the need of a people-centred approach, and the fundamental right to life); *c*) the absolute prohibitions of *jus cogens* and the humanization of international law; *d*) pitfalls of legal positivism. Judge Cançado Trindade stresses the need of a people-centred approach in this domain, keeping in mind the fundamental right to life (paras. 176–189). Attention is to be kept on the devastating and catastrophic consequences of the use of nuclear weapons.

44. He warns that, in the path towards nuclear disarmament, the peoples of the world cannot remain hostage of individual State consent. The absolute prohibitions of arbitrary deprivation of human life, of infliction of cruel, inhuman or degrading treatment, and of infliction of unnecessary suffering, are prohibitions of *jus cogens*, which have an incidence on ILHR, IHL, ILR and ICL, fostering the current historical process of *humanization* of international law (paras. 190–193).

45. He further warns that the positivist outlook unduly overlooks the *opinio juris communis* as to the illegality of all weapons of mass destruction, including nuclear weapons, and the obligation of nuclear disarmament, under contemporary international law (para. 199). Conventional and customary international law go together—he adds—in the domain of the protection of the human person, as disclosed by the Martens clause, with an incidence on the prohibition of nuclear weapons (paras. 201–209).

46. To Judge Cançado Trindade, the existence of nuclear weapons is the contemporary tragedy of the nuclear age; today, more than ever, human beings need protection from themselves. Nuclear weapons have no ethics, and ethics cannot be separated from law, as taught by jusnaturalist thinking (part XV). He ponders that

> "In the domain of nuclear disarmament, we are faced today, within the conceptual universe of international law, with unexplainable insufficiencies, or anomalies, if not absurdities. For example, there are fortunately in our times Conventions prohibiting biological and chemical weapons (of 1972 and 1993), but there is to date no such comprehensive conventional prohibition of nuclear weapons, which are far more destructive. There is no such prohibition despite the fact that they are in clear breach of international law, of IHL and the ILHR, as well as of the Law of the United Nations.
>
> Does this make any sense? Can international law prescind from ethics? In my understanding, not at all. Just as law and ethics go together (in the line of jusnaturalist thinking), scientific knowledge itself cannot be dissociated from ethics. The production of nuclear weapons is an illustration of the divorce between ethical considerations and scientific and technological progress. Otherwise, weapons which can destroy millions of innocent civilians, and the whole of humankind, would not have been conceived.
>
> The principles of *recta ratio*, orienting the *lex praeceptiva*, emanate from human conscience, affirming the ineluctable relationship between law and ethics. Ethical considerations are to guide the debates on nuclear disarmament. Nuclear weapons, capable of destroying humankind as a whole, carry evil in themselves. They ignore civilian populations, they make abstraction of the principles of necessity, of distinction and of proportionality. They overlook the principle of humanity. They have no respect for the fundamental right to life. They are wholly illegal and illegitimate, rejected by the *recta ratio*, which endowed *jus gentium*, in its historical evolution, with ethical foundations, and its character of universality" (paras. 211–213).

47. In Judge Cançado Trindade's understanding, humankind is subject of rights (as propounded by the "founding fathers" of international law); in the realm of the humanized new *jus gentium*; as a subject of rights, humankind has been a potential victim of nuclear weapons already for a long time. This humanist vision is centred on peoples, keeping in mind the humane ends of States.

48. In his view, the contemporary tragedy of nuclear weapons cannot be addressed from "the myopic outlook of positive law alone"; nuclear weapons, and other weapons of mass destruction, have no ethics, have no ground on the law of nations (*le droit des gens*). They are in flagrant breach of its fundamental principles, and those of International Humanitarian Law, the International Law on Human Rights, as well as the Law of the United Nations; they are a contemporary "manifestation of evil, in its perennial trajectory going back to the Book of *Genesis*". Jusnaturalist thinking, "always open to ethical considerations", identifies and discards the disrupting effects of the strategy of "deterrence" of fear creation and infliction; "humankind is victimized by this" (para. 217).

49. The next line of considerations of Judge Cançado Trindade concerns the *principle of humanity* (para. 221) and the universalist approach, with the *jus necessarium* transcending the limitations of *jus voluntarium* (part XVI). He recalls that, on several occasions, in his Individual Opinions both in the ICJ and, earlier on, in another international jurisdiction (the Inter-American Court of Human Rights), he underlined that

> "the law of nations (*droit des gens*), since its historical origins in the Sixteenth century, was seen as comprising not only States (emerging as they were), but also peoples, the human person (individually and in groups), and humankind as a whole. The strictly inter-State outlook was devised much later on, as from the Vattelian reductionism of the mid-Eighteenth century, which became *en vogue* by the end of the Nineteenth century and beginning of the Twentieth century, with the well-known disastrous consequences—the successive atrocities victimizing human beings and peoples in distinct regions of world,—along the whole Twentieth century. In the present nuclear age, extending for the last seven decades, humankind as a whole is threatened" (para. 223).

50. The conventional and customary obligation of nuclear disarmament—he proceeds—brings to the fore another aspect:

> "the issue of the *validity* of international legal norms is, after all, metajuridical. International law cannot simply remain indifferent to values, general principles of law and ethical considerations; it has, to start with, to identify what is necessary—such as a world free of nuclear weapons—in order to secure the survival of humankind. This *idée du droit* precedes positive international law, and is in line with jusnaturalist thinking. (…)
>
> It is clear to human conscience that those weapons, which can destroy the whole of humankind, are unlawful and prohibited. They are in clear breach of *jus cogens*" (paras. 231–233).

51. Judge Cançado Trindade then addresses other aspects of the matter at issue, mentioned by the contending parties in the present case of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*. He points out that *opinio juris communis necessitatis*, upholding a customary and conventional obligation of nuclear disarmament, has been finding expression, first, in the NPT Review Conferences, from 1975 to 2015 (part XVII).

52. Secondly, the same has happened in the relevant establishment of nuclear-weapon-free zones (part XVIII), to the ultimate benefit of humankind as a whole (para. 257). Basic considerations of humanity have surely been taken into account for the establishment of those zones, by the adoption of the 1967 Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (Tlatelolco), followed by four others of the kind, in distinct regions of the world, namely the 1985 South Pacific (Rarotonga) Nuclear-Free Zone Treaty, the 1995 Southeast Asia (Bangkok) Nuclear-Weapon-Free Zone Treaty, the 1996 African (Pelindaba) Nuclear Weapon-Free Zone Treaty, as well as the 2006 Central Asian (Semipalatinsk) Nuclear-Weapon-Free Zone Treaty (and their respective Protocols).

53. The establishment of those nuclear-weapon-free zones has, in effect, given expression to the growing disapproval of nuclear weapons by the international community as a whole (para. 250). To the establishment of aforementioned five nuclear-weapon-free zones other initiatives against nuclear weapons are to be added—Judge Cançado Trindade proceeds—such as the prohibitions of placement of nuclear weapons, and other kinds of weapons of mass destruction, in outer space, on the seabed, on the ocean floor and in the subsoil beyond the outer limit of the territorial seabed zone—"denuclearized" by the Treaties of Antarctica (1959), Outer Space (1967) and the Deep Sea Bed (1971), respectively, to which can be added the Treaty on the Moon and Other Celestial Bodies (1979), established a complete demilitarization thereon (para. 261).

54. The fact that the international community counts today on five nuclear-weapon-free zones, in relation to which States that possess nuclear weapons do have a particular responsibility, "reveals an undeniable advance of right reason, of the *recta ratio* in the foundations of contemporary international law". Moreover, the initiative of nuclear-weapon-free zones keeps on clearly gaining ground: in recent years, proposals are being examined for the setting up of new denuclearized zones of the kind, as well as of the so-called single-State zone (e.g., Mongolia). All this "further reflects the increasing disapproval, by the international community as a whole, of nuclear weapons, which, in view of their hugely destructive capability, constitute an affront to right reason (*recta ratio*)" (para. 262).

55. And thirdly, the same has happened in respect of the recent Conferences of the Humanitarian Impact of Nuclear Weapons (part XIX—held, respectively, in Oslo in March 2013, in Nayarit in February 2014, and in Vienna in December 2014)—in their common cause of achieving and maintaining a nuclear-weapon-free world. This recent series of Conferences—examined by Judge Cançado Trindade—has drawn attention to the humanitarian effects of nuclear weapons, "restoring the central position of the concern for human beings and peoples"; it has thus "stressed the importance of the human dimension of the whole matter, and has endeavoured to awaken the conscience of the whole international community as well as to enhance the needed humanitarian coordination in the present domain" (para. 265).

56. Given their devastating effects, nuclear weapons should never have been conceived and produced. The Nayarit and Vienna Conferences participants heard the poignant testimonies of some *Hibakusha*—survivors of the atomic bombings of Hiroshima and Nagasaki—who presented their accounts of the overwhelming devastation inflicted on those cities and their inhabitants by the atomic blasts (including the victims' burning alive, and carbonized or vaporized, as well as the long-term effects of radiation, such as the birth of "monster-like babies", the continuous suffering from "thyroid cancer, liver cancer and all types of radiogenic cancerous illnesses", extending over the years, and killing survivors along seven decades) (paras. 273 and 281).

57. This series of recent Conferences on the Humanitarian Impact of Nuclear Weapons have contributed to a deeper understanding of the consequences and risks of a nuclear detonation, and have demonstrated their devastating immediate, mid- and long-term effects of the use and testing of nuclear weapons; they have focused to a larger extent on the legal framework (and gaps therein) with regard to nuclear weapons (paras. 284–285 and 287–291). In the struggle against nuclear weapons, a "Humanitarian Pledge" has ensued from the Vienna Conference, which, by April 2016, has been formally endorsed by 127 States (para. 292–294).

58. Judge Cançado Trindade concludes on this point that all these recent initiatives (supra) have been

> "rightly drawing attention to the grave humanitarian consequences of nuclear weapons detonations. The reframing of the whole matter in a people-centred outlook appears to me particularly lucid, and necessary, keeping in mind the unfoundedness of the strategy of 'deterrence' and the catastrophic consequences of the use of nuclear weapons. (…)
>
> The obligation of nuclear disarmament being one of result, the 'step-by-step' approach cannot be extended indefinitely in time, with its insistence on the maintenance of the nuclear sword of Damocles. The 'step-by-step' approach has produced no significantly concrete results to date, seeming to make abstraction of the numerous pronouncements of the United Nations upholding the obligation of nuclear disarmament (cf. *supra*). After all, the absolute prohibition of nuclear weapons—which is multifaceted, is one of *jus cogens* (cf. *supra*). Such weapons, as the Conferences on the Humanitarian Impact of Nuclear Weapons have evidenced, are essentially inhumane, rendering the strategy of 'deterrence' unfounded and unsustainable" (paras. 295–296).

59. Moreover, those initiatives, reviewed in the present Dissenting Opinion (NPT Review Conferences, the establishment of nuclear-weapon-free zones, and the Conferences on the Humanitarian Impact of Nuclear Weapons)—referred to by the contending parties in the course of the proceedings before the ICJ in the present case of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*—"have gone beyond the inter-State outlook". In Judge Cançado Trindade's perception, "there is great need, in the present domain, to keep on looking beyond States, so as to behold peoples' and humankind's quest for survival in our times" (para. 299).

60. After recalling that nuclear weapons, "as from their conception, have been associated with overwhelming destruction" (para. 300), Judge Cançado Trindade proceeds to his final considerations (part XX). In his own understanding, *opinio juris communis*—to which United Nations General Assembly resolutions have contributed—has a much broader dimension than the subjective element of custom, being a key element in the formation of a law of conscience, so as to rid the world of the inhuman threat of nuclear weapons.

61. United Nations (General Assembly and Security Council) resolutions are adopted on behalf of the United Nations Organization itself (and not only of the States which voted in their favour); they are thus valid for *all* United Nations member States. Of the main organs of the United Nations, the contributions of the General Assembly, the Security Council and the Secretary-General to nuclear disarmament have been consistent and remarkable along the years. The ICJ, as the principal judicial organ of the United Nations, is to keep in mind basic considerations of humanity, with their incidence on questions of admissibility and jurisdiction, as well as of substantive law.

62. *Opinio juris* has already had a long trajectory in legal thinking, being today endowed with a wide dimension. Already in the Nineteenth century, the so-called "historical school" of legal thinking and jurisprudence, "in reaction to the voluntarist conception, gradually discarded the 'will' of the States by shifting attention to *opinio juris*, requiring practice to be an authentic expression of the 'juridical conscience' of nations and peoples". With the passing of time, the acknowledgment of conscience standing above the "will" developed further, as "a reaction against the reluctance of some States to abide by norms addressing matters of general or common interest of the international community" (para. 303). Judge Cançado Trindade adds that

> "*opinio juris* became a key element in the *formation* itself of international law, a *law of conscience*. This diminished the unilateral influence of the most powerful States, fostering international law-making in fulfilment of the public interest and in pursuance of the common good of the international community as a whole.
>
> The foundations of the international legal order came to be reckoned as independent from, and transcending, the 'will' of individual States; *opinio juris communis* came to give expression to the 'juridical conscience', no longer only of nations and peoples—sustained in the past by the 'historical school'—but of the international community as a whole, heading towards the universalization of international law. It is, in my perception, this international law of conscience that turns in particular towards nuclear disarmament, for the sake of the survival of humankind" (paras. 304–305).

63. Judge Cançado Trindade further recalls that, along the years, he has consistently repudiated "voluntarist positivism", as he does now in the present Dissenting Opinion, in respect of "the customary and conventional international obligation to put an end to nuclear weapons", so as "to rid the world of their inhuman threat" (paras. 307–309). He then ponders that United Nations General Assembly or Security Council resolutions on the present matter, surveyed herein,

> "are adopted on behalf not of the States which voted in favour of them, but more precisely on behalf of the United Nations Organization itself (its respective organs),

being thus *valid for all United Nations member States*. (…) [T]he United Nations is endowed with an international legal personality of its own, which enables it to act at international level as a distinct entity, independently of individual member States; in this way, it upholds the juridical equality of all States, and mitigates the worrisome vulnerability of factually weaker States, such as the NNWS; in doing so, it aims—by multilateralism—at the common good, at the realization of common goals of the international community as a whole, such as nuclear disarmament.

A small group of States—such as the NWS—cannot overlook or minimize those reiterated resolutions, extended in time, simply because they voted against them, or abstained. Once adopted, they are valid for all United Nations member States. They are resolutions of the United Nations Organization itself, and not only of the large majority of United Nations member States which voted in favour of them. United Nations General Assembly resolutions, reiteratedly addressing matters of concern to humankind as a whole (such as existing nuclear weapons), are in my view endowed with normative value. They cannot be properly considered from a State voluntarist perspective; they call for another approach, away from the strict voluntarist-positivist one" (paras. 310–311).

64. Those resolutions—he proceeds—"find inspiration in general principles of international law, which, for their part, give expression to values and aspirations of the international community as a whole, of all humankind". The values which find expression in those *prima principia* "inspire every legal order and, ultimately, lie in the foundations of this latter" (para. 312). The general principles of law (*prima principia*), in his perception,

> "confer upon the (national and international) legal order its ineluctable axiological dimension. Notwithstanding, legal positivism and political 'realism', in their characteristic subservience to power, incur into their basic mistake of minimizing those principles, which lie in the foundations of any legal system, and which inform and conform the norms and the action pursuant to them, in the search for the realization of justice. Whenever that minimization of principles has prevailed the consequences have been disastrous" (para. 313).

65. They have been contributing, in the last decades, to a vast *corpus juris* on matters of concern to the international community as a whole, overcoming the traditional inter-State paradigm of the international legal order. And this can no longer be overlooked in our days: the inter-State mechanism of the *contentieux* before the ICJ "cannot be invoked in justification for an inter-State reasoning". As "the principal judicial organ" of the United Nations,

> "the ICJ has to bear in mind not only States, but also 'we, the peoples', on whose behalf the United Nations Charter was adopted. In its international adjudication of contentious cases, like the present one of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, the ICJ has to bear in mind basic considerations of humanity, with their incidence on questions of admissibility and jurisdiction, as well as of substantive law" (para. 314).

66. Last but not least, in his epilogue (part XXI), Judge Cançado Trindade expresses the feeling of being in peace with his own conscience, in laying the foundations of his own personal position in the *cas d'espèce*, which "stands in clear and entire opposition to the view espoused by the Court's majority". In his understanding,

> "there is a dispute before the Court, which has jurisdiction to decide the case. There is a conventional and customary international law obligation of nuclear disarmament. Whether there has been a concrete breach of this obligation, the Court could only decide on the merits phase of the present case" (para. 315).

67. His dissenting position "is grounded not only on the assessment of the arguments produced before the Court by the contending parties, but above all on issues of principle and on fundamental values, to which I attach even greater importance" (para. 316). In conclusion—he adds—"[a] world with arsenals of nuclear weapons, like ours, is bound to destroy its past, dangerously threatens the present, and has no future at all. Nuclear weapons pave the way into nothingness" (para. 331). In his understanding,

> "the International Court *of Justice*, as the principal judicial organ of the United Nations, should, in the present Judgment, have shown sensitivity in this respect, and should have given its contribution to a matter which is a major concern of the vulnerable international community, and indeed of humankind as a whole" (para. 331).

Declaration of Judge Xue

Judge Xue votes in favour of the Judgment because she agrees with the decision of the Court to dismiss the case for lack of jurisdiction. Notwithstanding her vote, she wishes to make two points on the Judgment.

Her first point relates to the approach taken by the Court with regard to the existence of a dispute. In the Judgment, the Court finds that the evidence submitted to it fails to demonstrate that there existed between the Parties a dispute concerning the subject of the Application at the time the Marshall Islands instituted proceedings in the Court. Consequently, the condition for the Court's jurisdiction is not met. The Court reaches this conclusion primarily on the ground that, in all the circumstances, the Marshall Islands never offered any particulars to India, either in words or by conduct, which could have made India aware that the Marshall Islands held a legal claim against it for breach of its international obligation to negotiate on nuclear disarmament.

Judge Xue notes that the Court does not deal with the other objections raised by the Respondent, but dismissed the case by solely relying on the finding that there did not exist a dispute between the Parties at the time of the filing of the Application. Therefore, it is not unpredicted that questions arise as to the propriety of this formal and restrictive approach. Given the Court's past practice of judicial flexibility in handling procedural defects, it may be arguable that the non-existence of a dispute between the Parties at the time of the filing of the Application could by itself constitute a solid ground for the Court to reject the case; the Marshall Islands

might readily come back and file a new case to the same effect, as by now the dispute is indeed crystallized. For judicial economy, realism and flexibility seem called for under the present circumstances.

The reason for Judge Xue to support the Court's decision is threefold. First of all, in her opinion, there must be a minimum requirement for the Applicant to demonstrate to the Court that there existed a dispute between the Parties before the case is instituted. The evidence submitted by the Marshall Islands regarding the existence of a dispute between the Parties is noticeably insufficient. The Marshall Islands heavily relies on the positions expressed by the Parties during the current proceedings to demonstrate that one Party's claim was positively opposed by the other. As is pointed out by the Court, should that argument be accepted, it would virtually render the condition of the existence of a dispute without any meaning and value. More fundamentally, in her opinion, it would undermine the confidence of States in accepting the compulsory jurisdiction of the Court.

Secondly, even though prior notice and diplomatic exchanges are not required as a condition for the existence of a dispute, "surprise" litigation should nevertheless be discouraged. Any peaceful means of settlement, including judicial recourse, is aimed at the resolution of the dispute. Whenever the circumstances permit, a clear demonstration of a legal claim to the responsible party would facilitate the process of negotiation and settlement. The Court may take into account the post-application conduct of the parties as supplementary evidence to satisfy itself for the purpose of jurisdiction and admissibility, but judicial flexibility has to be exercised within a reasonable limit.

Thirdly, the Court's jurisdiction is built on mutuality and reciprocity. The present case is different in character from the previous cases where the Court took a flexible approach in dealing with some procedural defects. Judge Xue observes that the Marshall Islands did not institute the proceedings merely for the protection of its own interest, albeit a victim of nuclear weapons. Rather the case serves more the interest of the international community. Although the Court recognized obligations *erga omnes* in international law in the *Barcelona Traction* case (*Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33), it did not address the question of standing, *locus standi*, an issue that is yet to be developed in international law.

As to her second point, Judge Xue regrets very much that the Court does not proceed further to deal with some other objections raised by the Respondent. India argues, *inter alia*, that on the basis of the *Monetary Gold* rule, the alleged dispute cannot be decided by the Court in the absence of the other nuclear-weapon States. Moreover, it maintains that the alleged obligation to negotiate requires the participation of all nuclear-weapon States—and others. A decision binding the Marshall Islands and India therefore could not have the desired effect.

In her opinion, these objections deserve an immediate consideration of the Court at the preliminary stage, as the answer to them would have a direct effect on the jurisdiction of the Court and the admissibility of the Application. Had it done so, the Court would be in a better position to demonstrate that, so far as the questions of jurisdiction and admissibility are concerned, the Marshall Islands' Application is not merely defective in one procedural form.

She recalls the Court's Advisory Opinion in the *Legality of the Threat or Use of Nuclear Weapons* case, in which the Court stated that "any realistic search for general and complete disarmament, especially nuclear disarmament, necessitates the co-operation of *all States*" (*Legality of the Threat or the Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 264, para. 100; emphasis added) and that the obligation under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons is not a mere obligation of conduct, but an obligation to achieve a precise result.

Judge Xue observes that it has been twenty years since this Advisory Opinion was delivered. She notes that there has been a collective failure to deliver, but the issue for the present case is whether such a failure can be turned into a series of bilateral disputes, and addressed separately. She wonders whether such disagreement, as may exist between some nuclear-weapon States, on the one hand, and non-nuclear-weapon States, on the other, on the cessation of nuclear arms race and the negotiation process on nuclear disarmament, can be characterized as a dispute that falls within the meaning of Articles 36 and 38 of the Statute. She questions whether a dispute as such, assuming existent at the time of the filing of the application or crystallized subsequently, is justiciable for the Court to settle through contentious proceedings. In her view, the Court emphasizes a bit too much the way in which a dispute may be materialized, but does not give sufficient consideration to the nature of the dispute that the Marshall Islands alleges to have existed between India and itself.

Declaration of Judge Donoghue

Judge Donoghue notes that the criteria pursuant to which the Court decides on the existence of a dispute are not found in the Statute of the Court, but are instead contained in the reasoning of the Court's judgments. This calls for clarity in those criteria and for their consistent application. Judge Donoghue considers that the Court's inquiry into the existence of a dispute in today's Judgment follows the reasoning contained in the recent jurisprudence of the Court.

As to the Marshall Islands' proposition that opposing statements made by the parties during the proceedings before the Court can suffice to establish the existence of a dispute, Judge Donoghue considers that in its recent judgments the Court has not found the existence of a dispute based solely on the parties' statements in Court, but instead has adhered to the principle that the evidence must show that a dispute existed as of the date of an application, as it does today.

Concerning the Marshall Islands' contention that the Court should infer the existence of a dispute from the juxtaposition of the Marshall Islands' statements with the Respondent's conduct, Judge Donoghue observes that the objective standard applied today to scrutinize the evidence is consistent with the recent case law of the Court. The essential

question is whether the Applicant's statements referred to the subject-matter of its claim against the Respondent—i.e., "the issue brought before the Court" in the Application—with sufficient clarity that the Respondent "was aware, or could not have been unaware," of the Applicant's claim against it. As this was not the case, there was no reason to expect a response from the Respondent nor for the Court to infer opposition from the alleged unaltered course of conduct of the Respondent. Accordingly, there was no opposition of views, and no dispute, as of the date of the Application.

Declaration of Judge Gaja

Having reached the conclusion that there was no dispute between the Parties on the date when the Application was filed, the Court decides not to examine the other objections raised by the respondent States. Given that disputes have clearly arisen since that date, it would have been preferable for the Court to examine also other objections made by the respondent States which are likely to be litigated again should the Marshall Islands file new applications.

Separate opinion of Judge Sebutinde

The object and purpose of the United Nations Charter is the maintenance of international peace and security. It is in light of that object and purpose that the International Court of Justice (ICJ), as the principal judicial organ of the United Nations, discharges its mandate to decide inter-State disputes on the basis of international law. The object and purpose of the United Nations becomes apparent in view of the threat to international peace and security posed by nuclear weapons.

The subject-matter of the dispute between the Parties is the alleged breach by the Republic of India of an international obligation under customary international law to pursue in good faith and to bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control. Both the Republic of the Marshall Islands (RMI) and India filed optional clause declarations under Article 36, paragraph 2, of the Statute of the ICJ, in 2013 and 1974 respectively, accepting the compulsory jurisdiction of the Court. However, the existence of a dispute is a precondition for the exercise of that jurisdiction.

It is the role of the Court (and not the Parties) to objectively determine whether or not at the time the Application was filed, there was "a disagreement on a point of law or fact, or a conflict of legal views or interests" between the Parties, regarding the above-mentioned subject-matter. The Court's jurisprudence demonstrates that the Court has in the discharge of this function adopted a flexible approach attaching more importance to the substance of the evidence, including the conduct of the parties, rather than to matters of form or procedure. The approach and reasoning adopted by the majority in arriving at the conclusion that there is no dispute between the Parties in the present case, is not only both formalistic and procedural, but is also inflexible in as far as it does not take due account of the conduct of the Parties. A more flexible, substantive approach examining the conduct of the Parties as relevant evidence, would have shown that the RMI and India clearly held opposing views regarding the subject-matter of the present dispute.

Lastly, by insisting that, in order for a dispute to exist, an applicant must prove that the respondent State "was aware or could not have been unaware that its views were positively opposed by the applicant", the majority has introduced a new legal test that is alien to the Court's established jurisprudence and that unduly raises the evidential threshold. Apart from unduly emphasizing form over substance, this new legal criterion of "awareness" introduces a degree of subjectivity into an equation that ought to remain objective, since it requires both an applicant and the Court to delve into the mind of a respondent State. The jurisprudence relied upon by the majority in adopting this new criterion is distinguishable and inapplicable to the present case.

Separate opinion of Judge Bhandari

In his separate opinion, Judge Bhandari recalls that he has concurred with the conclusions of the majority Judgment. However, he wishes to expand the basis of the reasoning of the Judgment, and proposes to deal with another aspect of the case, namely that, in the facts of this case, the Court ought to have dealt with the other preliminary objections raised by India because the issues raised in the case affect not only the Parties, but also the entire humanity.

Judge Bhandari stated that, according to the Statute of the Court and its jurisprudence, this Court can only exercise its jurisdiction in case of a dispute between the Parties. Hence, the question to be decided is whether from the documents, pleadings and the conduct of the Parties it can be established that a dispute existed between them at the time of the filing of the Application in the terms prescribed by the applicable legal instruments and the Court's jurisprudence. He then refers to the relevant statutory provisions (Articles 36, paragraph 2, and 38, paragraph 1, of the Statute of the Court), the definition of "dispute" and the Respondent's reliance on the *South West Africa* cases, the *Fisheries Jurisdiction (Spain* v. *Canada)* case and the *Nuclear Tests* cases. Thereafter, he recalls that, in determining the existence of a dispute, the Court has reviewed in detail the Parties' diplomatic exchanges, documents and statements (*Georgia* v. *Russia* and *Belgium* v. *Senegal*) in order to establish whether there is "a disagreement on a point of law or fact, a conflict of legal views or of interests" (*Mavrommatis Palestine Concessions*). Given these considerations, he deems it proper to recapitulate the documents, pleadings and submissions of the Parties to determine whether a dispute in fact existed between them at the time of the Application.

Judge Bhandari begins this analysis with a consideration of the Marshall Islands' own submissions in its Application and during the oral proceedings, where it recognized that India's conduct is in fact pro-disarmament and that it has repeatedly and publicly stated so. He further recalls that the Applicant acknowledges that India supported, as it has done continuously since the days before its Independence, the call for nuclear disarmament.

The Respondent India filed a large number of documents and pleadings to demonstrate that India's nuclear policy has remained consistent since its Independence, regardless of the different parties and politicians who have at turns ruled and represented the country. India's case has been examined in light of the Statute and jurisprudence of the Court. All documents and pleadings from 1945, when nuclear weapons were used for the first time, to date and the irresistible conclusion is that India has had a consistent and unwavering stand on disarmament.

The convergence of the Parties' positions was further recalled by reference to the intervention of the Respondent's agent during the oral proceedings, who stated that "the position of the parties at [the Nayarit] conference regarding the need for nuclear disarmament actually coincided". It is evident from the excerpts transcribed in the opinion that there is more convergence than divergence on the Parties' stated positions. Nuclear disarmament is a complex issue and it is clear that the Parties' positions are not identical. But they are very far from being so distant as to qualify for the existence of a dispute.

In his separate opinion, Judge Bhandari concludes that, on application of the Court's Statute and its jurisprudence, as well as the documents and pleadings placed before the Court, the irresistible conclusion is the absence of any dispute between the Parties, and consequently, on the facts of this case, this Court lacks jurisdiction to deal with this case. The majority Judgment, instead of looking into these aspects closely, chose to focus mainly on the lack of awareness of the Respondent of the impending dispute.

The Court has the freedom to choose any preliminary objection when examining its own jurisdiction and, in doing so, it usually chooses the most "direct and conclusive" (*Norwegian Loans*). In the instant case, by choosing the lack of awareness on the part of the Respondent as the main ground for the dismissal of the claim, the Court has not chosen the most "direct and conclusive" ground for dismissal, as the lack of awareness on the part of the Respondent can easily be cured by the Applicant by giving proper notice of the dispute to the Respondent. In that case, the Applicant could simply bring the case again before the Court. This would be an undesirable result and should be discouraged. The Parties have already submitted documents, pleadings and submissions *in extenso*. In the facts of this case, this Court ought to have examined the other preliminary objections. Otherwise, a re-submission of the case again would entail a waste of the efforts, time and resources already spent by the Parties and the Court in the treatment of this matter.

Consequently, Judge Bhandari considers in his separate opinion that, in the facts of this case, the Court should have examined the other preliminary objections taken by the Respondent, namely, lack of jurisdiction due to the absence of essential parties not party to the instant proceedings (*Monetary Gold* principle), that any judgment given by the Court would serve no practical purpose, and the application of reservations numbers 4, 5, 7 and 11 to India's optional clause declaration under Article 36 (2) of the Statute of the Court, recognizing the Court's compulsory jurisdiction. In relation to the *Monetary Gold* principle in particular, it is recalled that in its 1996 Advisory Opinion on nuclear weapons the Court considered that any realistic search for general and complete disarmament would require the co-operation of all States. These preliminary objections are substantial in character and ought to have been adjudicated by the Court.

Dissenting opinion of Judge Robinson

Judge Robinson disagrees with the majority's conclusion that there is no dispute in this case.

The United Nations Charter has assigned the Court a special role, giving it a particular relevance in the maintenance of international peace and security through the exercise of its judicial functions. The majority's decision today fails to demonstrate sensitivity to this role.

The Court's case law has been consistent in the approach to be adopted in determining the existence of a dispute; an approach that is not reflected in today's Judgment. The jurisprudence of the Court calls for an objective, flexible and pragmatic approach in determining the existence of a dispute. It is firmly established in the Court's jurisprudence that a dispute arises where, examined objectively, there are "clearly opposite views concerning the question of the performance or non-performance" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74) of a State's obligations. There is not a single case in the Court's case law that authorizes the majority's proposition that the determination of the existence of a dispute requires a finding of the respondent's awareness of the applicant's positive opposition to its views. While awareness may act as evidence that confirms the existence of a dispute, framing awareness as a prerequisite for a dispute is a departure from the empirical and pragmatic enquiry that the Court must undertake: an enquiry focused simply on whether or not the evidence reveals clearly opposite views.

The majority also misconstrues the plain meaning of its dicta and its own case law in concluding that post-Application evidence may act simply to confirm the existence of a dispute. The Court's approach to this question has been less definitive and uncompromising than the majority would like to suggest. The Court has given itself room to afford significant weight to statements made during the proceedings, particularly the denial of allegations by the respondent, not just to confirm but to establish a dispute. This is entirely consistent with the flexible, pragmatic approach that is the hallmark of the Court's jurisprudence on this question. A respondent's opportunity to react is more properly addressed as a question of procedural due process rather than as an element of the dispute criterion.

Another reason for rejecting the majority decision is that it militates against the sound administration of justice, a principle that the Court has emphasized on more than one occasion. The Court spoke against an approach that would lead to, what it termed, the "needless proliferation of proceedings" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 443, para. 89). An odd result of the majority Judgment is that,

given the basis on which the claim has been dismissed, the Applicant could, in theory, file another Application against the Respondent.

The facts of this case show that there was a dispute between the Applicant and the Respondent. Even though Judge Robinson disagrees with the majority's position that awareness is not a prerequisite for a finding that a dispute exists, it is hard to conclude that the Respondent "could not have been unaware" of the opposite views of the Parties.

The majority's holding today has placed an additional and unwarranted hurdle in the way of claims that may proceed to be examined on the merits. In so doing, it has detracted from the potential of the Court to play the role envisaged for it as a standing body for the peaceful settlement of the disputes and through this function, as an important contributor to the maintenance of international peace and security. This conclusion is rendered even more telling by the subject-matter of the dispute before the Court today.

Dissenting opinion of Judge Crawford

Judge Crawford disagreed with the "objective awareness" test for the existence of a dispute adopted by the majority. No such legal requirement was to be found in the Court's jurisprudence. An objective awareness test was difficult to distinguish from a formal notice requirement, which the Court had rejected. Moreover, the Court had traditionally exercised flexibility in determining the existence of a dispute. While Judge Crawford agreed that in principle the dispute should exist at the time the application was filed, a finding of a dispute could be based, *inter alia*, on post-application conduct or evidence, including the statements of the parties in the proceedings.

As well as disagreeing with the Court's statement of the law, Judge Crawford disagreed with its application to the facts. In particular, the dispute in question should have been characterized as a multilateral dispute, relying on *South West Africa (Preliminary Objections)* as authority for the proposition that such a dispute may crystallize in multilateral fora involving a plurality of States. In his view there was, at the least, an incipient dispute between the Applicant and the Respondent as at the date of the Application, given that the Marshall Islands had associated itself with one side of a multilateral disagreement with the nuclear-weapon States.

Since there was, at the date of the Application, a dispute between the Marshall Islands and the Respondent as to the latter's compliance with Article VI of the NPT or its customary international law equivalent, it was unnecessary to consider whether any deficiency could and should be remedied in the exercise of the *Mavrommatis* discretion, as recently articulated in *Croatia* v. *Serbia*.

Judge Crawford also referred to one of the other objections to jurisdiction and admissibility raised by the Respondent, the *Monetary Gold* objection. In his view this was a question for the merits stage. Whether it was necessary as a precondition for resolving the dispute for the Court to rule on the rights and obligations of third parties to the dispute would depend, *inter alia*, on the scope and application of Article VI of the NPT, or any parallel customary international law obligation.

Dissenting opinion of Judge *ad hoc* Bedjaoui

I. Introduction

Judge *ad hoc* Bedjaoui voted against the operative clause adopted by the Court in the case between the Marshall Islands and India. He believes that a dispute does exist between the Marshall Islands and the Respondent.

He notes that although the Court has always adhered to a standard general definition of a legal dispute, it has not shown the same level of consistency in respect of the criteria it has itself identified for determining the existence of that dispute. The most significant break from its jurisprudence can be seen in the Judgment of 1 April 2011 in the *Georgia* v. *Russian Federation* case, and this was continued in the case concerning *Questions relating to the Obligation to Prosecute or Extradite*.

II. A traditionally less formalistic jurisprudence

Judge *ad hoc* Bedjaoui argues that the Court's present approach, which pays a heavy price for a certain degree of formalism, could rightly be regarded as a move away from its traditional jurisprudence.

He refers to the Court's clarity and resourcefulness in the exercise of both its advisory and contentious functions. The Court has successfully avoided falling prisoner to the letter of the Charter and the lacunae of international law. Judge *ad hoc* Bedjaoui gives a quick and simplified overview of the Court's jurisprudence, leaving him saddened at the impression that might be left by today's decision in the present case.

In his view, it is all the more vital that the Court should endeavour to clarify how it determines the existence of a dispute, since this is a fundamental question on which both its jurisdiction and the exercise of its jurisdiction directly depend. It is essential for the Court to show greater consistency when determining the criteria for establishing the existence of a dispute and when applying those criteria to each individual case. Failing to do so creates legal uncertainty for States and a certain level of confusion for readers, none of them knowing why one case may benefit from the Court's understanding, when another cannot aspire to do so.

Besides this first duty of consistency, Judge *ad hoc* Bedjaoui believes that the Court must also guard against fossilization. Being committed to the rational application of criteria does not preclude simultaneously remaining open to changing global concerns; it is by no means a case of the Court accepting every new idea, but of knowing when and how to limit, or, alternatively, to expand, the application of the criteria at the root of the *Mavrommatis* and *South West Africa* Judgments, and, above all, explaining each time why it is necessary to favour flexibility or formalism in that particular case.

To his mind, the greatest danger for the moment remains excessive formalism, especially when, as is the case here, it

combines with a jurisprudence which is entirely unclear for the future. That evidently increases the risk of the arbitrary.

III. Notification/"awareness"?

Judge *ad hoc* Bedjaoui is of the opinion that while the Court has traditionally been reticent to make notification of the dispute by the applicant to the respondent a precondition for the institution of proceedings, since the 2011 decision there has been uncertainty obscuring the general view.

He laments the fact that the Court seems to establish a direct and—it would appear—automatic correlation between *awareness* of an opposition of views and the existence of a dispute. He also points out that, in the Court's reasoning, what is essential is the fact that the respondent should "be aware". Judge *ad hoc* Bedjaoui wonders if we are not thus witnessing the resurrection by degrees of the "notification" concept.

However, if we accept the existence of this additional precondition, then why not apply it correctly? Judge *ad hoc* Bedjaoui maintains that India had to be "aware" of the Marshall Islands' anti-nuclear views in opposition to its own nuclear conduct, given, among other things, the history of the Marshall Islands and its 2013 and 2014 statements made at international events which were open to all. These statements were aimed at all States possessing nuclear weapons, without distinction, as everyone knows, and they did not exclude India.

Finally, Judge *ad hoc* Bedjaoui asks: how can the Respondent's level of "awareness" be assessed? And how could this unusual excursion into subjectivity be reconciled with the stated "objective" search for the existence of a dispute?

IV. Date of the existence of a dispute

Judge *ad hoc* Bedjaoui is pleased that, in the present Judgment, the Court appears to follow its traditional jurisprudence closely, according to which: "[i]n principle, the date for determining the existence of a dispute is the date on which the application is submitted to the Court".

However, in practice, the Court has refused, without convincing explanation, to take account of the evidence which arose after the date on which the proceedings were instituted and which attested to the existence of a dispute. In so doing, it establishes as an absolute dogma a solution that runs counter to its traditional approach, which was characterized by great flexibility, as reflected in its statement that the dispute must only "in principle" exist on the date that proceedings are instituted.

V. Procedural defects

As regards reparable procedural defects, whether it is the applicant or the respondent, whether it is a case of proceedings being instituted prematurely or of accessing the Court too early, Judge *ad hoc* Bedjaoui notes that the Court has created sound jurisprudence which has stood the test of time and demonstrated its flawless consistency over a period of almost 90 years. It is this jurisprudence that the 2011 Judgment started to destroy, with the deathblow being delivered by the *Belgium* v. *Senegal* case.

In the present proceedings, the Court has once again dispensed with its traditional jurisprudence, despite the latter's wisdom. Judge *ad hoc* Bedjaoui laments the fact that the majority of the Court considered the Marshall Islands' statements insufficient to crystallize the existence of a legal dispute. All the Marshall Islands needs to do tomorrow is to send a simple Note Verbale to the Respondent with a few lines expressing its opposition to the latter's nuclear policy, in order to be able to resubmit the then formalized dispute to the Court. It was neither coherent nor judicious for the Court to focus on easily reparable procedural defects, when it has long dealt with these with a welcome degree of flexibility.

VI. Proof by inference; proof by the interpretation of silence

Judge *ad hoc* Bedjaoui recalls that, contrary to the approach followed in this case, the Court has on other occasions demonstrated flexibility and common sense, turning a respondent's *silence* or *failure to respond* to good account and even proceeding by *simple deduction*, in order to conclude that a dispute exists.

In its present Judgment, the Court sweeps aside its traditional jurisprudence and takes the view that the 13 February 2014 statement, in which the Marshall Islands accused States possessing nuclear weapons of breaching their international obligations, "[g]iven its very general content and the context in which it was made … did not call for a specific reaction by India". And thus, "[a]ccordingly, no opposition of views can be inferred from the absence of any such reaction". The Court seems to have ventured to substitute itself for India, in order to justify the latter's silence in its place and, moreover, with reasons that no one can be certain were shared by that State.

VII. Proof provided by the exchanges before the Court

Judge *ad hoc* Bedjaoui is of the opinion that the Court has made little effort in the present case to take full account of the circumstances following the filing of the Marshall Islands' Application, once again moving away from its traditional jurisprudence.

He wonders how one can conclude that a dispute does not exist, when one Party is complaining before the Court that the other has long been in breach of its international obligations, and the other Party denies that its conduct constitutes a violation of those obligations. The exchanges that took place before the Court did not create the dispute anew. They merely "confirmed" its prior existence.

VIII. *Sui generis* nature of any nuclear dispute

Judge *ad hoc* Bedjaoui notes that the general historical background to the international community's efforts to bring about nuclear disarmament in itself foreshadows and signals the potential existence of a dispute. Indeed, the dispute submitted by the Marshall Islands, which aims at nothing short of protecting the human race from permanent annihilation by a terrifying weapon of mass destruction, should in itself have sounded an alarm for the Court. The Court declared 20 years ago that a twofold obligation exists to negotiate and to achieve

nuclear disarmament. For 20 years, it heard no more of that appeal. And then, one day, a non-nuclear State wishes to find out from another State, one that possesses nuclear weapons, why this already considerable delay appears to be continuing for even longer.

This particular type of highly specific disagreement between a non-nuclear State and a nuclear State regarding the abolition of nuclear weapons is, in and of itself, the expression of a major dispute whose existence should *ipso facto* have been obvious to the Court. Because what is the Marshall Islands seeking? That the international community and the Court itself should know why an obligation identified by the Court 20 years ago has yet to be performed.

IX. An objection not of an exclusively preliminary character?

Judge *ad hoc* Bedjaoui could perhaps have accepted, in a case as complex and important as this one between the Marshall Islands and India, a decision which reflected the Court's—after all highly legitimate—concern to avoid ruling prematurely on jurisdiction and admissibility. The Court might very well still require further clarification from the Parties. And knowing that, at this stage, it could not evaluate their conduct without addressing the merits, the Court might logically decide to wait for the merits stage before determining its position. In other words, the Court might have been more prudent to find that the question of the existence of a dispute was not of an exclusively preliminary character.

X. The train of undesirable consequences of this decision

Finally, Judge *ad hoc* Bedjaoui notes that the present decision has the unfortunate potential to unleash whole train of undesirable consequences, not only for the Respondent, which could find itself encouraged to withdraw its optional recognition of the Court's jurisdiction, but also for the Applicant, which has shouldered the cost of coming to the Court, as well as for the international community and the Court itself.

As regards the international community, the decisions handed down by the Court today reveal to international public opinion a world that is regrettably inconsistent, not only in terms of procedural jurisprudence, but also in respect of its substantive jurisprudence. What message is the Court leaving the international community when it decides, on what are exceedingly flimsy bases, moreover, to decline to exercise its jurisdiction in cases concerning the most crucial issues of nuclear disarmament, involving the very survival of the whole human race?

As for the Court itself, it risks being the fourth losing party, because by dismissing the Marshall Islands on the basis of a reparable procedural defect, it is undermining the sound administration of justice, on which its functioning depends. In these three cases, the Court seems to have been unable to break away from a formalism which sacrifices the merits to procedure, content to form, and the case to its subject-matter. Moreover, even though the Court has always declared that its aim is to give a fundamentally "objective" assessment of the evidence, it seems here to have made little attempt to avoid being subjective in its assessment of the evidence put forward by the Applicant, *itself organizing the Respondent's defence* and examining all of the Applicant's arguments with what appears to be a negative prejudice.

217. OBLIGATIONS CONCERNING NEGOTIATIONS RELATING TO CESSATION OF THE NUCLEAR ARMS RACE AND TO NUCLEAR DISARMAMENT (MARSHALL ISLANDS *v.* PAKISTAN) [JURISDICTION AND ADMISSIBILITY]

Judgment of 5 October 2016

On 5 October 2016, the International Court of Justice delivered its Judgment on the preliminary objections raised by Pakistan on the jurisdiction of the Court and on the admissibility of the Application in the case regarding *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan)*. The Court upheld the preliminary objection on jurisdiction raised by Pakistan, based on the absence of a dispute between the Parties, and found that it could not proceed to the merits of the case.

The Court was composed as follows: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian; Judge *ad hoc* Bedjaoui; Registrar Couvreur.

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The operative paragraph of the Judgment (para. 56) reads as follows:

"…

The Court,

(1) By nine votes to seven,

Upholds the objection to jurisdiction raised by Pakistan, based on the absence of a dispute between the Parties;

In favour: President Abraham; Vice-President Yusuf; Judges Owada, Greenwood, Xue, Donoghue, Gaja, Bhandari, Gevorgian;

Against: Judges Tomka, Bennouna, Cançado Trindade, Sebutinde, Robinson, Crawford; Judge *ad hoc* Bedjaoui;

(2) By ten votes to six,

Finds that it cannot proceed to the merits of the case.

In favour: President Abraham; Vice-President Yusuf; *Judges* Owada, Tomka, Greenwood, Xue, Donoghue, Gaja, Bhandari, Gevorgian;

Against: Judges Bennouna, Cançado Trindade, Sebutinde, Robinson, Crawford; Judge *ad hoc* Bedjaoui."

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President Abraham and Vice-President Yusuf appended declarations to the Judgment of the Court; Judges Owada and Tomka appended separate opinions to the Judgment of the Court; Judges Bennouna and Cançado Trindade appended dissenting opinions to the Judgment of the Court; Judges Xue, Donoghue and Gaja appended declarations to the Judgment of the Court; Judges Sebutinde and Bhandari appended separate opinions to the Judgment of the Court; Judges Robinson and Crawford appended dissenting opinions to the Judgment of the Court; Judge *ad hoc* Bedjaoui appended a dissenting opinion to the Judgment of the Court.

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Procedural background (paras. 1–13)

The Court recalls that, on 24 April 2014, the Republic of the Marshall Islands (hereinafter the "Marshall Islands" or the "Applicant") filed an Application instituting proceedings against the Islamic Republic of Pakistan (hereinafter "Pakistan" or the "Respondent"), in which it claimed that Pakistan breached customary international law obligations concerning negotiations relating to cessation of the nuclear arms race and to nuclear disarmament. The Marshall Islands seeks to found the Court's jurisdiction on the declarations made by the Parties pursuant to Article 36, paragraph 2, of its Statute.

The Court further recalls that, on 9 July 2014, Pakistan indicated that it considered that the Court did not have jurisdiction in the alleged dispute and that the Application was inadmissible. By an Order of 10 July 2014, the President of the Court held, pursuant to Article 79, paragraph 2, of the Rules of Court, that, in the circumstances of the case, it was necessary first of all to resolve the questions of the Court's jurisdiction and the admissibility of the Application, and that these questions should accordingly be separately determined before any proceedings on the merits; to that end, the President decided that the written pleadings should first be addressed to the said questions. The Parties filed such pleadings within the time-limits set by the President. By a letter dated 2 March 2016, Pakistan informed the Court that it would not be participating in the oral proceedings on jurisdiction and admissibility. A public hearing on the questions of the jurisdiction of the Court and the admissibility of the Application was held on Tuesday 8 March 2016, at which the Court heard the oral arguments of the Marshall Islands.

I. Introduction (paras. 14–24)

A. Historical Background (paras. 14–20)

The Court provides a brief historical background to the case, in particular in relation to the nuclear disarmament activities of the United Nations.

B. Proceedings brought before the Court (paras. 21–24)

The Court notes the other proceedings brought by the Marshall Islands at the same time as the present case. It then outlines Pakistan's objections to jurisdiction and admissibility. It announces that it will first consider the objection that the Marshall Islands has failed to show that there was, at the time of the filing of the Application, a legal dispute between the Parties.

II. The objection based on the absence of a dispute (paras. 25–55)

After outlining the Parties' arguments, the Court recalls the applicable law on this question. It explains that the existence of a dispute between the Parties is a condition of its jurisdiction. In order for a dispute to exist, it must be shown that the claim of one party is positively opposed by the other;

the two sides must hold clearly opposite views concerning the question of the performance or non-performance of certain international obligations. The Court's determination of the existence of a dispute is a matter of substance, and not a question of form or procedure. Prior negotiations are not required where the Court has been seised on the basis of declarations made pursuant to Article 36, paragraph 2, of its Statute, unless one of the relevant declarations so provides. Moreover, although a formal diplomatic protest may be an important step to bring a claim of one party to the attention of the other, such a formal protest is not a necessary condition for the existence of a dispute. Similarly, notice of an intention to file a case is not required as a condition for the seisin of the Court.

The Court continues by underlining that whether a dispute exists is a matter for objective determination by the Court which must turn on an examination of the facts. For that purpose, the Court takes into account in particular any statements or documents exchanged between the parties, as well as any exchanges made in multilateral settings. In so doing, it pays special attention to the author of the statement or document, their intended or actual addressee, and their content. The conduct of the parties may also be relevant, especially when there have been no diplomatic exchanges. In particular, the Court has previously held that the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for. The evidence must show that the parties "hold clearly opposite views" with respect to the issue brought before the Court. As reflected in previous decisions of the Court in which the existence of a dispute was under consideration, a dispute exists when it is demonstrated, on the basis of the evidence, that the respondent was aware, or could not have been unaware, that its views were "positively opposed" by the applicant.

The Court further explains that, in principle, the date for determining the existence of a dispute is the date on which the application is submitted to the Court. Conduct subsequent to the application (or the application itself) may be relevant for various purposes, in particular to confirm the existence of a dispute, to clarify its subject-matter or to determine whether the dispute has disappeared as of the time when the Court makes its decision. However, neither the application nor the parties' subsequent conduct and statements made during the judicial proceedings can enable the Court to find that the condition of the existence of a dispute has been fulfilled in the same proceedings. If the Court had jurisdiction with regard to disputes resulting from exchanges in the proceedings before it, a respondent would be deprived of the opportunity to react before the institution of proceedings to the claim made against its own conduct. Furthermore, the rule that the dispute must in principle exist prior to the filing of the application would be subverted.

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The Court then turns to the case at hand, noting at the outset that the Marshall Islands, by virtue of the suffering which its people endured as a result of it being used as a site for extensive nuclear testing programs, has special reasons for concern about nuclear disarmament. But that fact does not remove the need to establish that the conditions for the Court's jurisdiction are met. While it is a legal matter for the Court to determine whether it has jurisdiction, it remains for the Applicant to demonstrate the facts underlying its case that a dispute exists.

The Court observes that Pakistan relies on the fact that the Marshall Islands did not commence negotiations or give notice to it of the claim that is the subject of the Application to support its contention that there is no dispute between the Parties. However, the Court recalls that it has rejected the view that notice or prior negotiations are required where it has been seised on the basis of declarations made pursuant to Article 36, paragraph 2, of the Statute, unless one of those declarations so provides. The Court's jurisprudence treats the question of the existence of a dispute as a jurisdictional one that turns on whether there is, in substance, a dispute, not on what form that dispute takes or whether the respondent has been notified.

The Court next examines the Marshall Islands' arguments in support of its contention that it had a dispute with Pakistan.

First, the Court notes that the Marshall Islands refers to two statements made in multilateral fora before the date of the filing of its Application which, in its view, suffice to establish the existence of a dispute. The Marshall Islands relies on the statement made at the High-level Meeting of the General Assembly on Nuclear Disarmament, on 26 September 2013 by its Minister for Foreign Affairs, "urg[ing] all nuclear weapons states to intensify efforts to address their responsibilities in moving towards an effective and secure disarmament". However, the Court considers that this statement is formulated in hortatory terms and cannot be understood as an allegation that Pakistan (or any other nuclear power) was in breach of any of its legal obligations. It does not mention the obligation to negotiate, nor does it say that the nuclear-weapon States are failing to meet their obligations in this regard. It suggests that they are making "efforts" to address their responsibilities, and calls for an intensification of those efforts, rather than deploring a failure to act. The Court adds that a statement can give rise to a dispute only if it refers to the subject-matter of a claim with sufficient clarity to enable the State against which that claim is made to identify that there is, or may be, a dispute with regard to that subject-matter. The 2013 statement relied upon by the Marshall Islands does not meet these requirements. The Court observes that the statement made by the Marshall Islands at the Nayarit conference on 13 February 2014 goes further than the 2013 statement, in that it contains a sentence asserting that "States possessing nuclear arsenals are failing to fulfil their legal obligations" under Article VI of the NPT and customary international law. Pakistan was present at the Nayarit conference. However, the subject of the conference was not specifically the question of negotiations with a view to nuclear disarmament, but the broader question of the humanitarian impact of nuclear weapons, and while this statement contains a general criticism of the conduct of all nuclear-weapon States, it does not specify the conduct of Pakistan that gave rise to the alleged breach. For the Court, such a specification would have been particularly necessary if, as the Marshall Islands contends, the Nayarit statement was aimed at invoking the international responsibility of the Respondent on the grounds of a course of conduct which had remained unchanged for many years. Given its very general content and the context in which it was

made, that statement did not call for a specific reaction by Pakistan. Accordingly, no opposition of views can be inferred from the absence of any such reaction. The Nayarit statement is insufficient to bring into existence, between the Marshall Islands and Pakistan, a specific dispute as to the existence or scope of the asserted customary international law obligations to pursue in good faith, and to bring to a conclusion, negotiations leading to nuclear disarmament in all its aspects under strict and effective international control, as well as to cease the nuclear arms race at an early date, or as to Pakistan's compliance with any such obligations. The Court concludes that, in all the circumstances, on the basis of those statements—whether taken individually or together—it cannot be said that Pakistan was aware, or could not have been unaware, that the Marshall Islands was making an allegation that Pakistan was in breach of its obligations.

Secondly, the Court considers the Marshall Islands' argument that the very filing of the Application and statements made in the course of the proceedings by both Parties suffice to establish the existence of a dispute. The Court deems that the case law invoked by the Marshall Islands does not support this contention. In the case concerning *Certain Property*, the existence of a dispute was clearly referenced by bilateral exchanges between the parties prior to the date of the application (*Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 19, para. 25). The reference to subsequent materials in the *Cameroon* v. *Nigeria* case related to the scope of the dispute, not to its existence (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 317, para. 93). Moreover, while it is true that the Court did not explicitly reference any evidence before the filing of the application demonstrating the existence of a dispute in its Judgment in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia*), in the particular context of that case, which involved an ongoing armed conflict, the prior conduct of the parties was sufficient to establish the existence of a dispute (*Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 614, paras. 27–29). Instead, the issues the Court focused on in that case were not the date when the dispute arose but the proper subject-matter of that dispute, whether it fell within the scope of the relevant compromissory clause, and whether it "persist[ed]" at the date of the Court's decision. The Court reiterates that, although statements made or claims advanced in or even subsequently to the Application may be relevant for various purposes—notably in clarifying the scope of the dispute submitted—they cannot create a dispute *de novo*, one that does not already exist.

Thirdly, the Court assesses the Marshall Islands argument that the conduct of Pakistan in maintaining and upgrading its nuclear arsenal, and in failing to co-operate with certain diplomatic initiatives, shows the existence of a dispute between the Parties. The Court recalls that the question whether there is a dispute in a particular contentious case turns on the evidence of opposition of views. In this regard, the conduct of a respondent can contribute to a finding by the Court that the views of the parties are in opposition. However, as the Court has previously concluded, in the present case neither of the statements that were made in a multilateral context by the Marshall Islands offered any particulars regarding Pakistan's conduct. On the basis of such statements, it cannot be said that Pakistan was aware, or could not have been unaware, that the Marshall Islands was making an allegation that Pakistan was in breach of its obligations. In this context, the conduct of Pakistan does not provide a basis for finding a dispute between the two States before the Court.

* *

The Court therefore concludes that the first objection made by Pakistan must be upheld. It follows that the Court does not have jurisdiction under Article 36, paragraph 2, of its Statute. Consequently, it is not necessary for the Court to deal with the other objections raised by Pakistan. The questions of the existence of and extent of customary international law obligations in the field of nuclear disarmament, and Pakistan's compliance with such obligations, pertain to the merits. But the Court has found that no dispute existed between the Parties prior to the filing of the Application, and consequently it lacks jurisdiction to consider these questions.

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Declaration of President Abraham

In his declaration, President Abraham explains that he voted in favour of the Judgment because he considers the Court's decision to be fully consistent with its recent jurisprudence relating to the requirement for a "dispute" to exist between the parties, as established by a series of Judgments handed down over the past five years, in particular the Judgment of 1 April 2011 in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)*, the Judgment of 20 July 2012 in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* and the Judgment of 17 March 2016 in the case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*. It is apparent from these Judgments, he explains, that, in order to determine whether the condition relating to the existence of a dispute has been met, the date to be referred to is the date of the institution of the proceedings, and that the Court can only find that it has jurisdiction to entertain a case where each party was—or must have been—aware on that date that the views of the other party were opposed to its own.

President Abraham explains that, even though he expressed reservations at the time the Court established this jurisprudence, he nevertheless considers himself to be bound by such jurisprudence and therefore voted in conformity with it.

Declaration of Vice-President Yusuf

1. Whilst agreeing with the conclusion of the Court in *Marshall Islands* v. *Pakistan*, Vice-President Yusuf sets forth in his declaration his disagreement with two aspects of the Judgment. First, he rejects the criterion of "awareness" as

the condition for the existence of a dispute. Second, he criticizes the one-size-fits-all approach taken to the three distinct cases argued before the Court by the Parties (*Marshall Islands* v. *India*, *Marshall Islands* v. *United Kingdom*, *Marshall Islands* v. *Pakistan*).

2. As the Judgment recognizes, "[a] dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (*Mavrommatis Palestine Concessions Judgment No. 2, 1924, P.C.I.J. Series A, No. 2*, p. 11). It is for the Court to determine the existence of a dispute objectively (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, I.C.J. Reports 1950*, p. 74), which is a matter "of substance, not of form" (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, I.C.J. Reports 2011 (I)*, para. 30).

3. In the present Judgment, the Court states that "a dispute exists when it is demonstrated, on the basis of the evidence, that the respondent was aware, or could not have been unaware, that its views were 'positively opposed' by the applicant" (paragraph 38). The two Judgments that it invokes as authority for this statement—namely the Judgments on preliminary objections in the cases of *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*, and the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)*—do not provide support for the "awareness" criterion expounded by the Court. In both those cases, the Court simply noted that as a matter of fact the respondent State was aware of the position of the applicant; it did not identify "awareness" as a requirement for the existence of a dispute at any point nor was this implicit in the Court's reasoning.

4. Vice-President Yusuf notes that the introduction of the "awareness" criterion conflicts with the Court's established jurisprudence that the existence of a dispute is for objective determination. Moreover, he argues that such an approach also undermines judicial economy and the sound administration of justice by inviting submissions of second applications on the same dispute.

5. The Court could have come to the same conclusions reached in the present Judgment by applying the criteria traditionally used by it in the determination of the existence of a dispute. On the basis of the evidence placed before it in this case, the Court could have concluded that the Parties did not hold positively opposed views prior to the submission of the Application by the Republic of the Marshall Islands. There was no need to introduce a new criterion of "awareness" in order to justify those conclusions.

6. The conclusions of the Judgment on the absence of a dispute between the Republic of the Marshall Islands and Pakistan should have been based on an analysis of the facts presented to the Court regarding the positions of the Parties on the subject-matter of the alleged dispute, referring in particular to the articulation of those positions in multilateral settings.

7. In particular, reference should have been made to: *(a)* the resolutions adopted by the United Nations General Assembly calling upon States to pursue multilateral negotiations on nuclear disarmament and the voting patterns of the Republic of the Marshall Islands and Pakistan on such resolutions; and *(b)* statements made by the Parties on the subject-matter of the alleged dispute in multilateral forums.

8. As regards the United Nations General Assembly resolutions, Pakistan has consistently voted in favour of the United Nations General Assembly resolutions that call upon States to negotiate a comprehensive nuclear disarmament treaty. Furthermore, Pakistan, as a member of the Non-Aligned Movement (NAM), has consistently subscribed to statements made by this group of States that express willingness to engage in multilateral negotiations leading to nuclear disarmament.

9. In addition to its voting record on United Nations General Assembly and Non-Aligned Movement resolutions, Pakistan's consistent support for the commencement and conclusion of negotiations leading to nuclear disarmament is substantiated by the statements of its Head of State and Ministers in multilateral forums or official documents.

10. Thus, Vice-President Yusuf considers that there is no evidence in the record that positively opposed views were held by Pakistan and the Republic of the Marshall Islands, prior to the submission of the Application of the Republic of the Marshall Islands, on the obligation to pursue and conclude negotiations on nuclear disarmament, assuming that such an obligation exists in customary international law.

11. The record shows instead that both States have been advocating in various multilateral forums, including at the Nayarit conference, but most of all at the United Nations General Assembly (at least since 2013 in the case of the Republic of the Marshall Islands), the necessity for all States, including nuclear-weapons States, to pursue in good faith and to conclude negotiations on nuclear disarmament. Rather than positive opposition or conflict of legal views on the subject-matter of the alleged dispute, the evidence appears to point towards a convergence of views between the Parties on the negotiation and conclusion of a comprehensive convention on nuclear disarmament.

Separate opinion of Judge Owada

Judge Owada recognizes that the history of the Marshall Islands (hereinafter the "RMI") has created reasons for special concern about nuclear disarmament, and particularly the obligation of the nuclear-weapon States under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons (hereinafter the "NPT"). Yet the evidence must demonstrate the existence of a concrete legal dispute in order for this Court to have jurisdiction. For this reason, Judge Owada concurs with the reasoning of the Court, but has appended a separate opinion to clarify the reasoning of the Court with respect to three issues in this legal, though politically charged, context.

The first point relates to the legal standard applied by the Court in determining whether or not a dispute existed at the time of the filing of the Application by the RMI. Judge Owada recalls that, for the purpose of establishing the existence of a

dispute, it must be shown that the claim of one party is positively opposed by the other. It is important to recognize that this requirement is not a mere formality, but a matter of cardinal significance as an *indispensable precondition* for the seisin of the Court by the Applicant. For this reason, the absence of an alleged dispute at the time of the filing of an application is not a procedural technicality that can be cured by a subsequent act, as was the case in the *Mavrommatis Palestine Concessions* case. In this context, a legal dispute must be distinguished from a mere divergence of positions. The jurisprudence of the Court reflects this principle, though it has examined this issue in diverse factual and legal circumstances and in doing so has assessed a variety of different factors. It might be tempting to conclude that the Court's reliance on such factors evidences a certain threshold for establishing the existence of a dispute, but in Judge Owada's view the jurisprudence of the Court is not quite so linear. These judgments instead represent case-specific instances in which the evidence was adjudged to be sufficient or insufficient. This point must be borne in mind when appreciating the true meaning of the respondent's awareness, as introduced by the present Judgment. Although the Judgment might appear to introduce this element of "awareness" out of the blue, the reality is that the element of awareness is the common denominator running through the case law. The awareness of the respondent demonstrates the transformation of a mere disagreement into a true legal dispute and is thus an essential minimum common to all cases.

The second point relates to the time at which a dispute must be shown to exist. The RMI argued that the Judgments of the Court in several previous cases support its contention that statements made *during* the proceedings may serve as evidence of the existence of a dispute. The Court correctly explained the meaning of these precedents in the Judgment, but Judge Owada wished to provide a more detailed explanation of the correct interpretation of the case concerning the *Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*. The unique circumstances and mixed questions of law and fact tied to the merits of that case made the question to be decided by the Court very different from the question at issue in the present proceedings and, as such, the Court's reliance on statements made during the proceedings in that case should not be taken as signalling a departure from the Court's consistent jurisprudence on the subject.

Finally, Judge Owada wishes to elaborate upon the treatment of the evidence by the Court in the present Judgment. Some may feel that the Court adopted a piecemeal approach by rejecting each category of evidence individually, whereas the RMI argued that the evidence must be taken as a whole. It is Judge Owada's view that the Court examined all of the evidence and correctly determined that this evidence—*even when taken as a whole*—was not sufficient to demonstrate the existence of a dispute.

Having stated this, Judge Owada adds that a new legal situation might have emerged as a result of the present proceedings before the Court. To the extent that the present Judgment reflects the position of the Court with respect to the legal situation that existed at the time of the filing of the present Application, a new application might not be subject to the same preliminary objection to jurisdiction. The viability of such a new application would remain an open question and its fate would depend upon the Court's examination of *all* of the objections to jurisdiction and admissibility.

Separate opinion of Judge Tomka

Judge Tomka is not convinced by the approach taken by the Court in relation to the existence of a dispute in this case, and does not consider that it is warranted by the Court's previous jurisprudence. He is therefore regrettably unable to support the Court's conclusions in this regard.

Judge Tomka begins by outlining the claims made by the Marshall Islands in this case, relating to Pakistan's alleged breach of obligations relating to nuclear disarmament said to exist under customary international law. He observes that Pakistan has denied those claims.

He recalls that the Marshall Islands has invoked the Article 36 (2) declarations of the Parties as the basis for jurisdiction in this case. Judge Tomka observes that, when analysing issues of jurisdiction, caution should be taken in relying on different pronouncements of the Court which may have been made in the context of particular Article 36 (2) declarations or compromissory clauses which set preconditions for the seising of the Court. He notes that the Court in this Judgment reiterates its previous view that there is no requirement that a State negotiate before seising the Court or give notice of its claim before instituting proceedings, unless there is such a condition in the relevant basis of jurisdiction.

Judge Tomka observes that, although the Court has often stated that the existence of a dispute is a condition for its jurisdiction, it is, in his view, more properly characterized as a condition for the exercise of the Court's jurisdiction. He observes in this respect that, in relation to States which have made declarations under Article 36 (2) of the Statute, the Court's jurisdiction is established from the moment the declaration is deposited with the Secretary-General of the United Nations. Thus, in Judge Tomka's view, it is not the emergence of a dispute which establishes the Court's jurisdiction or perfects it. Rather, the emergence of a dispute is a necessary condition for the Court to exercise its jurisdiction. The disappearance of the dispute during the proceedings does not deprive the Court of its jurisdiction, but the Court in such situation will not give any judgment on the merits, as there is nothing upon which to decide.

Judge Tomka notes the function of the Court, as the principal judicial organ of the United Nations, "is to decide in accordance with international law such disputes as are submitted to it" (Article 38, paragraph 1, of the Statute). He observes that, in order to discharge that function, the dispute must still exist when the Court decides on its merits. However, even though the formulation of Article 38, paragraph 1, implies that the dispute will already exist when proceedings before the Court are instituted, the phrase about the Court's function was not intended to constitute a condition for the Court's jurisdiction and should not be determinative in respect thereof.

Judge Tomka highlights that the Court's jurisprudence requires that a dispute exist *in principle* at the time of the application. He considers that, even though the Court repeats this general rule in this Judgment, it has here adopted rather a very strict requirement that the dispute *must* have existed prior to the filing of the Marshall Islands' Application.

He outlines that, in some cases, circumstances will dictate that the dispute must indeed exist as at the date of the application. This may be because of the subsequent expiry of the acceptance of the Court's jurisdiction by one of the States, as in the recent case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections*, Judgment of 17 March 2016. It may also be because, as in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 70, the compromissory clause at issue requires prior negotiations before the filing of the Application, from which it logically follows that a dispute relating to the subject-matter of the relevant Convention should have arisen prior to instituting the proceedings. Judge Tomka cannot agree with those who consider that the Georgia v. Russia case indicates the beginning of a more formalistic approach to the existence of a dispute in the Court's jurisprudence.

Judge Tomka observes that where there are no circumstances requiring that the dispute exist by a particular date, the Court has been flexible in not limiting itself only to the period prior to the filing of the application in order to ascertain whether a dispute existed between the parties before it. He highlights in this respect the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 595.

Moreover, Judge Tomka observes that the Court, and its predecessor, have always shown a reasonable amount of flexibility, not being overly formalistic, when it comes to the timing at which jurisdictional requirements are to be met. He discusses, *inter alia*, *Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 595, and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 412. The Court observed, in the latter case, *inter alia*, that

> "What matters is that, at the latest by the date when the Court decides on its jurisdiction, the applicant must be entitled, if it so wishes, to bring fresh proceedings in which the initially unmet condition would be fulfilled. In such a situation, it is not in the interests of the sound administration of justice to compel the applicant to begin the proceedings anew—or to initiate fresh proceedings—and it is preferable, except in special circumstances, to conclude that the condition has, from that point on, been fulfilled" (*ibid*., p. 441, para. 85).

Judge Tomka considers that there is no compelling reason why this principle cannot be applied to the existence of a dispute. He cannot agree with the view that the Judgment in *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 422, represents a departure in the Court's jurisprudence in this regard.

While Judge Tomka accepts that the Marshall Islands had, for some time, not taken a particularly active position on nuclear disarmament in multilateral fora, he observes that it has, since at least 2013, voiced its dissatisfaction about the compliance, or rather lack thereof, with obligations relating to nuclear disarmament alleged to exist under, *inter alia*, customary international law by nuclear powers, among them Pakistan. He does not consider that a State is required, under international law, to give notice to another State of its intention to institute proceedings before the Court, but takes the view that a State can formulate its claim in the application seising the Court. He observes that to require a State to give prior notice may entail, in the present optional clause system of the Court's compulsory jurisdiction, a risk that the Court will be deprived of its jurisdiction prior to receiving an application.

Judge Tomka concludes on this point that the proceedings before the Court in this case have clarified that there is a dispute between the Marshall Islands and Pakistan about the latter's performance of obligations relating to nuclear disarmament and alleged to exist under customary international law. In his view, the conclusion that the Court has no jurisdiction in the absence of a dispute is not justified in the case at hand.

Nonetheless, Judge Tomka takes the view that the nature of any obligations that may exist in the field of nuclear disarmament renders the Marshall Islands' Application inadmissible. He discusses Article VI of the NPT, which is in similar terms to the obligations the Marshall Islands alleges to exist under customary international law in this case, and the way the obligation thereunder was characterized by the Court *in Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 226. He observes, with reference to the literature on this point, that disarmament requires cooperation and performance by all States. He outlines that disarmament can realistically be achieved only through balancing the security interests of the States concerned, in particular all nuclear powers and other countries with significant military capabilities. Judge Tomka considers that enquiry into the compliance by one nuclear power with its obligations relating to nuclear disarmament, including any obligation to negotiate in good faith, invites consideration of the position taken by all other nuclear powers in relation to the same obligations which are or may be binding on them. He observes that it is only with an understanding of the positions taken by other States that the Court can stand on safe ground in considering the conduct of any one State alone, which necessarily is influenced by the positions of those other States, and whether that one State alone is open to achieving the goal of nuclear disarmament through *bona fide* negotiations. He emphasizes that this is not a question of ruling on the responsibility of those other States as a precondition for ruling on the responsibility of the Respondent such that the *Monetary Gold* principle would apply. It is, in his view, rather a question of whether it is possible

for the Court, in this context, to undertake consideration of a single State's conduct without considering and understanding the positions taken by the other States with which that State (the Respondent in the case at hand) would need to have negotiated, and with which it would need to agree on the steps and measures to be taken by all concerned in order to achieve the overall goal of nuclear disarmament.

Judge Tomka concludes that the issues raised in the present proceedings are not of a bilateral nature between the Marshall Islands and Pakistan. He is convinced that the Court cannot meaningfully engage in a consideration of Pakistan's conduct when other States are not present before the Court to explain their positions and actions. This case illustrates, in his view, the limits of the Court's function, focused as it is on bilateral disputes. Had the Court been endowed with universal compulsory jurisdiction, all Members of the United Nations would have been subject to its jurisdiction. There would not have then existed obstacles to the Court's exercising its jurisdiction fully and thus contributing to the achievement of the purposes and goals of that Organization.

To his sincere and profound regret, Judge Tomka concludes that the absence of other nuclear powers in the proceedings prevents the Court from considering the Marshall Islands' claims in their proper multilateral context. Therefore, he considers that the Application is inadmissible and that the Court cannot proceed to the merits of the case.

Dissenting opinion of Judge Bennouna

In the three cases brought by the Marshall Islands concerning the obligation to negotiate pursuant to Article VI of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons and under customary international law, the Court has declared that it lacks jurisdiction on the grounds of the non-existence of a dispute between the Parties. In doing so, the Court has preferred an exercise in pure formalism to the realism and flexibility expressed in its previous and consistent jurisprudence. Hence, whereas the existence of a dispute had until now been determined objectively, the Court has introduced a new subjective element in its three Judgments. By stopping the time of law and analysis at the date of submission of the Marshall Islands' Application and requiring that the Respondent must have been aware or could not have been "unaware that its views were 'positively opposed' by the applicant", the Court has shown excessive formalism at the expense of a flexible approach that favours the sound administration of justice.

Dissenting opinion of Judge Cançado Trindade

1. In his Dissenting Opinion, composed of 20 parts, in the present case of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (Marshall Islands *versus* Pakistan), Judge Cançado Trindade presents the foundations of his personal dissenting position, pertaining to the Court's decision, encompassing the approach pursued, the whole reasoning as well as the resolutory points. In doing so, Judge Cançado Trindade distances himself as much as he can from the position of the Court's majority.

2. In analysing, first of all, the issue of the existence of a dispute before the Hague Court, Judge Cançado Trindade examines in detail the *jurisprudence constante* of the Hague Court (PCIJ and ICJ), whereby a dispute exists when there is "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (not necessarily stated *expressis verbis*). Whether there exists a dispute is a matter for *"objective determination" by the Court*, and the mere denial of the existence of a dispute does not prove its non-existence.

3. Such has been the position of the Hague Court—both the PCIJ, as from the case of *Mavrommatis Palestine Concessions* (Judgment of 30 August 1924), and the ICJ, as from the Advisory Opinion (of 30 March 1950) on the *Interpretation of Peace Treaties*. Even along the last decade—he recalls—the Hague Court has deemed it fit to insist on its own faculty to proceed to the "objective determination" of the dispute, consistent with its *jurisprudence constante*, examined in detail in Judge Cançado Trindade's Dissenting Opinion (part II).

4. It was only very recently, in a passage of its Judgment on Preliminary Objections (of 1 April 2011) in the case of the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD Convention)*, that the ICJ at a certain moment has decided to apply to the facts of the case a higher threshold for the determination of the existence of a dispute, by proceeding to ascertain whether the applicant State had given the respondent State prior notice of its claim and whether the respondent State had opposed it. Judge Cançado Trindade warns that such new requirement "is not consistent with the PCIJ's and the ICJ's *jurisprudence constante* on the determination of the existence of a dispute" (para. 9).

5. Now, in the present cases of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, the three respondent States (Pakistan, India and United Kingdom), seek to rely on a requirement of prior notification of the claim, or the test of prior awareness of the applicant State's claim, for a dispute to exist under the ICJ's Statute or general international law. Yet—Judge Cançado Trindade further warns —

> "nowhere can such a requirement be found in the Court's *jurisprudence constante* as to the existence of a dispute: quite on the contrary, the ICJ has made clear that the position or the attitude of a party can be established by inference [case of *Land and Maritime Boundary between Cameroon and Nigeria*, *Judgment on Preliminary Objections*, 11 June 1998]. Pursuant to the Court's approach, it is not necessary for the respondent to oppose previously the claim by an express statement, or to express acknowledgment of the existence of a dispute" (para. 10).

6. Judge Cançado Trindade next recalls that, in his earlier Dissenting Opinion (para. 161) in the Court's 2011 Judgment in the case of the *Application of the CERD Convention*, he criticized the Court's "formalistic reasoning" in determining the existence of a dispute, introducing a higher threshold that went beyond the *jurisprudence constante* of the PCIJ and the ICJ itself (paras. 11–12). There is no general

requirement of prior notice of the Applicant State's intention to initiate proceedings before the ICJ. He adds that "*the purpose* of the need of determination of the existence of a dispute (and its object) before the Court is to enable this latter to exercise jurisdiction properly: it is not intended to protect the respondent State, but rather and more precisely to safeguard the proper exercise of the Court's judicial function" (para. 13).

7. Likewise, there is no such requirement of prior "exhaustion" of diplomatic negotiations (para. 14) before lodging a case with, and instituting proceedings before, the Court (case of *Land and Maritime Boundary between Cameroon and Nigeria*, *Judgment on Preliminary Objections*, 11 June 1998). In the present case opposing the Marshall Islands to Pakistan, there were two sustained and distinct courses of conduct of the two contending parties, evidencing their distinct legal positions, which suffice for the determination of the existence of a dispute. The subject-matter of the dispute between the parties is whether Pakistan has breached its obligation under customary international law to pursue in good faith and to conclude negotiations leading to nuclear disarmament in all its aspects under effective international control (para. 16).

8. In the present cases of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (Marshall Islands *versus* Pakistan/India/United Kingdom), the Court's majority has unduly heightened the threshold for establishing the existence of a dispute; it has laid down the "awareness" requirement, seemingly "undermining its own ability to infer the existence of a dispute from the conflicting courses of conduct of the contending parties" (para. 18).

9. In Judge Cançado Trindade's understanding, the view taken by the Court's majority in the present case "contradicts the Hague Court's (PCIJ and ICJ) own earlier case-law, in which it has taken a much less formalistic approach to the establishment of the existence of a dispute" (as to the PCIJ, cf., *inter alia*, case of *Mavrommatis Palestine Concessions*, Judgment of 30 August 1924; case of *Certain German Interests in Polish Upper Silesia*, Judgment (Jurisdiction) of 25 August 1925; case of *Interpretation of Judgments ns. 7 and 8 - Chorzów Factory*, Judgment of 16 December 1927; and, as to the ICJ, cf., *inter alia*, case of *East Timor*, Judgment of 30 June 1995; case of the *Application of the Convention against Genocide*, Preliminary Objections, Judgment of 11 July 1996; case of *Certain Property*, Preliminary Objections, Judgment of 10 February 2005) (paras. 20–21).

10. In the cases of *East Timor* (1995) of the *Application of the Convention against Genocide* (1996) and of *Certain Property* (2005), the ICJ has considered that conduct post-dating the critical date (i.e., the date of the filing of the Application) supports a finding of the existence of a dispute between the parties. In the light of this approach taken by the ICJ itself in its earlier case-law, it is clear that a dispute exists in the *cas d'espèce* (paras. 22–23).

11. Moreover, the Court's majority makes *tabula rasa* of the requirement that "in principle" the date for determining the existence of the dispute is the date of filing of the application (case of *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, Preliminary Objections, Judgment of 17 March 2016; as already seen, in its case-law the ICJ has taken into account conduct post-dating that critical date (para. 26).

12. In the present case—Judge Cançado Trindade proceeds—the Court's majority borrows the obiter dicta it made in the case of the *Application of the CERD Convention* (2011)—"unduly elevating the threshold for the determination of the existence of a dispute—in respect of a compromissory clause under that Convention (wrongly interpreted anyway, making abstraction of the object and purpose of the CERD Convention). In the present case, opposing the Marshall Islands to Pakistan, worse still, the Court's majority takes that higher standard out of context, and applies it herein, in a case lodged with the Court on the basis of an optional clause declaration, and concerning an obligation under customary international law" (para. 27).

13. This higher threshold is, "besides formalistic, artificial", and it does not follow from the definition of a dispute in the Court's *jurisprudence constante* (para. 28). In applying the criterion of "awareness", the Court's majority formalistically requires a specific reaction of the respondent State to the claim made by the applicant State, "even in a situation where, as in the *cas d'espèce*, there are two consistent and distinct courses of conduct on the part of the contending parties" (para. 28). Judge Cançado Trindade concludes, on this particular issue, that the formalistic raising, by the Court's majority, of the higher threshold for the determination of the existence of a dispute,

> "unduly creates a difficulty for the very *access to justice* (by applicants) at international level, in a case on a matter of concern to the whole of humankind. This is most regrettable" (para. 29).

14. In sequence, he then turns attention to the distinct series of United Nations General Assembly resolutions on nuclear weapons and *opinio juris* (part III), namely: *a*) United Nations General Assembly resolutions on Nuclear Weapons (1961–1981); *b*) United Nations General Assembly Resolutions on Freeze of Nuclear Weapons (1982–1992); *c*) United Nations General Assembly Resolutions Condemning Nuclear Weapons (1982–2015); *d*) United Nations General Assembly Resolutions Following up the ICJ's 1996 Advisory Opinion (1996–2015). He recalls, that, first, in the course of the proceedings in the present case of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, the contending parties addressed United Nations General Assembly resolutions on the matter of nuclear disarmament (para. 30).

15. As to *the first series of United Nations General Assembly Resolutions on Nuclear Weapons (1961–1981)*, the ground-breaking General Assembly resolution 1653 (XVI), of 24 November 1961, advanced its *célèbre* "Declaration on the Prohibition of the Use of Nuclear and Thermonuclear Weapons". There followed three Disarmament Decades (para. 31). In this first period under review (1961–1981), the United Nations General Assembly continuously paid special attention to disarmament issues and to nuclear disarmament in particular (para. 32). In 1978 and 1982, the United Nations General Assembly held two Special Sessions on Nuclear

Disarmament (respectively, the 10th and 12th sessions), where the question of nuclear disarmament featured prominently amongst the themes discussed; it was stressed that the most immediate goal of disarmament is the elimination of the danger of a nuclear war (para. 33).

16. Judge Cançado Trindade recalls that the General Assembly repeatedly drew attention to the dangers of the nuclear arms race for humankind and the survival of civilization and expressed apprehension concerning the harmful consequences of nuclear testing for the acceleration of such arms race. Thus, the General Assembly reiterated its condemnation of all nuclear weapon tests, in whatever environment they may be conducted, and it urged NWS to suspend nuclear weapon tests in all environments (para. 34).

17. He further recalls that, in that period, the General Assembly also emphasized that NWS bear a special responsibility for fulfilling the goal of achieving nuclear disarmament (para. 35). At the 84th plenary meeting—he adds—following the 10th Special Session on Disarmament, the General Assembly declared that the use of nuclear weapons is a "violation of the Charter of the United Nations" and "a crime against humanity", and that the use of nuclear weapons should be prohibited, pending nuclear disarmament (para. 36).

18. As to *the second series of United Nations General Assembly Resolutions on Freeze of Nuclear Weapons (1982–1992)*, every year in that period of 1982–1992 (following up on the 10th and 12th Special Sessions on Nuclear Disarmament, held in 1978 and 1982, respectively), the General Assembly adopted resolutions calling for a nuclear-weapons freeze. Such resolutions on freeze of nuclear weapons note that existing arsenals of nuclear weapons are more than sufficient to destroy all life on earth. They express the conviction that lasting world peace can be based only upon the achievement of general and complete disarmament, under effective international control. In this connection, the aforementioned General Assembly resolutions note that the highest priority objectives in the field of disarmament have to be nuclear disarmament and the elimination of all weapons of mass destruction (para. 38).

19. They at last call upon NWS to agree to reach "a freeze on nuclear weapons", which would, *inter alia*, provide for "a simultaneous total stoppage of any further production of fissionable material for weapons purposes". Such nuclear-weapons freeze was not seen as an end in itself but as the most effective first step towards the reduction of nuclear arsenals, a comprehensive test ban, the cessation of the manufacture and deployment of nuclear weapons, and the cessation of the production of fissionable material for weapons purposes (para. 39).

20. After recalling the acknowledgment of the authority and legal value of General Assembly resolutions made in the course of the pleadings of late 1995 in the advisory proceedings before the ICJ (paras. 43–45), Judge Cançado Trindade points out that those resolutions continue to grow in number ever since and until today, "clearly forming", in his perception, "an *opinio juris communis* as to nuclear disarmament" (para. 43).

21. He then turns to *the longstanding series of General Assembly resolutions condemning nuclear weapons (1982–2015)*, wherein the General Assembly moved on straightforwardly to the condemnation of nuclear weapons warning against their threat to the survival of humankind (para. 45). Those General Assembly resolutions next significantly *reaffirm*, in their preambular paragraphs, year after year, that "the use of nuclear weapons would be a violation of the Charter of the United Nations and a crime against humanity" (para. 46).

22. Last but not least, Judge Cançado Trindade surveys *the series of United Nations General Assembly resolutions following up the ICJ's 1996 Advisory Opinion (1996–2015)*, which begin by expressing the General Assembly's belief that "the continuing existence of nuclear weapons poses a threat to humanity" and that "their use would have catastrophic consequences for all life on earth", and, further, that "the only defence against a nuclear catastrophe is the total elimination of nuclear weapons and the certainty that they will never be produced again" (2nd preambular paragraph). The General Assembly resolutions reiteratedly reaffirm "the commitment of the international community to the realization of the goal of a nuclear-weapon-free world through the total elimination of nuclear weapons" (para. 51).

23. Those General Assembly significantly call upon *all States* to fulfil promptly the obligation leading to an early conclusion of a Convention prohibiting the development, production, testing, deployment, stockpiling, transfer, threat or use of nuclear weapons and providing for their elimination (para. 52). The aforementioned series of General Assembly resolutions further recognize, in recent years, "with satisfaction", in a preambular paragraph, that the Antarctic Treaty, the Treaties of Tlatelolco, Rarotonga, Bangkok and Pelindaba, and the Treaty on a Nuclear-Weapon-Free Zone in Central Asia, as well as Mongolia's nuclear-weapon-free status, are "gradually freeing the entire southern hemisphere and adjacent areas covered by those treaties from nuclear weapons" (para. 53).

24. More recent resolutions (from 2013 onwards) are significantly further expanded. They call upon all NWS to undertake concrete disarmament efforts, stressing that all States need to make special efforts to achieve and maintain a world without nuclear weapons. In their operative part, they underline the ICJ's unanimous conclusion, in its 1996 Advisory Opinion on the *Threat or Use of Nuclear Weapons*, that "there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control" (para. 54).

25. Those of General Assembly follow-up resolutions contain paragraphs referring to the obligation to pursue and conclude, in good faith, negotiations leading to nuclear disarmament, without any reference to the NPT or to States Parties to it; they rather refer to that obligation as a general one, not grounded on any treaty provision. *All States*, and not only States Parties to the NPT, are called upon to fulfil promptly that obligation, incumbent upon *all States*, to report (to the Secretary-General) on their compliance with the resolutions at issue. In sum, "references to *all States* are deliberate, and in the absence of any references to a treaty or other specifically-imposed international obligation, this thus points towards a customary law obligation to negotiate and achieve nuclear disarmament" (para. 55).

26. Like the United Nations General Assembly, the United Nations Security Council has also often dwelt upon the matter at issue (part IV). For example, in two of its resolutions (984/1995, of 11 April 1995; and 1887/2009 of 24 September 2009), the United Nations Security Council refers, in particular, to the obligation to pursue negotiations in good faith in relation to nuclear disarmament (para. 60). The Security Council also makes a general call, upon all United Nations member States, whether or not Parties to the NPT (para. 61). In Judge Cançado Trindade's perception,

> "the aforementioned resolutions of the Security Council, like those of the General Assembly (cf. *supra*), addressing all United Nations member States, provide significant elements of the emergence of an *opinio juris*, in support of the gradual formation of an obligation of customary international law, corresponding to the conventional obligation under Article VI of the NPT. In particular, the fact that the Security Council calls upon *all States*, and not only States Parties to the NPT, to pursue negotiations towards nuclear disarmament in good faith (or to join the NPT State Parties in this endeavour) is significant. It is an indication that the obligation is incumbent on all United Nations member States, irrespectively of their being or not Parties to the NPT" (para. 62).

27. The surveyed United Nations resolutions (of the General Assembly and the Security Council)—he adds—portray the United Nations' longstanding saga in the condemnation of nuclear weapons (part V), going back to its birth and earlier years (paras. 66–67). In 1956, the International Atomic Energy Agency (IAEA) was established. And half a decade later, in 1961, the General Assembly adopted a ground-breaking and historical resolution 1653 (XVI), of 24 November 1961, titled "Declaration on the Prohibition of the Use of Nuclear and Thermo-Nuclear Weapons", which "remains contemporary today, and, 55 years later, continues to require close attention" (para. 65).

28. Over half a century later, that lucid and poignant declaration appears endowed with permanent topicality, as the whole international community remains still awaiting for the conclusion of the propounded general Convention on the prohibition of nuclear and thermo-nuclear weapons: nuclear disarmament remains still a goal to be achieved by the United Nations today, as it was in 1961. The Comprehensive Nuclear-Test-Ban Treaty (CTBT), adopted on 24 September 1996, has not yet entered into force, although 164 States have ratified it to date (para. 66). Since the adoption of the CTBT in 1996, the Conference on Disarmament has been largely deadlocked, in the face of the invocation of divergent "security interests" (para. 72).

29. After all, in historical perspective, some advances have been attained in the last decades in respect of other weapons of mass destruction—as illustrated by the adoption of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (on 10 April 1972), as well as the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (on 13 January 1993); distinctly from the CTBT, these two Conventions have already entered into force (on 26 March 1975, and on 29 April 1997, respectively). Judge Cançado Trindade concludes, in this respect, that

> "If we look at conventional international law only, weapons of mass destruction (poisonous gases, biological and chemical weapons) have been outlawed; yet, nuclear weapons, far more destructive, have not been banned yet. This juridical absurdity nourishes the positivist myopia, or blindness, in inferring therefrom that there is no customary international obligation of nuclear disarmament. Positivists only have eyes for treaty law, for individual State consent, revolving in vicious circles, unable to see the pressing needs and aspirations of the international community as a whole, and to grasp the *universality* of contemporary international law—as envisaged by its 'founding fathers', already in the Sixteenth-Seventeenth centuries—with its underlying fundamental principles (…).
>
> The truth is that, in our times, the obligation of nuclear disarmament has emerged and crystallized, in both conventional and customary international law, and the United Nations has been giving a most valuable contribution to this along the decades" (paras. 74–75).

30. In their arguments before the Court in the present case, the contending parties have presented their distinct arguments on the issue of United Nations resolutions on nuclear disarmament and the emergence of *opinio juris* (part VI). Judge Cançado Trindade is of the view that, despite their distinct patterns of voting, the United Nations General Assembly resolutions reviewed in the present Dissenting Opinion, taken altogether,

> "are not at all deprived of their contribution to the conformation of *opinio juris* as to the formation of a customary international law obligation of nuclear denuclearization. After all, they are resolutions of the United Nations General Assembly itself (and not only of the large majority of United Nations member States which voted in their favour); they are resolutions of the United Nations Organization itself, addressing a matter of common concern of humankind as a whole" (para. 82)

31. The presence of evil has marked human existence along the centuries (part VII). Ever since the eruption of the nuclear age in August 1945, some of the world's great thinkers have been inquiring whether humankind has a future (paras. 83–91), and have been drawing attention to the imperative of respect for life and the relevance of humanist values (paras. 92–104). Also in international legal doctrine there have been those who have been stressing the needed prevalence of human conscience, the universal juridical conscience, over State voluntarism (paras. 105–108).

32. This is the position upheld also by Judge Cançado Trindade, to whom

> "it is the universal juridical conscience that is the ultimate material source of international law. (…) one cannot face the new challenges confronting the whole international community keeping in mind only State susceptibilities; such is the case with the obligation to render the world free of nuclear weapons, an imperative of *recta ratio* and not a derivative of the 'will' of States. In effect, to keep hope

alive it is necessary to bear always in mind humankind as a whole" (para. 109).

33. Within the ICJ, Judge Cançado Trindade has made this point also in his Dissenting Opinion (paras. 488–489) in the case concerning the *Application of the Convention against Genocide* (Croatia *versus* Serbia, Judgment of 03 February 2015). He further ponders that "[t]he presence of evil has accompanied and marked human existence along the centuries", with the "increasing disregard for human life"; the "tragic message of the Book of *Genesis*", in his perception, "seems perennial, as contemporary as ever, in the current nuclear age" (paras. 111–112).

34. His next line of considerations pertain to the attention of the United Nations Charter to peoples, as shown in several of its provisions, and in its attention also to the safeguarding of values common to humankind, and to the respect for life and human dignity (part VIII). The new vision advanced by the United Nations Charter, and espoused by the Law of the United Nations—he proceeds—has, in his perception,

> "an incidence upon judicial settlement of international disputes. Thus, the fact that the ICJ's mechanism for the handling of contentious cases is an inter-State one, does not mean that its reasoning should also pursue a strictly inter-State dimension; that will depend on the nature and substance of the cases lodged with it. And there have been several cases lodged with the Court that required a reasoning going well beyond the inter-State dimension. Such reasoning beyond the inter-State dimension is faithful to the United Nations Charter, the ICJ being 'the principal judicial organ of the United Nations'" (para. 115).

35. Likewise, the cycle of World Conferences of the United Nations along the nineties, in a commendable endeavour of the United Nations *to go beyond and transcend the purely inter-State dimension*, imbued of a spirit of solidarity, so as to consider the challenges for the future of humankind. The common denominator in those United Nations World Conferences—Judge Cançado Trindade adds—can be found in the recognition of the legitimacy of the concern of the international community as a whole with the conditions of living of all human beings everywhere. At the end of the decade and the dawn of the new millennium, the United Nations Millennium Declaration (2000) stated the determination "to eliminate the dangers posed by weapons of mass destruction" (paras. 119–121).

36. In sum, the nature of a case before the Court may well require a reasoning going beyond the strictly inter-State outlook; the present case concerning the obligation of nuclear disarmament requires attention to be focused on peoples, in pursuance of a humanist outlook, rather than on inter-State susceptibilities. The inter-State mechanism of adjudication of contentious cases before the ICJ does not at all imply that the Court's reasoning should likewise be strictly inter-State. Nuclear disarmament is a matter of concern to humankind as a whole.

37. Contrary to the reasoning of the Court's majority, the so-called *Monetary Gold* "principle" has no place in a case like the present one, and it "does not belong to the realm of the *prima principia*, being nothing more than a concession to State consent, within an outdated State voluntarist framework". The present case, in the perception of Judge Cançado Trindade, shows

> "the need to go beyond the strict inter-State outlook. The fact that the mechanism for the adjudication of contentious cases before the ICJ is an inter-State one, does not at all imply that the Court's reasoning should likewise be strictly inter State. In the present case concerning nuclear weapons and the obligation of nuclear disarmament, it is necessary to focus attention on peoples, rather than on inter-State susceptibilities. It is imperative to keep in mind the world population, in pursuance of a humanist outlook, in the light of the *principle of humanity*" (paras. 124–125).

38. The present case of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* stresses the utmost importance of general principles of international law, such as the principle of the juridical equality of States (part XI). General principles of law (*prima principia*) rest in the foundations of any legal system. They inform and conform its norms, guide their application, and draw attention to the prevalence of *jus necessarium* over *jus voluntarium* (cf. *infra*).

39. Factual inequalities and the strategy of "deterrence" cannot be made to prevail over the juridical equality of States; "deterrence" cannot keep on overlooking the distinct series of United Nations General Assembly resolutions, expressing an *opinio juris communis* in condemnation of nuclear weapons (part XI). As also sustained by general principles of international law and international legal doctrine—Judge Cançado Trindade adds—nuclear weapons are in breach of international law, of IHL and the ILHR, of the United Nations Charter, and of *jus cogens*, for the devastating effects and sufferings they can inflict upon humankind as a whole (paras. 132–133).

40. In his understanding, the ICJ should give "far greater weight to the *raison d'humanité*", rather than to the *raison d'État* nourishing "deterrence"; it should "keep in mind the human person and the peoples, for which States were created, instead of relying only on what one assumes to be the *raison d'État*". The *raison d'humanité*, in his understanding, "prevails surely over considerations of *Realpolitik*" (para. 143). He adds that, in its 1996 Advisory Opinion, the ICJ rightly acknowledged the importance of complete nuclear disarmament (asserted in the series of General Assembly resolutions) as an obligation of result, and not of mere conduct (para. 89), but

> "did not extract the consequences of that. Had it done so, it would have reached the conclusion that nuclear disarmament cannot be hampered by the conduct of a few States—the NWS—which maintain and modernize their own arsenals of nuclear weapons, pursuant to their strategy of 'deterrence'.
>
> The strategy of 'deterrence' has a suicidal component. Nowadays, in 2016, twenty years after the 1996 ICJ Advisory Opinion, and with the subsequent reiteration of the conventional and customary international legal obligation of nuclear disarmament, there is no longer any room for ambiguity. There is an *opinio juris communis* as to the illegality of nuclear weapons, and as to the well-established

obligation of nuclear disarmament, which is an obligation of result and not of mere conduct. Such *opinio juris* cannot be erased by the dogmatic positivist insistence on an express prohibition of nuclear weapons; on the contrary, that *opinio juris* discloses that the invocation of the absence of an express prohibition is nonsensical, in relying upon the destructive and suicidal strategy of 'deterrence'" (paras. 134–135).

41. Judge Cançado Trindade concludes on this point that there is here, in effect, clearly formed, an *opinio juris communis* as to the illegality and prohibition of nuclear weapons, and the survival of humankind cannot be made to depend on the "will" and the insistence on "national security interests" of a handful of privileged States; the "universal juridical conscience stands well above the 'will' of individual States" (para. 140).

42. His next line of considerations pertains to the illegality of nuclear weapons and the obligation of nuclear disarmament (part XII), encompassing: *a*) the condemnation of all weapons of mass destruction; *b*) the prohibition of nuclear weapons (the need of a people-centred approach, and the fundamental right to life); *c*) the absolute prohibitions of *jus cogens* and the humanization of international law; *d*) pitfalls of legal positivism. Judge Cançado Trindade stresses the need of a people-centred approach in this domain, keeping in mind the fundamental right to life (paras. 166–179). Attention is to be kept on the devastating and catastrophic consequences of the use of nuclear weapons.

43. He warns that, in the path towards nuclear disarmament, the peoples of the world cannot remain hostage of individual State consent. The absolute prohibitions of arbitrary deprivation of human life, of infliction of cruel, inhuman or degrading treatment, and of infliction of unnecessary suffering, are prohibitions of *jus cogens*, which have an incidence on ILHR, IHL, ILR and ICL, fostering the current historical process of *humanization* of international law (paras. 180–183).

44. He further warns that the positivist outlook unduly overlooks the *opinio juris communis* as to the illegality of all weapons of mass destruction, including nuclear weapons, and the obligation of nuclear disarmament, under contemporary international law (paras. 184–190). Conventional and customary international law go together—he adds—in the domain of the protection of the human person, as disclosed by the Martens clause, with an incidence on the prohibition of nuclear weapons (paras. 191–199).

45. To Judge Cançado Trindade, the existence of nuclear weapons is the contemporary tragedy of the nuclear age; today, more than ever, human beings need protection from themselves. Nuclear weapons have no ethics, and ethics cannot be separated from law, as taught by jusnaturalist thinking (part XIV). He ponders that

> "In the domain of nuclear disarmament, we are faced today, within the conceptual universe of international law, with unexplainable insufficiencies, or anomalies, if not absurdities. For example, there are fortunately in our times Conventions prohibiting biological and chemical weapons (of 1972 and 1993), but there is to date no such comprehensive conventional prohibition of nuclear weapons, which are far more destructive. There is no such prohibition despite the fact that they are in clear breach of international law, of IHL and the ILHR, as well as of the Law of the United Nations.
>
> Does this make any sense? Can international law prescind from ethics? In my understanding, not at all. Just as law and ethics go together (in the line of jusnaturalist thinking), scientific knowledge itself cannot be dissociated from ethics. The production of nuclear weapons is an illustration of the divorce between ethical considerations and scientific and technological progress. Otherwise, weapons which can destroy millions of innocent civilians, and the whole of humankind, would not have been conceived.
>
> The principles of *recta ratio*, orienting the *lex praeceptiva*, emanate from human conscience, affirming the ineluctable relationship between law and ethics. Ethical considerations are to guide the debates on nuclear disarmament. Nuclear weapons, capable of destroying humankind as a whole, carry evil in themselves. They ignore civilian populations, they make abstraction of the principles of necessity, of distinction and of proportionality. They overlook the principle of humanity. They have no respect for the fundamental right to life. They are wholly illegal and illegitimate, rejected by the *recta ratio*, which endowed *jus gentium*, in its historical evolution, with ethical foundations, and its character of universality" (paras. 201–203).

46. In Judge Cançado Trindade's understanding, humankind is subject of rights (as propounded by the "founding fathers" of international law); in the realm of the humanized new *jus gentium*; as a subject of rights, humankind has been a potential victim of nuclear weapons already for a long time. This humanist vision is centred on peoples, keeping in mind the humane ends of States.

47. In his view, the contemporary tragedy of nuclear weapons cannot be addressed from "the myopic outlook of positive law alone"; nuclear weapons, and other weapons of mass destruction, have no ethics, have no ground on the law of nations (*le droit des gens*). They are in flagrant breach of its fundamental principles, and those of International Humanitarian Law, the International Law on Human Rights, as well as the Law of the United Nations; they are a contemporary "manifestation of evil, in its perennial trajectory going back to the Book of *Genesis*". Jusnaturalist thinking, "always open to ethical considerations", identifies and discards the disrupting effects of the strategy of "deterrence" of fear creation and infliction; "humankind is victimized by this" (para. 210).

48. The next line of considerations of Judge Cançado Trindade concerns the *principle of humanity* (para. 215) and the universalist approach, with the *jus necessarium* transcending the limitations of *jus voluntarium* (part XV). He recalls that, on several occasions, in his Individual Opinions both in the ICJ and, earlier on, in another international jurisdiction (the Inter-American Court of Human Rights), he underlined that

> "the law of nations (*droit des gens*), since its historical origins in the Sixteenth century, was seen as comprising not only States (emerging as they were), but also peoples, the human person (individually and in groups), and humankind as a whole. The strictly inter-State outlook was

devised much later on, as from the Vattelian reductionism of the mid-Eighteenth century, which became *en vogue* by the end of the Nineteenth century and beginning of the Twentieth century, with the well-known disastrous consequences—the successive atrocities victimizing human beings and peoples in distinct regions of world,—along the whole Twentieth century. In the present nuclear age, extending for the last seven decades, humankind as a whole is threatened" (para. 213).

49. The conventional and customary obligation of nuclear disarmament—he proceeds—brings to the fore another aspect:

> "the issue of the *validity* of international legal norms is, after all, metajuridical. International law cannot simply remain indifferent to values, general principles of law and ethical considerations; it has, to start with, to identify what is *necessary*—such as a world free of nuclear weapons—in order to secure the survival of humankind. This *idée du droit* precedes positive international law, and is in line with jusnaturalist thinking. (…)
>
> It is clear to human conscience that those weapons, which can destroy the whole of humankind, are unlawful and prohibited. They are in clear breach of *jus cogens*" (paras. 221–223).

50. Judge Cançado Trindade then addresses other aspects of the matter at issue, mentioned by the contending parties in the present case of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*. He points out that *opinio juris communis necessitatis*, upholding a customary and conventional obligation of nuclear disarmament, has been finding expression, first, in the NPT Review Conferences, from 1975 to 2015 (part XVI).

51. Secondly, the same has happened in the relevant establishment of nuclear-weapon-free zones (part XVII), to the ultimate benefit of humankind as a whole (paras. 247). Basic considerations of humanity have surely been taken into account for the establishment of those zones, by the adoption of the 1967 Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (Tlatelolco), followed by four others of the kind, in distinct regions of the world, namely the 1985 South Pacific (Rarotonga) Nuclear-Free Zone Treaty, the 1995 Southeast Asia (Bangkok) Nuclear-Weapon-Free Zone Treaty, the 1996 African (Pelindaba) Nuclear Weapon-Free Zone Treaty, as well as the 2006 Central Asian (Semipalatinsk) Nuclear-Weapon-Free Zone Treaty (and their respective Protocols).

52. The establishment of those nuclear-weapon-free zones has, in effect, given expression to the growing disapproval of nuclear weapons by the international community as a whole (para. 240). To the establishment of aforementioned five nuclear-weapon-free zones other initiatives against nuclear weapons are to be added—Judge Cançado Trindade proceeds—such as the prohibitions of placement of nuclear weapons, and other kinds of weapons of mass destruction, in outer space, on the seabed, on the ocean floor and in the subsoil beyond the outer limit of the territorial seabed zone—"denuclearized" by the Treaties of Antarctica (1959), Outer Space (1967) and the Deep Sea Bed (1971), respectively, to which can be added the Treaty on the Moon and Other Celestial Bodies (1979), established a complete demilitarization thereon (para. 251).

53. The fact that the international community counts today on five nuclear-weapon-free zones, in relation to which States that possess nuclear weapons do have a particular responsibility, "reveals an undeniable advance of right reason, of the *recta ratio* in the foundations of contemporary international law". Moreover, the initiative of nuclear-weapon-free zones keeps on clearly gaining ground: in recent years, proposals are being examined for the setting up of new denuclearized zones of the kind, as well as of the so-called single-State zone (e.g., Mongolia). All this "further reflects the increasing disapproval, by the international community as a whole, of nuclear weapons, which, in view of their hugely destructive capability, constitute an affront to right reason (*recta ratio*)" (para. 252).

54. And thirdly, the same has happened in respect of the recent Conferences of the Humanitarian Impact of Nuclear Weapons (part XVIII—held, respectively, in Oslo in March 2013, in Nayarit in February 2014, and in Vienna in December 2014)—in their common cause of achieving and maintaining a nuclear-weapon-free world. This recent series of Conferences—examined by Judge Cançado Trindade—has drawn attention to the humanitarian effects of nuclear weapons, "restoring the central position of the concern for human beings and peoples"; it has thus "stressed the importance of the human dimension of the whole matter, and has endeavoured to awaken the conscience of the whole international community as well as to enhance the needed humanitarian coordination in the present domain" (para. 255).

55. Given their devastating effects, nuclear weapons should never have been conceived and produced. The Nayarit and Vienna Conferences participants heard the poignant testimonies of some *Hibakusha*—survivors of the atomic bombings of Hiroshima and Nagasaki—who presented their accounts of the overwhelming devastation inflicted on those cities and their inhabitants by the atomic blasts (including the victims' burning alive, and carbonized or vaporized, as well as the long-term effects of radiation, such as the birth of "monster-like babies", the continuous suffering from "thyroid cancer, liver cancer and all types of radiogenic cancerous illnesses", extending over the years, and killing survivors along seven decades) (paras. 263 and 273).

56. This series of recent Conferences on the Humanitarian Impact of Nuclear Weapons have contributed to a deeper understanding of the consequences and risks of a nuclear detonation, and have demonstrated their devastating immediate, mid- and long-term effects of the use and testing of nuclear weapons; they have focused to a larger extent on the legal framework (and gaps therein) with regard to nuclear weapons (paras. 274–275 and 277–281). In the struggle against nuclear weapons, a "Humanitarian Pledge" has ensued from the Vienna Conference, which, by April 2016, has been formally endorsed by 127 States (paras. 282–284).

57. Judge Cançado Trindade concludes on this point that all these recent initiatives (*supra*) have been

> "rightly drawing attention to the grave humanitarian consequences of nuclear weapons detonations. The reframing

> of the whole matter in a people-centred outlook appears to me particularly lucid, and necessary, keeping in mind the unfoundedness of the strategy of 'deterrence' and the catastrophic consequences of the use of nuclear weapons. (…)
>
> The obligation of nuclear disarmament being one of result, the 'step-by-step' approach cannot be extended indefinitely in time, with its insistence on the maintenance of the nuclear sword of Damocles. The 'step-by-step' approach has produced no significantly concrete results to date, seeming to make abstraction of the numerous pronouncements of the United Nations upholding the obligation of nuclear disarmament (cf. *supra*). After all, the absolute prohibition of nuclear weapons—which is multifaceted, is one of *jus cogens* (cf. *supra*). Such weapons, as the Conferences on the Humanitarian Impact of Nuclear Weapons have evidenced, are essentially inhumane, rendering the strategy of 'deterrence' unfounded and unsustainable" (paras. 285–286).

58. Moreover, those initiatives, reviewed in the present Dissenting Opinion (NPT Review Conferences, the establishment of nuclear-weapon-free zones, and the Conferences on the Humanitarian Impact of Nuclear Weapons)—referred to by the contending parties in the course of the proceedings before the ICJ in the present case of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*—"have gone beyond the inter-State outlook". In Judge Cançado Trindade's perception, "there is great need, in the present domain, to keep on looking beyond States, so as to behold peoples' and humankind's quest for survival in our times" (para. 289).

59. After recalling that nuclear weapons, "as from their conception, have been associated with overwhelming destruction" (para. 290), Judge Cançado Trindade proceeds to his final considerations (part XIX). In his own understanding, *opinio juris communis*—to which United Nations General Assembly resolutions have contributed—has a much broader dimension than the subjective element of custom, being a key element in the formation of a law of conscience, so as to rid the world of the inhuman threat of nuclear weapons.

60. United Nations (General Assembly and Security Council) resolutions are adopted on behalf of the United Nations Organization itself (and not only of the States which voted in their favour); they are thus valid for *all* United Nations member States. Of the main organs of the United Nations, the contributions of the General Assembly, the Security Council and the Secretary-General to nuclear disarmament have been consistent and remarkable along the years. The ICJ, as the principal judicial organ of the United Nations, is to keep in mind basic considerations of humanity, with their incidence on questions of admissibility and jurisdiction, as well as of substantive law.

61. *Opinio juris* has already had a long trajectory in legal thinking, being today endowed with a wide dimension. Already in the Nineteenth century, the so-called "historical school" of legal thinking and jurisprudence, "in reaction to the voluntarist conception, gradually discarded the 'will' of the States by shifting attention to *opinio juris*, requiring practice to be an authentic expression of the 'juridical conscience' of nations and peoples". With the passing of time, the acknowledgment of conscience standing above the "will" developed further, as "a reaction against the reluctance of some States to abide by norms addressing matters of general or common interest of the international community" (para. 293). Judge Cançado Trindade adds that

> "*opinio juris* became a key element in the *formation* itself of international law, a *law of conscience*. This diminished the unilateral influence of the most powerful States, fostering international law-making in fulfilment of the public interest and in pursuance of the common good of the international community as a whole.
>
> The foundations of the international legal order came to be reckoned as independent from, and transcending, the 'will' of individual States; *opinio juris communis* came to give expression to the 'juridical conscience', no longer only of nations and peoples—sustained in the past by the 'historical school'—but of the international community as a whole, heading towards the universalization of international law. It is, in my perception, this international law of conscience that turns in particular towards nuclear disarmament, for the sake of the survival of humankind" (paras. 294–295).

62. Judge Cançado Trindade further recalls that, along the years, he has consistently repudiated "voluntarist positivism", as he does now in the present Dissenting Opinion, in respect of "the customary and conventional international obligation to put an end to nuclear weapons", so as "to rid the world of their inhuman threat" (paras. 297–299). He then ponders that United Nations General Assembly or Security Council resolutions on the present matter, surveyed herein,

> "are adopted on behalf not of the States which voted in favour of them, but more precisely on behalf of the United Nations Organization itself (its respective organs), being thus *valid for all United Nations member States*. (…) [T]he United Nations is endowed with an international legal personality of its own, which enables it to act at international level as a distinct entity, independently of individual member States; in this way, it upholds the juridical equality of all States, and mitigates the worrisome vulnerability of factually weaker States, such as the NNWS; in doing so, it aims—by multilateralism—at the common good, at the realization of common goals of the international community as a whole, such as nuclear disarmament.
>
> A small group of States—such as the NWS—cannot overlook or minimize those reiterated resolutions, extended in time, simply because they voted against them, or abstained. Once adopted, they are valid for all United Nations member States. They are resolutions of the United Nations Organization itself, and not only of the large majority of United Nations member States which voted in favour of them. United Nations General Assembly resolutions, reiteratedly addressing matters of concern to humankind as a whole (such as existing nuclear weapons), are in my view endowed with normative value. They cannot be properly considered from a State voluntarist perspective; they call for another approach, away from the strict voluntarist-positivist one" (paras. 300–301).

63. Those resolutions—he proceeds—"find inspiration in general principles of international law, which, for their part, give expression to values and aspirations of the international community as a whole, of all humankind". The values which find expression in those *prima principia* "inspire every

legal order and, ultimately, lie in the foundations of this latter" (para. 302). The general principles of law (*prima principia*), in his perception,

> "confer upon the (national and international) legal order its ineluctable axiological dimension. Notwithstanding, legal positivism and political 'realism', in their characteristic subservience to power, incur into their basic mistake of minimizing those principles, which lie in the foundations of any legal system, and which inform and conform the norms and the action pursuant to them, in the search for the realization of justice. Whenever that minimization of principles has prevailed the consequences have been disastrous" (para. 303).

64. They have been contributing, in the last decades, to a vast *corpus juris* on matters of concern to the international community as a whole, overcoming the traditional inter-State paradigm of the international legal order. And this can no longer be overlooked in our days: the inter-State mechanism of the *contentieux* before the ICJ "cannot be invoked in justification for an inter-State reasoning". As "the principal judicial organ" of the United Nations,

> "the ICJ has to bear in mind not only States, but also 'we, the peoples', on whose behalf the United Nations Charter was adopted. In its international adjudication of contentious cases, like the present one of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, the ICJ has to bear in mind basic considerations of humanity, with their incidence on questions of admissibility and jurisdiction, as well as of substantive law" (para. 304).

65. Last but not least, in his epilogue (part XX), Judge Cançado Trindade expresses the feeling of being in peace with his own conscience, in laying the foundations of his own personal position in the *cas d'espèce*, which "stands in clear and entire opposition to the view espoused by the Court's majority". In his understanding,

> "there is a dispute before the Court, which has jurisdiction to decide the case. There is a conventional and customary international law obligation of nuclear disarmament. Whether there has been a concrete breach of this obligation, the Court could only decide on the merits phase of the present case" (para. 305).

66. His dissenting position "is grounded not only on the assessment of the arguments produced before the Court by the contending parties, but above all on issues of principle and on fundamental values, to which I attach even greater importance" (para. 306). In conclusion—he adds—"[a] world with arsenals of nuclear weapons, like ours, is bound to destroy its past, dangerously threatens the present, and has no future at all. Nuclear weapons pave the way into nothingness" (para. 321). In his understanding,

> "the International Court *of Justice*, as the principal judicial organ of the United Nations, should, in the present Judgment, have shown sensitivity in this respect, and should have given its contribution to a matter which is a major concern of the vulnerable international community, and indeed of humankind as a whole" (para. 321).

Declaration of Judge Xue

Judge Xue votes in favour of the Judgment because she agrees with the decision of the Court to dismiss the case for lack of jurisdiction. Notwithstanding her vote, she wishes to make two points on the Judgment.

Her first point relates to the approach taken by the Court with regard to the existence of a dispute. In the Judgment, the Court finds that the evidence submitted to it fails to demonstrate that there existed between the Parties a dispute concerning the subject of the Application at the time the Marshall Islands instituted proceedings in the Court. Consequently, the condition for the Court's jurisdiction is not met. The Court reaches this conclusion primarily on the ground that, in all the circumstances, the Marshall Islands never offered any particulars to Pakistan, either in words or by conduct, which could have made Pakistan aware that the Marshall Islands held a legal claim against it for breach of its international obligation to negotiate on nuclear disarmament.

Judge Xue notes that the Court does not deal with the other objections raised by the Respondent, but dismissed the case by solely relying on the finding that there did not exist a dispute between the Parties at the time of the filing of the Application. Therefore, it is not unpredicted that questions arise as to the propriety of this formal and restrictive approach. Given the Court's past practice of judicial flexibility in handling procedural defects, it may be arguable that the non-existence of a dispute between the Parties at the time of the filing of the Application could by itself constitute a solid ground for the Court to reject the case; the Marshall Islands might readily come back and file a new case to the same effect, as by now the dispute is indeed crystallized. For judicial economy, realism and flexibility seem called for under the present circumstances.

The reason for Judge Xue to support the Court's decision is threefold. First of all, in her opinion, there must be a minimum requirement for the Applicant to demonstrate to the Court that there existed a dispute between the Parties before the case is instituted. The evidence submitted by the Marshall Islands regarding the existence of a dispute between the Parties is noticeably insufficient. The Marshall Islands heavily relies on the positions expressed by the Parties during the current proceedings to demonstrate that one Party's claim was positively opposed by the other. As is pointed out by the Court, should that argument be accepted, it would virtually render the condition of the existence of a dispute without any meaning and value. More fundamentally, in her opinion, it would undermine the confidence of States in accepting the compulsory jurisdiction of the Court.

Secondly, even though prior notice and diplomatic exchanges are not required as a condition for the existence of a dispute, "surprise" litigation should nevertheless be discouraged. Any peaceful means of settlement, including judicial recourse, is aimed at the resolution of the dispute. Whenever the circumstances permit, a clear demonstration of a legal claim to the responsible party would facilitate the process of negotiation and settlement. The Court may take into account the post-application conduct of the parties as supplementary evidence to satisfy itself for the purpose of jurisdiction and

admissibility, but judicial flexibility has to be exercised within a reasonable limit.

Thirdly, the Court's jurisdiction is built on mutuality and reciprocity. The present case is different in character from the previous cases where the Court took a flexible approach in dealing with some procedural defects. Judge Xue observes that the Marshall Islands did not institute the proceedings merely for the protection of its own interest, albeit a victim of nuclear weapons. Rather the case serves more the interest of the international community. Although the Court recognized obligations *erga omnes* in international law in the *Barcelona Traction* case (*Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33), it did not address the question of standing, *locus standi*, an issue that is yet to be developed in international law.

As to her second point, Judge Xue regrets very much that the Court does not proceed further to deal with some other objections raised by the Respondent. Pakistan argues, *inter alia*, that on the basis of the *Monetary Gold* rule, the alleged dispute cannot be decided by the Court in the absence of the other nuclear-weapon States. Moreover, it maintains that the alleged obligation to negotiate requires the participation of all nuclear-weapon States—and others. A decision binding the Marshall Islands and Pakistan therefore could not have the desired effect.

In her opinion, these objections deserve an immediate consideration of the Court at the preliminary stage, as the answer to them would have a direct effect on the jurisdiction of the Court and the admissibility of the Application. Had it done so, the Court would be in a better position to demonstrate that, so far as the questions of jurisdiction and admissibility are concerned, the Marshall Islands' Application is not merely defective in one procedural form.

She recalls the Court's Advisory Opinion in the *Legality of the Threat or Use of Nuclear Weapons* case, in which the Court stated that "any realistic search for general and complete disarmament, especially nuclear disarmament, necessitates the co-operation of all States" (*Legality of the Threat or the Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 264, para. 100; emphasis added) and that the obligation under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons is not a mere obligation of conduct, but an obligation to achieve a precise result.

Judge Xue observes that it has been twenty years since this Advisory Opinion was delivered. She notes that there has been a collective failure to deliver, but the issue for the present case is whether such a failure can be turned into a series of bilateral disputes, and addressed separately. She wonders whether such disagreement, as may exist between some nuclear-weapon States, on the one hand, and non-nuclear-weapon States, on the other, on the cessation of nuclear arms race and the negotiation process on nuclear disarmament, can be characterized as a dispute that falls within the meaning of Articles 36 and 38 of the Statute. She questions whether a dispute as such, assuming existent at the time of the filing of the application or crystallized subsequently, is justiciable for the Court to settle through contentious proceedings. In her view, the Court emphasizes a bit too much the way in which a dispute may be materialized, but does not give sufficient consideration to the nature of the dispute that the Marshall Islands alleges to have existed between Pakistan and itself.

Declaration of Judge Donoghue

Judge Donoghue notes that the criteria pursuant to which the Court decides on the existence of a dispute are not found in the Statute of the Court, but are instead contained in the reasoning of the Court's judgments. This calls for clarity in those criteria and for their consistent application. Judge Donoghue considers that the Court's inquiry into the existence of a dispute in today's Judgment follows the reasoning contained in the recent jurisprudence of the Court.

As to the Marshall Islands' proposition that opposing statements made by the parties during the proceedings before the Court can suffice to establish the existence of a dispute, Judge Donoghue considers that in its recent judgments the Court has not found the existence of a dispute based solely on the parties' statements in Court, but instead has adhered to the principle that the evidence must show that a dispute existed as of the date of an application, as it does today.

Concerning the Marshall Islands' contention that the Court should infer the existence of a dispute from the juxtaposition of the Marshall Islands' statements with the Respondent's conduct, Judge Donoghue observes that the objective standard applied today to scrutinize the evidence is consistent with the recent case law of the Court. The essential question is whether the Applicant's statements referred to the subject-matter of its claim against the Respondent—i.e., "the issue brought before the Court" in the Application—with sufficient clarity that the Respondent "was aware, or could not have been unaware," of the Applicant's claim against it. As this was not the case, there was no reason to expect a response from the Respondent nor for the Court to infer opposition from the alleged unaltered course of conduct of the Respondent. Accordingly, there was no opposition of views, and no dispute, as of the date of the Application.

Declaration of Judge Gaja

Having reached the conclusion that there was no dispute between the Parties on the date when the Application was filed, the Court decides not to examine the other objections raised by the respondent States. Given that disputes have clearly arisen since that date, it would have been preferable for the Court to examine also other objections made by the respondent States which are likely to be litigated again should the Marshall Islands file new applications.

Separate opinion of Judge Sebutinde

The object and purpose of the United Nations Charter is the maintenance of international peace and security. It is in light of that object and purpose that the International Court of Justice (ICJ), as the principal judicial organ of the United Nations, discharges its mandate to decide inter-State

disputes on the basis of international law. The object and purpose of the United Nations becomes apparent in view of the threat to international peace and security posed by nuclear weapons.

The subject-matter of the dispute between the Parties is the alleged breach by the Republic of Pakistan of an international obligation under customary international law to pursue in good faith and to bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control. Both the Republic of the Marshall Islands (RMI) and Pakistan filed optional clause declarations under Article 36, paragraph 2, of the Statute of the ICJ, in 2013 and 1960 respectively, accepting the compulsory jurisdiction of the Court. However, the existence of a dispute is a precondition for the exercise of that jurisdiction.

It is the role of the Court (and not the Parties) to objectively determine whether or not at the time the Application was filed, there was "a disagreement on a point of law or fact, or a conflict of legal views or interests" between the Parties, regarding the above-mentioned subject-matter. The Court's jurisprudence demonstrates that the Court has in the discharge of this function adopted a flexible approach attaching more importance to the substance of the evidence, including the conduct of the parties, rather than to matters of form or procedure. The approach and reasoning adopted by the majority in arriving at the conclusion that there is no dispute between the Parties in the present case, is not only both formalistic and procedural but is also inflexible in as far as it does not take due account of the conduct of the Parties. A more flexible, substantive approach examining the conduct of the Parties as relevant evidence, would have shown that the RMI and Pakistan clearly held opposing views regarding the subject-matter of the present dispute.

Lastly, by insisting that, in order for a dispute to exist, the applicant must prove that the respondent State "was aware or could not have been unaware that its views were positively opposed by the applicant", the majority has introduced a new legal test that is alien to the Court's established jurisprudence and that unduly raises the evidential threshold. Apart from unduly emphasizing form over substance, this new legal criterion of "awareness" introduces a degree of subjectivity into an equation that ought to remain objective, since it requires both an applicant and the Court to delve into the mind of a respondent State. The jurisprudence relied upon by the majority in adopting this new criterion is distinguishable and inapplicable to the present case.

Separate opinion of Judge Bhandari

In his separate opinion, Judge Bhandari recalls that he has concurred with the conclusions of the majority Judgment. However, he wishes to expand the basis of the reasoning of the Judgment, and proposes to deal with another aspect of the case, namely that, in the facts of this case, the Court ought to have dealt with the other preliminary objections raised by Pakistan because the issues raised in the case affect not only the Parties, but also the entire humanity.

Judge Bhandari stated that, according to the Statute of the Court and its jurisprudence, this Court can only exercise its jurisdiction in case of a dispute between the Parties. Hence, the question to be decided is whether from the documents, pleadings and the conduct of the Parties it can be established that a dispute existed between them at the time of the filing of the Application in the terms prescribed by the applicable legal instruments and the Court's jurisprudence. He then refers to the relevant statutory provisions (Articles 36, paragraph 2, and 38, paragraph 1, of the Statute of the Court) and to the definition of "dispute". Thereafter, he recalls that, in determining the existence of a dispute, the Court has reviewed in detail the Parties' diplomatic exchanges, documents and statements (*Georgia* v. *Russia* and *Belgium* v. *Senegal*) in order to establish whether there is "a disagreement on a point of law or fact, a conflict of legal views or of interests" (*Mavrommatis Palestine Concessions*). Further to the holding in the *South West Africa* cases, the criterion for the existence of a dispute is that the claim of one party be positively opposed by the other.

In his separate opinion, Judge Bhandari concludes that, on application of the Court's Statute and its jurisprudence, as well as the documents and pleadings placed before the Court, the irresistible conclusion is the absence of any dispute between the Parties, and consequently, on the facts of this case, this Court lacks jurisdiction to deal with this case. The majority Judgment, instead of looking into these aspects closely, chose to focus mainly on the lack of awareness of the Respondent of the impending dispute.

The Court has the freedom to choose any preliminary objection when examining its own jurisdiction and, in doing so, it usually chooses the most "direct and conclusive" (*Norwegian Loans*). In the instant case, by choosing the lack of awareness on the part of the Respondent as the main ground for the dismissal of the claim, the Court has not chosen the most "direct and conclusive" ground for dismissal, as the lack of awareness on the part of the Respondent can easily be cured by the Applicant by giving proper notice of the dispute to the Respondent. In that case, the Applicant could simply bring the case again before the Court. This would be an undesirable result and should be discouraged. The Parties have already submitted documents and pleadings *in extenso*. In the facts of this case, this Court ought to have examined the other preliminary objections. Otherwise, a re-submission of the case again would entail a waste of the efforts, time and resources already spent by the Parties and the Court in the treatment of this matter.

Consequently, Judge Bhandari considers in his separate opinion that, in the facts of this case, the Court should have examined the other preliminary objections taken by the Respondent, namely, lack of jurisdiction due to the absence of essential parties not party to the instant proceedings (*Monetary Gold* principle), the lack of standing of the Applicant to bring this case, and that any judgment given by the Court would amount to an advisory opinion. In relation to the *Monetary Gold* principle in particular, it is recalled that in its 1996 Advisory Opinion on nuclear weapons the Court considered that any realistic search for general and complete disarmament would require the co-operation of all States.

These preliminary objections are substantial in character and ought to have been adjudicated by the Court.

Dissenting opinion of Judge Robinson

Judge Robinson disagrees with the majority's conclusion that there is no dispute in this case.

The United Nations Charter has assigned the Court a special role, giving it a particular relevance in the maintenance of international peace and security through the exercise of its judicial functions. The majority's decision today fails to demonstrate sensitivity to this role.

The Court's case law has been consistent in the approach to be adopted in determining the existence of a dispute; an approach that is not reflected in today's Judgment. The jurisprudence of the Court calls for an objective, flexible and pragmatic approach in determining the existence of a dispute. It is firmly established in the Court's jurisprudence that a dispute arises where, examined objectively, there are "clearly opposite views concerning the question of the performance or non-performance" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74) of a State's obligations. There is not a single case in the Court's case law that authorizes the majority's proposition that the determination of the existence of a dispute requires a finding of the respondent's awareness of the applicant's positive opposition to its views. While awareness may act as evidence that confirms the existence of a dispute, framing awareness as a prerequisite for a dispute is a departure from the empirical and pragmatic enquiry that the Court must undertake: an enquiry focused simply on whether or not the evidence reveals clearly opposite views.

The majority also misconstrues the plain meaning of its *dicta* and its own case law in concluding that post-Application evidence may act simply to confirm the existence of a dispute. The Court's approach to this question has been less definitive and uncompromising than the majority would like to suggest. The Court has given itself room to afford significant weight to statements made during the proceedings, particularly the denial of allegations by the respondent, not just to confirm but to establish a dispute. This is entirely consistent with the flexible, pragmatic approach that is the hallmark of the Court's jurisprudence on this question. A respondent's opportunity to react is more properly addressed as a question of procedural due process rather than as an element of the dispute criterion.

Another reason for rejecting the majority decision is that it militates against the sound administration of justice, a principle that the Court has emphasized on more than one occasion. The Court spoke against an approach that would lead to, what it termed, the "needless proliferation of proceedings" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 443, para. 89). An odd result of the majority Judgment is that, given the basis on which the claim has been dismissed, the Applicant could, in theory, file another Application against the Respondent.

The facts of this case show that there was a dispute between the Applicant and the Respondent. Even though Judge Robinson disagrees with the majority's position that awareness is not a prerequisite for a finding that a dispute exists, it is hard to conclude that the Respondent "could not have been unaware" of the opposite views of the Parties.

The majority's holding today has placed an additional and unwarranted hurdle in the way of claims that may proceed to be examined on the merits. In so doing, it has detracted from the potential of the Court to play the role envisaged for it as a standing body for the peaceful settlement of the disputes and through this function, as an important contributor to the maintenance of international peace and security. This conclusion is rendered even more telling by the subject-matter of the dispute before the Court today.

Dissenting opinion of Judge Crawford

Judge Crawford disagreed with the "objective awareness" test for the existence of a dispute adopted by the majority. No such legal requirement was to be found in the Court's jurisprudence. An objective awareness test was difficult to distinguish from a formal notice requirement, which the Court had rejected. Moreover, the Court had traditionally exercised flexibility in determining the existence of a dispute. While Judge Crawford agreed that in principle the dispute should exist at the time the application was filed, a finding of a dispute could be based, *inter alia*, on post-application conduct or evidence, including the statements of the parties in the proceedings.

As well as disagreeing with the Court's statement of the law, Judge Crawford disagreed with its application to the facts. In particular, the dispute in question should have been characterized as a multilateral dispute, relying on *South West Africa (Preliminary Objections)* as authority for the proposition that such a dispute may crystallize in multilateral fora involving a plurality of States. In his view there was, at the least, an incipient dispute between the Applicant and the Respondent as at the date of the Application, given that the Marshall Islands had associated itself with one side of a multilateral disagreement with the nuclear-weapon States.

Since there was, at the date of the Application, a dispute between the Marshall Islands and the Respondent as to the latter's compliance with Article VI of the NPT or its customary international law equivalent, it was unnecessary to consider whether any deficiency could and should be remedied in the exercise of the *Mavrommatis* discretion, as recently articulated in *Croatia* v. *Serbia*.

Judge Crawford also referred to one of the other objections to jurisdiction and admissibility raised by the Respondent, the *Monetary Gold* objection. In his view this was a question for the merits stage. Whether it was necessary as a precondition for resolving the dispute for the Court to rule on the rights and obligations of third parties to the dispute would depend, *inter alia*, on the scope and application of Article VI of the NPT, or any parallel customary international law obligation.

Dissenting opinion of Judge *ad hoc* Bedjaoui

I. Introduction

Judge *ad hoc* Bedjaoui voted against the operative clause adopted by the Court in the case between the Marshall Islands and Pakistan. He believes that a dispute does exist between the Marshall Islands and the Respondent.

He notes that although the Court has always adhered to a standard general definition of a legal dispute, it has not shown the same level of consistency in respect of the criteria it has itself identified for determining the existence of that dispute. The most significant break from its jurisprudence can be seen in the Judgment of 1 April 2011 in the *Georgia* v. *Russian Federation* case, and this was continued in the case concerning *Questions relating to the Obligation to Prosecute or Extradite*.

II. A traditionally less formalistic jurisprudence

Judge *ad hoc* Bedjaoui argues that the Court's present approach, which pays a heavy price for a certain degree of formalism, could rightly be regarded as a move away from its traditional jurisprudence.

He refers to the Court's clarity and resourcefulness in the exercise of both its advisory and contentious functions. The Court has successfully avoided falling prisoner to the letter of the Charter and the lacunae of international law. Judge *ad hoc* Bedjaoui gives a quick and simplified overview of the Court's jurisprudence, leaving him saddened at the impression that might be left by today's decision in the present case.

In his view, it is all the more vital that the Court should endeavour to clarify how it determines the existence of a dispute, since this is a fundamental question on which both its jurisdiction and the exercise of its jurisdiction directly depend. It is essential for the Court to show greater consistency when determining the criteria for establishing the existence of a dispute and when applying those criteria to each individual case. Failing to do so creates legal uncertainty for States and a certain level of confusion for readers, none of them knowing why one case may benefit from the Court's understanding, when another cannot aspire to do so.

Besides this first duty of consistency, Judge *ad hoc* Bedjaoui believes that the Court must also guard against fossilization. Being committed to the rational application of criteria does not preclude simultaneously remaining open to changing global concerns; it is by no means a case of the Court accepting every new idea, but of knowing when and how to limit, or, alternatively, to expand, the application of the criteria at the root of the *Mavrommatis* and *South West Africa* Judgments, and, above all, explaining each time why it is necessary to favour flexibility or formalism in that particular case.

To his mind, the greatest danger for the moment remains excessive formalism, especially when, as is the case here, it combines with a jurisprudence which is entirely unclear for the future. That evidently increases the risk of the arbitrary.

III. Notification/"awareness"?

Judge *ad hoc* Bedjaoui is of the opinion that while the Court has traditionally been reticent to make notification of the dispute by the applicant to the respondent a precondition for the institution of proceedings, since the 2011 decision there has been uncertainty obscuring the general view.

He laments the fact that the Court seems to establish a direct and—it would appear—automatic correlation between *awareness* of an opposition of views and the existence of a dispute. He also points out that, in the Court's reasoning, what is essential is the fact that the respondent should "be aware". Judge *ad hoc* Bedjaoui wonders if we are not thus witnessing the resurrection by degrees of the "notification" concept.

However, if we accept the existence of this additional precondition, then why not apply it correctly? Judge *ad hoc* Bedjaoui maintains that Pakistan had to be "aware" of the Marshall Islands' anti-nuclear views in opposition to its own nuclear conduct, given, among other things, the history of the Marshall Islands and its 2013 and 2014 statements made at international - 28 - events which were open to all. These statements were aimed at all States possessing nuclear weapons, without distinction, as everyone knows, and they did not exclude Pakistan.

Finally, Judge *ad hoc* Bedjaoui asks: how can the Respondent's level of "awareness" be assessed? And how could this unusual excursion into subjectivity be reconciled with the stated "objective" search for the existence of a dispute?

IV. Date of the existence of a dispute

Judge *ad hoc* Bedjaoui is pleased that, in the present Judgment, the Court appears to follow its traditional jurisprudence closely, according to which: "[i]n principle, the date for determining the existence of a dispute is the date on which the application is submitted to the Court".

However, in practice, the Court has refused, without convincing explanation, to take account of the evidence which arose after the date on which the proceedings were instituted and which attested to the existence of a dispute. In so doing, it establishes as an absolute dogma a solution that runs counter to its traditional approach, which was characterized by great flexibility, as reflected in its statement that the dispute must only "in principle" exist on the date that proceedings are instituted.

V. Procedural defects

As regards reparable procedural defects, whether it is the applicant or the respondent, whether it is a case of proceedings being instituted prematurely or of accessing the Court too early, Judge *ad hoc* Bedjaoui notes that the Court has created sound jurisprudence which has stood the test of time and demonstrated its flawless consistency over a period of almost 90 years. It is this jurisprudence that the 2011 Judgment started to destroy, with the deathblow being delivered by the *Belgium* v. *Senegal* case.

In the present proceedings, the Court has once again dispensed with its traditional jurisprudence, despite the

latter's wisdom. Judge *ad hoc* Bedjaoui laments the fact that the majority of the Court considered the Marshall Islands' statements insufficient to crystallize the existence of a legal dispute. All the Marshall Islands needs to do tomorrow is to send a simple Note Verbale to the Respondent with a few lines expressing its opposition to the latter's nuclear policy, in order to be able to resubmit the then formalized dispute to the Court. It was neither coherent nor judicious for the Court to focus on easily reparable procedural defects, when it has long dealt with these with a welcome degree of flexibility.

VI. Proof by inference; proof by the interpretation of silence

Judge *ad hoc* Bedjaoui recalls that, contrary to the approach followed in this case, the Court has on other occasions demonstrated flexibility and common sense, turning a respondent's *silence* or *failure to respond* to good account and even proceeding by *simple deduction*, in order to conclude that a dispute exists.

In its present Judgment, the Court sweeps aside its traditional jurisprudence and takes the view that the 13 February 2014 statement, in which the Marshall Islands accused States possessing nuclear weapons of breaching their international obligations, "[g]iven its very general content and the context in which it was made, … did not call for a specific reaction by Pakistan". And thus, "[a]ccordingly, no opposition of views can be inferred from the absence of any such reaction". The Court seems to have ventured to substitute itself for Pakistan, in order to justify the latter's silence in its place and, moreover, with reasons that no one can be certain were shared by that State.

VII. Proof provided by the exchanges before the court

Judge *ad hoc* Bedjaoui is of the opinion that the Court has made little effort in the present case to take full account of the circumstances following the filing of the Marshall Islands' Application, once again moving away from its traditional jurisprudence.

He wonders how one can conclude that a dispute does not exist, when one Party is complaining before the Court that the other has long been in breach of its international obligations, and the other Party denies that its conduct constitutes a violation of those obligations. The exchanges that took place before the Court did not create the dispute anew. They merely "confirmed" its prior existence.

VIII. *Sui generis* nature of any nuclear dispute

Judge *ad hoc* Bedjaoui notes that the general historical background to the international community's efforts to bring about nuclear disarmament in itself foreshadows and signals the potential existence of a dispute. Indeed, the dispute submitted by the Marshall Islands, which aims at nothing short of protecting the human race from permanent annihilation by a terrifying weapon of mass destruction, should in itself have sounded an alarm for the Court. The Court declared 20 years ago that a twofold obligation exists to negotiate and to achieve nuclear disarmament. For 20 years, it heard no more of that appeal. And then, one day, a non-nuclear State wishes to find out from another State, one that possesses nuclear weapons, why this already considerable delay appears to be continuing for even longer.

This particular type of highly specific disagreement between a non-nuclear State and a nuclear State regarding the abolition of nuclear weapons is, in and of itself, the expression of a major dispute whose existence should *ipso facto* have been obvious to the Court. Because what is the Marshall Islands seeking? That the international community and the Court itself should know why an obligation identified by the Court 20 years ago has yet to be performed.

IX. An objection not of an exclusively preliminary character

Judge *ad hoc* Bedjaoui could perhaps have accepted, in a case as complex and important as this one between the Marshall Islands and Pakistan, a decision which reflected the Court's—after all highly legitimate—concern to avoid ruling prematurely on jurisdiction and admissibility. The Court might very well still require further clarification from the Parties. And knowing that, at this stage, it could not evaluate their conduct without addressing the merits, the Court might logically decide to wait for the merits stage before determining its position. In other words, the Court might have been more prudent to find that the question of the existence of a dispute was not of an exclusively preliminary character.

X. The train of undesirable consequences of this decision

Finally, Judge *ad hoc* Bedjaoui notes that the present decision has the unfortunate potential to unleash whole train of undesirable consequences, not only for the Respondent, which could find itself encouraged to withdraw its optional recognition of the Court's jurisdiction, but also for the Applicant, which has shouldered the cost of coming to the Court, as well as for the international community and the Court itself.

As regards the international community, the decisions handed down by the Court today reveal to international public opinion a world that is regrettably inconsistent, not only in terms of procedural jurisprudence, but also in respect of its substantive jurisprudence. What message is the Court leaving the international community when it decides, on what are exceedingly flimsy bases, moreover, to decline to exercise its jurisdiction in cases concerning the most crucial issues of nuclear disarmament, involving the very survival of the whole human race?

As for the Court itself, it risks being the fourth losing party, because by dismissing the Marshall Islands on the basis of a reparable procedural defect, it is undermining the sound administration of justice, on which its functioning depends. In these three cases, the Court seems to have been unable to break away from a formalism which sacrifices the merits to procedure, content to form, and the case to its subject-matter. Moreover, even though the Court has always declared that its aim is to give a fundamentally "objective" assessment of the evidence, it seems here to have made little attempt to avoid being subjective in its assessment of the evidence put forward by the Applicant, *itself organizing the Respondent's defence* and examining all of the Applicant's arguments with what appears to be a negative prejudice.

218. OBLIGATIONS CONCERNING NEGOTIATIONS RELATING TO CESSATION OF THE NUCLEAR ARMS RACE AND TO NUCLEAR DISARMAMENT (MARSHALL ISLANDS *v.* UNITED KINGDOM) [PRELIMINARY OBJECTIONS]

Judgment of 5 October 2016

On 5 October 2016, the International Court of Justice rendered its Judgment on the preliminary objections raised by the United Kingdom on the jurisdiction of the Court and on the admissibility of the Application in the case regarding *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom)*. The Court upheld the first preliminary objection on jurisdiction raised by the United Kingdom, based on the absence of a dispute between the Parties, and found that it could not proceed to the merits of the case.

The Court was composed as follows: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian; Judge *ad hoc* Bedjaoui; Registrar Couvreur.

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The operative paragraph of the Judgment (para. 59) reads as follows:

"…

The Court,

(1) By eight votes to eight, by the President's casting vote,

Upholds the first preliminary objection to jurisdiction raised by the United Kingdom of Great Britain and Northern Ireland, based on the absence of a dispute between the Parties;

In favour: President Abraham; Judges Owada, Greenwood, Xue, Donoghue, Gaja, Bhandari, Gevorgian;

Against: Vice-President Yusuf; Judges Tomka, Bennouna, Cançado Trindade, Sebutinde, Robinson, Crawford; Judge *ad hoc* Bedjaoui;

(2) By nine votes to seven,

Finds that it cannot proceed to the merits of the case.

In favour: President Abraham; Judges Owada, Tomka, Greenwood, Xue, Donoghue, Gaja, Bhandari, Gevorgian;

Against: Vice-President Yusuf; Judges Bennouna, Cançado Trindade, Sebutinde, Robinson, Crawford; Judge *ad hoc* Bedjaoui."

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President Abraham appended a declaration to the Judgment of the Court; Vice-President Yusuf appended a dissenting opinion to the Judgment of the Court; Judges Owada and Tomka appended separate opinions to the Judgment of the Court; Judges Bennouna and Cançado Trindade appended dissenting opinions to the Judgment of the Court; Judges Xue, Donoghue and Gaja appended declarations to the Judgment of the Court; Judges Sebutinde and Bhandari appended separate opinions to the Judgment of the Court; Judges Robinson and Crawford appended dissenting opinions to the Judgment of the Court; Judge *ad hoc* Bedjaoui appended a dissenting opinion to the Judgment of the Court.

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Procedural background (paras. 1–14)

The Court recalls that, on 24 April 2014, the Republic of the Marshall Islands (hereinafter the "Marshall Islands" or the "Applicant") filed an Application instituting proceedings against the United Kingdom of Great Britain and Northern Ireland (hereinafter the "United Kingdom" or the "Respondent"), in which it claimed that the United Kingdom breached treaty and customary international law obligations concerning negotiations relating to cessation of the nuclear arms race and to nuclear disarmament. The Marshall Islands seeks to found the Court's jurisdiction on the declarations made by the Parties pursuant to Article 36, paragraph 2, of its Statute.

The Court further recalls that, after the Marshall Islands filed its Memorial in the case, the United Kingdom raised preliminary objections to the jurisdiction of the Court and the admissibility of the Application. Consequently, by an Order of 19 June 2015, the President of the Court, noting that, by virtue of Article 79, paragraph 5, of the Rules of Court, the proceedings on the merits were suspended, and taking account of Practice Direction V, fixed 15 October 2015 as the time-limit for the presentation by the Marshall Islands of a written statement of its observations and submissions on the preliminary objections raised by the United Kingdom. The Marshall Islands filed such a statement within the time-limit so prescribed. Public hearings on the preliminary objections raised by the United Kingdom were held from Wednesday 9 to Wednesday 16 March 2016.

I. Introduction (paras. 15–25)

A. Historical Background (paras. 15–21)

The Court provides a brief historical background to the case, in particular in relation to the nuclear disarmament activities of the United Nations.

B. Proceedings brought before the Court (paras. 22–25)

The Court notes the other proceedings brought by the Marshall Islands at the same time as the present case. It then outlines the United Kingdom's preliminary objections to jurisdiction and admissibility. It announces that it will first consider the preliminary objection that the Marshall Islands has failed to show that there was, at the time of the filing of the Application, a legal dispute between the Parties.

II. The objection based on the absence of a dispute (paras. 26–58)

After outlining the Parties' arguments, the Court recalls the applicable law on this question. It explains that the existence of a dispute between the Parties is a condition of its jurisdiction. In order for a dispute to exist, it must be shown that the claim of one party is positively opposed by the other; the two sides must hold clearly opposite views concerning the question of the performance or non-performance of certain international obligations. The Court's determination of the existence of a dispute is a matter of substance, and not a question of form or procedure. Prior negotiations are not required where the Court has been seised on the basis of declarations made pursuant to Article 36, paragraph 2, of its Statute, unless one of the relevant declarations so provides. Moreover, although a formal diplomatic protest may be an important step to bring a claim of one party to the attention of the other, such a formal protest is not a necessary condition for the existence of a dispute. Similarly, notice of an intention to file a case is not required as a condition for the seisin of the Court.

The Court continues by underlining that whether a dispute exists is a matter for objective determination by the Court which must turn on an examination of the facts. For that purpose, the Court takes into account in particular any statements or documents exchanged between the parties, as well as any exchanges made in multilateral settings. In so doing, it pays special attention to the author of the statement or document, their intended or actual addressee, and their content. The conduct of the parties may also be relevant, especially when there have been no diplomatic exchanges. In particular, the Court has previously held that the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for. The evidence must show that the parties "hold clearly opposite views" with respect to the issue brought before the Court. As reflected in previous decisions of the Court in which the existence of a dispute was under consideration, a dispute exists when it is demonstrated, on the basis of the evidence, that the respondent was aware, or could not have been unaware, that its views were "positively opposed" by the applicant.

The Court further explains that, in principle, the date for determining the existence of a dispute is the date on which the application is submitted to the Court. Conduct subsequent to the application (or the application itself) may be relevant for various purposes, in particular to confirm the existence of a dispute, to clarify its subject-matter or to determine whether the dispute has disappeared as of the time when the Court makes its decision. However, neither the application nor the parties' subsequent conduct and statements made during the judicial proceedings can enable the Court to find that the condition of the existence of a dispute has been fulfilled in the same proceedings. If the Court had jurisdiction with regard to disputes resulting from exchanges in the proceedings before it, a respondent would be deprived of the opportunity to react before the institution of proceedings to the claim made against its own conduct. Furthermore, the rule that the dispute must in principle exist prior to the filing of the application would be subverted.

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The Court then turns to the case at hand, noting at the outset that the Marshall Islands, by virtue of the suffering which its people endured as a result of it being used as a site for extensive nuclear testing programs, has special reasons for concern about nuclear disarmament. But that fact does not remove the need to establish that the conditions for the Court's jurisdiction are met. While it is a legal matter for the Court to determine whether it has jurisdiction, it remains for the Applicant to demonstrate the facts underlying its case that a dispute exists.

The Court observes that the United Kingdom relies on the fact that the Marshall Islands did not commence negotiations or give notice to it of the claim that is the subject of the Application to support its contention that there is no dispute between the Parties. The United Kingdom lays particular emphasis on Article 43 of the International Law Commission's ("ILC") Articles on State Responsibility, which requires an injured State to "give notice of its claim" to the allegedly responsible State. Article 48, paragraph 3, applies that requirement *mutatis mutandis* to a State other than an injured State which invokes responsibility. However, the Court notes that the ILC's commentary specifies that the Articles "are not concerned with questions of the jurisdiction of international courts and tribunals, or in general with the conditions for the admissibility of cases brought before such courts or tribunals". Moreover, the Court has rejected the view that notice or prior negotiations are required where it has been seised on the basis of declarations made pursuant to Article 36, paragraph 2, of the Statute, unless one of those declarations so provides. The Court's jurisprudence treats the question of the existence of a dispute as a jurisdictional one that turns on whether there is, in substance, a dispute, not on what form that dispute takes or whether the respondent has been notified.

The Court next examines the Marshall Islands' arguments in support of its contention that it had a dispute with the United Kingdom.

First, the Court notes that the Marshall Islands refers to a number of statements made in multilateral fora before the date of the filing of its Application which, in its view, suffice to establish the existence of a dispute. The Marshall Islands relies on the statement made at the High-level Meeting of the General Assembly on Nuclear Disarmament, on 26 September 2013 by its Minister for Foreign Affairs, "urg[ing] all nuclear weapons states to intensify efforts to address their responsibilities in moving towards an effective and secure disarmament". However, the Court considers that this statement is formulated in hortatory terms and cannot be understood as an allegation that the United Kingdom (or any other nuclear power) was in breach of any of its legal obligations. It does not mention the obligation to negotiate, nor does it say that the nuclear-weapon States are failing to meet their obligations in this regard. It suggests that they are making "efforts" to address their responsibilities, and calls for an intensification of those efforts, rather than deploring a failure to act. The Court adds that a statement can give rise to a dispute only if it refers to the subject-matter of a claim with sufficient clarity to enable the State against which that claim is made to identify that there is, or may be, a dispute with regard to that subject-matter. The 2013 statement relied upon by the Marshall Islands does not

meet these requirements. The Court observes that the statement made by the Marshall Islands at the Nayarit conference on 13 February 2014 goes further than the 2013 statement, in that it contains a sentence asserting that "States possessing nuclear arsenals are failing to fulfil their legal obligations" under Article VI of the NPT and customary international law. However, the United Kingdom was not present at the Nayarit conference. Further, the subject of the conference was not specifically the question of negotiations with a view to nuclear disarmament, but the broader question of the humanitarian impact of nuclear weapons, and while this statement contains a general criticism of the conduct of all nuclear-weapon States, it does not specify the conduct of the United Kingdom that gave rise to the alleged breach. For the Court, such a specification would have been particularly necessary if, as the Marshall Islands contends, the Nayarit statement was aimed at invoking the international responsibility of the Respondent on the grounds of a course of conduct which had remained unchanged for many years. Given its very general content and the context in which it was made, that statement did not call for a specific reaction by the United Kingdom. Accordingly, no opposition of views can be inferred from the absence of any such reaction. The Nayarit statement is insufficient to bring into existence, between the Marshall Islands and the United Kingdom, a specific dispute as to the scope of Article VI of the NPT and the asserted corresponding customary international law obligation, or as to the United Kingdom's compliance with such obligations. In the Court's view, none of the other more general statements relied on by the Marshall Islands in this case supports the existence of a dispute, since none articulates an alleged breach by the United Kingdom of the obligation enshrined in Article VI of the NPT or the corresponding customary international law obligation invoked by the Marshall Islands. The Court concludes that, in all the circumstances, on the basis of those statements—whether taken individually or together—it cannot be said that the United Kingdom was aware, or could not have been unaware, that the Marshall Islands was making an allegation that the United Kingdom was in breach of its obligations.

Secondly, the Court considers the Marshall Islands' argument that the very filing of the Application and statements made in the course of the proceedings by both Parties suffice to establish the existence of a dispute. The Court deems that the case law invoked by the Marshall Islands does not support this contention. In the case concerning *Certain Property*, the existence of a dispute was clearly referenced by bilateral exchanges between the parties prior to the date of the application (*Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005,* p. 19, para. 25). The reference to subsequent materials in the *Cameroon* v. *Nigeria* case related to the scope of the dispute, not to its existence (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 317, para. 93). Moreover, while it is true that the Court did not explicitly reference any evidence before the filing of the application demonstrating the existence of a dispute in its Judgment in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia*), in the particular context of that case, which involved an ongoing armed conflict, the prior conduct of the parties was sufficient to establish the existence of a dispute (*Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 614, paras. 27–29). Instead, the issues the Court focused on in that case were not the date when the dispute arose but the proper subject-matter of that dispute, whether it fell within the scope of the relevant compromissory clause, and whether it "persist[ed]" at the date of the Court's decision. The Court reiterates that, although statements made or claims advanced in or even subsequently to the Application may be relevant for various purposes—notably in clarifying the scope of the dispute submitted—they cannot create a dispute *de novo*, one that does not already exist.

Thirdly, the Court observes that the Marshall Islands refers to the Parties' voting records in multilateral fora on nuclear disarmament to demonstrate the existence of a dispute. But in the Court's view, considerable care is required before inferring from votes cast on resolutions before political organs such as the General Assembly conclusions as to the existence or not of a legal dispute on some issue covered by a resolution. The wording of a resolution, and votes or patterns of voting on resolutions of the same subject-matter, may constitute relevant evidence of the existence of a legal dispute in some circumstances, particularly where statements were made by way of explanation of vote. However, some resolutions contain a large number of different propositions; a State's vote on such resolutions cannot by itself be taken as indicative of the position of that State on each and every proposition within that resolution, let alone of the existence of a legal dispute between that State and another State regarding one of those propositions.

Fourthly, the Court assesses the Marshall Islands argument that the conduct of the United Kingdom in declining to co-operate with certain diplomatic initiatives, in failing to initiate any disarmament negotiations, and in replacing and modernizing its nuclear weapons, together with statements that its conduct is consistent with its treaty obligations, shows the existence of a dispute between the Parties. The Court recalls that the question whether there is a dispute in a particular contentious case turns on the evidence of opposition of views. In this regard, conduct of a respondent can contribute to a finding by the Court that the views of the parties are in opposition. However, as the Court has previously concluded, in the present case none of the statements that were made in a multilateral context by the Marshall Islands offered any particulars regarding the United Kingdom's conduct. On the basis of such statements, it cannot be said that the United Kingdom was aware, or could not have been unaware, that the Marshall Islands was making an allegation that the United Kingdom was in breach of its obligations. In this context, the conduct of the United Kingdom does not provide a basis for finding a dispute between the two States before the Court.

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The Court therefore concludes that the first preliminary objection made by the United Kingdom must be upheld. It follows that the Court does not have jurisdiction under Article 36, paragraph 2, of its Statute. Consequently, it is

not necessary for the Court to deal with the other objections raised by the United Kingdom.

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Declaration of President Abraham

In his declaration, President Abraham explains that he voted in favour of the Judgment because he considers the Court's decision to be fully consistent with its recent jurisprudence relating to the requirement for a "dispute" to exist between the parties, as established by a series of Judgments handed down over the past five years, in particular the Judgment of 1 April 2011 in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)*, the Judgment of 20 July 2012 in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* and the Judgment of 17 March 2016 in the case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*. It is apparent from these Judgments, he explains, that, in order to determine whether the condition relating to the existence of a dispute has been met, the date to be referred to is the date of the institution of the proceedings, and that the Court can only find that it has jurisdiction to entertain a case where each party was—or must have been—aware on that date that the views of the other party were opposed to its own.

President Abraham explains that, even though he expressed reservations at the time the Court established this jurisprudence, he nevertheless considers himself to be bound by such jurisprudence and therefore voted in conformity with it.

Dissenting Opinion of Vice-President Yusuf

I. Introduction

1. In his dissenting opinion, Vice-President Yusuf sets forth the reasons why he cannot subscribe to the decision of the Court. These reasons are fourfold: first, the Judgment fails to distinguish the objections raised by the United Kingdom from those in the two other cases of the *Marshall Islands* v. *India* and *Marshall Islands* v. *Pakistan*; secondly, he disagrees with the introduction by the majority of the subjective criterion of "awareness" in the determination of the existence of a dispute; thirdly, in the view of the Vice-President it is difficult to determine the existence of a dispute without specifying its subject-matter; finally, he is of the view that an incipient dispute existed between the Republic of the Marshall Islands and the United Kingdom (UK) prior to the submission of the Application by the former, and that this dispute further crystallized during the proceedings before the Court.

II. The distinctive features of the Marshall Islands v. United Kingdom case with regard to the existence of a dispute

2. The Vice-President highlights the features that distinguish the present case from the two cases submitted by the Republic of the Marshall Islands against India and Pakistan respectively. The first is that the both the Republic of the Marshall Islands and the United Kingdom are parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), and hence the current proceedings are concerned with the interpretation and application of this Treaty, and in particular Article VI thereof.

3. The second distinguishing feature is the arguments put forward by the United Kingdom regarding the inexistence of a dispute. In particular, it argues that there was "no justiciable dispute between the UK and Marshall Islands in relation to the UK's obligations, whether arising under the NPT or under customary international law, to pursue negotiations in good faith on effective measures of nuclear disarmament". Furthermore, it emphasizes that "no legal dispute can be said to exist where the State submitting the dispute has given no notice thereof to the other State".

4. The Court does not address the former argument nor does the United Kingdom explain what it means by "justiciable" dispute. In relation to the latter, the Court correctly notes that it "has rejected the view that notice or prior negotiations are required where it has been seised on the basis of declarations made pursuant to Article 36, paragraph 2, of the Statute, unless one of those declarations so provides" (paragraph 45). Having rejected the requirement of notice for the existence of a dispute, the Judgment unfortunately raises "awareness" to a precondition for the existence of a dispute.

III. The concept of a dispute and the new "awareness" test

5. As the Judgment recognizes, "[a] dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J. Series A, No. 2,* p. 11). It is for the Court to determine the existence of a dispute objectively (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, I.C.J. Reports 1950,* p. 74), which is a matter "of substance, not of form" (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, I.C.J. Reports 2011 (I),* para. 30).

6. In the present Judgment, the Court states that "a dispute exists when it is demonstrated, on the basis of the evidence, that the respondent was aware, or could not have been unaware, that its views were 'positively opposed' by the applicant" (paragraph 41). The two Judgments that it invokes as authority for this statement—namely the Judgments on preliminary objections in the cases of *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*, and the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)*—do not provide support for the "awareness" criterion expounded by the Court. In both those cases, the Court simply noted that as a matter of fact the respondent State was aware of the position of the applicant; it did not identify "awareness" as a requirement for the existence of a dispute at any point nor was this implicit in the Court's reasoning.

7. The introduction of the "awareness" criterion conflicts with the Court's established jurisprudence that the existence of a dispute is for objective determination. Moreover, such an approach also undermines judicial economy and the sound administration of justice by inviting submissions of second applications on the same dispute.

8. The existence of a dispute has to stand objectively by itself. What matters is that there is a positive opposition of juridical viewpoints, a disagreement on a point of law or fact. The positively opposed legal viewpoints may consist of a claim by one party, which is contested or rejected by the other, or by a course of conduct of one party which is met by the protest or resistance of another party. In the latter case, the dispute may be considered to be only at an incipient stage until such time as the State whose conduct is protested is afforded an opportunity either to reject the protest or to accede to the protesting States' demands and consequently change its conduct. The institution of proceedings before the Court may, however, result in the subsequent crystallization of the nascent dispute if the juridical viewpoints of the parties in relation to the subject-matter of the dispute continue to be positively opposed.

IV. The existence of a dispute prior to the filing of an application

9. One of the important arguments put forward by the United Kingdom in support of its preliminary objections to jurisdiction and admissibility was that the dispute must have existed on the date of the filing of the Application by the Republic of the Marshall Islands.

10. The Court has recently stated in some of its Judgments that a dispute must "in principle" exist at the time of the application (see, for example, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections*, Judgment of 17 March 2016, para. 52). The use of the term "in principle" suggests that it is not an absolute precondition for the Court's jurisdiction that a full-fledged dispute exist at the date of the application. Such a dispute may be in the process of taking shape or at an incipient stage at the time the application is submitted, but may clearly manifest itself during the proceedings before the Court.

11. This flexible approach regarding the date for the determination of the existence of a dispute is borne out by the case law of the Court, in which it has occasionally founded the existence of a dispute on opposing statements of parties made during written and oral pleadings.

V. The subject-matter of the dispute

12. It is for the Court itself to determine on an objective basis the subject-matter of the dispute between the parties. In doing so, the Court examines the positions of both parties, while giving particular attention to the manner in which the subject-matter of the dispute is framed by the applicant State (*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998,* p. 448, para. 30).

13. In its Written Statement, the Republic of the Marshall Islands describes the scope of its dispute with the United Kingdom in the following terms: the obligation "to pursue in good faith, and bring to a conclusion, negotiations leading to nuclear disarmament in all its aspects under strict and effective international control" (Written Statement of the Marshall Islands (WSMI, para. 30)). This characterization of the dispute was reiterated during the oral proceedings.

14. Moreover, the Republic of the Marshall Islands relies on its statement at the Nayarit conference, as evidence of the existence of a dispute with the United Kingdom, in which it declared that the immediate commencement and conclusion of negotiations on nuclear disarmament is "required by legal obligation of nuclear disarmament resting upon each and every State under Article VI of the Non-Proliferation Treaty and customary international law".

15. Thus, the subject-matter of the dispute in this case may be defined as whether the alleged opposition of the United Kingdom to various initiatives for the immediate commencement and conclusion of multilateral negotiations on nuclear disarmament constitutes a breach of the obligation to negotiate nuclear disarmament in good faith under Article VI of the Non-Proliferation Treaty.

VI. The opposing viewpoints of the Parties on the interpretation and application of Article VI of the Non-Proliferation Treaty

16. The Republic of the Marshall Islands primarily relies on its statement made at the Nayarit conference as evidence of its position prior to the submission of its Application, which it claims is positively opposed by the conduct of the United Kingdom.

17. In particular, it refers to the opposition of the United Kingdom to all the attempts made in the context of resolutions adopted by the United Nations General Assembly to call for the immediate commencement of negotiations with a view to the conclusion of a convention on nuclear disarmament, to convene a working group to prepare the ground for such a convention, or to ensure concrete follow-up to the Advisory Opinion of the Court which underscored the existence of an obligation to pursue negotiations on nuclear disarmament.

18. The United Kingdom does not deny this consistent pattern of conduct *vis-à-vis* the fulfilment of the obligation underlined in the Advisory Opinion and the United Nations General Assembly's attempts to implement it, but it claims that various political and legal factors account for its position on these resolutions (see Written Reply of the United Kingdom to the questions put by Judges Cançado Trindade and Greenwood at the public sitting held on the afternoon of 16 March 2016, para. 2).[1]

19. The statements on which the Republic of the Marshall Islands relies as evidence of the United Kingdom's opposition to the immediate commencement and conclusion of negotiations on nuclear disarmament also include statements made in the British House of Lords, or by the United Kingdom Prime Minister, in which the officials concerned explain the objections of their Government to such

[1] This document may be viewed at the following address: https://www.icj-cij.org/files/case-related/160/19118.pdf.

comprehensive negotiations and advocate a step-by-step approach to denuclearization.

20. The Nayarit statement by the Republic of the Marshall Islands, taken together with the statements made by the United Kingdom with regard to the calls by the United Nations General Assembly for the immediate commencement of nuclear disarmament negotiations appear, in the view of Vice-President Yusuf, to have given rise to an incipient dispute prior to the submission of the Application by the Republic of the Marshall Islands. The prior existence of the beginning of a dispute relating to the interpretation and application of Article VI of the Non-Proliferation Treaty, evidenced by the opposed positions of the Parties on negotiations on nuclear disarmament and their timely conclusion, distinguishes this case from the two other cases of *Marshall Islands* v. *India* and *Marshall Islands* v. *Pakistan*. This nascent dispute has fully crystallized during the proceedings before the Court where the Parties continued to manifest positively opposed views on the subject-matter of the dispute as defined above.

Separate opinion of Judge Owada

Judge Owada recognizes that the history of the Marshall Islands (hereinafter the "RMI") has created reasons for special concern about nuclear disarmament, and particularly the obligation of the nuclear-weapon States under Article VI of the NPT. Yet the evidence must demonstrate the existence of a concrete legal dispute in order for this Court to have jurisdiction. For this reason, Judge Owada concurs with the reasoning of the Court, but has appended a separate opinion to clarify the reasoning of the Court with respect to three issues in this legal, though politically charged, context.

The first point relates to the legal standard applied by the Court in determining whether or not a dispute existed at the time of the filing of the Application by the RMI. Judge Owada recalls that, for the purpose of establishing the existence of a dispute, it must be shown that the claim of one party is positively opposed by the other. It is important to recognize that this requirement is not a mere formality, but a matter of cardinal significance as an *indispensable precondition* for the seisin of the Court by the Applicant. For this reason, the absence of an alleged dispute at the time of the filing of an application is not a procedural technicality that can be cured by a subsequent act, as was the case in the *Mavrommatis Palestine Concessions* case. In this context, a legal dispute must be distinguished from a mere divergence of positions. The jurisprudence of the Court reflects this principle, though it has examined this issue in diverse factual and legal circumstances and in doing so has assessed a variety of different factors. It might be tempting to conclude that the Court's reliance on such factors evidences a certain threshold for establishing the existence of a dispute, but in Judge Owada's view the jurisprudence of the Court is not quite so linear. These Judgments instead represent case-specific instances in which the evidence was adjudged to be sufficient or insufficient. This point must be borne in mind when appreciating the true meaning of the respondent's awareness, as introduced by the present Judgment. Although the Judgment might appear to introduce this element of "awareness" out of the blue, the reality is that the element of awareness is the common denominator running through the case law. The awareness of the respondent demonstrates the transformation of a mere disagreement into a true legal dispute and is thus an essential minimum common to all cases.

The second point relates to the time at which a dispute must be shown to exist. The RMI argued that the Judgments of the Court in several previous cases support its contention that statements made *during* the proceedings may serve as evidence of the existence of a dispute. The Court correctly explained the meaning of these precedents in the Judgment, but Judge Owada wished to provide a more detailed explanation of the correct interpretation of the case concerning the *Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*. The unique circumstances and mixed questions of law and fact tied to the merits of that case made the question to be decided by the Court very different from the question at issue in the present proceedings and, as such, the Court's reliance on statements made during the proceedings in that case should not be taken as signalling a departure from the Court's consistent jurisprudence on the subject.

Finally, Judge Owada wishes to elaborate upon the treatment of the evidence by the Court in the present Judgment. Some may feel that the Court adopted a piecemeal approach by rejecting each category of evidence individually, whereas the RMI argued that the evidence must be taken as a whole. It is Judge Owada's view that the Court examined all of the evidence and correctly determined that this evidence—*even when taken as a whole*—was not sufficient to demonstrate the existence of a dispute.

Having stated this, Judge Owada adds that a new legal situation might have emerged as a result of the present proceedings before the Court. To the extent that the present Judgment reflects the position of the Court with respect to the legal situation that existed at the time of the filing of the present Application, a new application might not be subject to the same preliminary objection to jurisdiction. The viability of such a new application would remain an open question and its fate would depend upon the Court's examination of *all* of the objections to jurisdiction and admissibility.

Separate opinion of Judge Tomka

Judge Tomka is not convinced by the approach taken by the Court in relation to the existence of a dispute in this case, and does not consider that it is warranted by the Court's previous jurisprudence. He is therefore regrettably unable to support the Court's conclusions in this regard.

Judge Tomka begins by outlining the claims made by the Marshall Islands in this case, relating to the United Kingdom's alleged breach of Article VI of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons ("NPT"). He observes that the United Kingdom has clearly denied those claims.

He recalls that the Marshall Islands has invoked the Article 36 (2) declarations of the Parties as the basis for jurisdiction in this case. Judge Tomka observes that, when

analysing issues of jurisdiction, caution should be taken in relying on different pronouncements of the Court which may have been made in the context of particular Article 36 (2) declarations or compromissory clauses which set preconditions for the seising of the Court. He notes that the Court in this Judgment reiterates its previous view that there is no requirement that a State negotiate before seising the Court or give notice of its claim before instituting proceedings, unless there is such a condition in the relevant basis of jurisdiction.

Judge Tomka observes that, although the Court has often stated that the existence of a dispute is a condition for its jurisdiction, it is, in his view, more properly characterized as a condition for the exercise of the Court's jurisdiction. He observes in this respect that, in relation to States which have made declarations under Article 36 (2) of the Statute, the Court's jurisdiction is established from the moment the declaration is deposited with the Secretary-General of the United Nations. Thus, in Judge Tomka's view, it is not the emergence of a dispute which establishes the Court's jurisdiction or perfects it. Rather, the emergence of a dispute is a necessary condition for the Court to exercise its jurisdiction. The disappearance of the dispute during the proceedings does not deprive the Court of its jurisdiction, but the Court in such situation will not give any judgment on the merits, as there is nothing upon which to decide.

Judge Tomka notes the function of the Court, as the principal judicial organ of the United Nations, "is to decide in accordance with international law such disputes as are submitted to it" (Article 38, paragraph 1, of the Statute). He observes that, in order to discharge that function, the dispute must still exist when the Court decides on its merits. However, even though the formulation of Article 38, paragraph 1, implies that the dispute will already exist when proceedings before the Court are instituted, the phrase about the Court's function was not intended to constitute a condition for the Court's jurisdiction and should not be determinative in respect thereof.

Judge Tomka highlights that the Court's jurisprudence requires that a dispute exist *in principle* at the time of the application. He considers that, even though the Court repeats this general rule in this Judgment, it has here adopted rather a very strict requirement that the dispute *must* have existed prior to the filing of the Marshall Islands' Application.

He outlines that in some cases, circumstances will dictate that the dispute must indeed exist as at the date of the application. This may be because of the subsequent expiry of the acceptance of the Court's jurisdiction by one of the States, as in the recent case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections*, Judgment of 17 March 2016. It may also be because, as in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 70, the compromissory clause at issue requires prior negotiations before the filing of the Application, from which it logically follows that a dispute relating to the subject-matter of the relevant Convention should have arisen prior to instituting the proceedings. Judge Tomka cannot agree with those who consider that the *Georgia* v. *Russia* case indicates the beginning of a more formalistic approach to the existence of a dispute in the Court's jurisprudence.

Judge Tomka observes that where there are no circumstances requiring that the dispute exist by a particular date, the Court has been flexible in not limiting itself only to the period prior to the filing of the Application in order to ascertain whether a dispute existed between the parties before it. He highlights in this respect the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 595.

Moreover, Judge Tomka observes that the Court, and its predecessor, have always shown a reasonable amount of flexibility, not being overly formalistic, when it comes to the timing at which jurisdictional requirements are to be met. He discusses, *inter alia*, *Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J. Series A, No. 6, Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J. Series A, No. 2, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 595, and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 412. The Court observed, in the latter case, *inter alia*, that

> "What matters is that, at the latest by the date when the Court decides on its jurisdiction, the applicant must be entitled, if it so wishes, to bring fresh proceedings in which the initially unmet condition would be fulfilled. In such a situation, it is not in the interests of the sound administration of justice to compel the applicant to begin the proceedings anew—or to initiate fresh proceedings—and it is preferable, except in special circumstances, to conclude that the condition has, from that point on, been fulfilled" (*ibid*., p. 441, para. 85).

Judge Tomka considers that there is no compelling reason why this principle cannot be applied to the existence of a dispute. He cannot agree with the view that the Judgment in *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012*, p. 422, represents a departure in the Court's jurisprudence in this regard.

While Judge Tomka accepts that the Marshall Islands had, for some time, not taken a particularly active position on nuclear disarmament in multilateral fora, he observes that it has, since at least 2013, voiced its dissatisfaction about the compliance, or rather lack thereof, with obligations under Article VI of the NPT by nuclear powers, among them the United Kingdom. He does not consider that a State is required, under international law, to give notice to another State of its intention to institute proceedings before the Court, but takes the view that a State can formulate its claim in the application seising the Court. He observes that to require a State to give prior notice may entail, in the present optional clause system of the Court's compulsory jurisdiction, a risk that the Court will be deprived of its jurisdiction prior to receiving an Application.

Judge Tomka concludes on this point that the proceedings before the Court in this case have clarified that there is a dispute between the Marshall Islands and the United Kingdom about the latter's performance of its obligations under Article VI of the NPT. In his view, the conclusion that the Court has no jurisdiction in the absence of a dispute is not justified in the case at hand.

Nonetheless, Judge Tomka takes the view that the nature of the obligations in the field of nuclear disarmament, including of the obligations under Article VI of the NPT, renders the Marshall Islands' Application inadmissible. He discusses Article VI of the NPT and the way the obligation thereunder was characterized by the Court in *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 226. He observes, with reference to the literature on this point, that disarmament requires co-operation and performance by all States. He outlines that disarmament can realistically be achieved only through balancing the security interests of the States concerned, in particular all nuclear powers and other countries with significant military capabilities. Judge Tomka considers that enquiry into the compliance by one nuclear power with its obligations relating to nuclear disarmament, including any obligation to negotiate in good faith, invites consideration of the position taken by all other nuclear powers in relation to the same obligations which are or may be binding on them. He observes that it is only with an understanding of the positions taken by other States that the Court can stand on safe ground in considering the conduct of any one State alone, which necessarily is influenced by the positions of those other States, and whether that one State alone is open to achieving the goal set down in Article VI of the NPT through *bona fide* negotiations. He emphasizes that this is not a question of ruling on the responsibility of those other States as a precondition for ruling on the responsibility of the Respondent such that the *Monetary Gold* principle would apply. It is, in his view, rather a question of whether it is possible for the Court, in this context, to undertake consideration of a single State's conduct without considering and understanding the positions taken by the other States with which that State (the Respondent in the case at hand) would need to have negotiated, and with which it would need to agree on the steps and measures to be taken by all concerned in order to achieve the overall goal of nuclear disarmament.

Judge Tomka concludes that the issues raised in the present proceedings are not of a bilateral nature between the Marshall Islands and the United Kingdom. He is convinced that the Court cannot meaningfully engage in a consideration of the United Kingdom's conduct when other States are not present before the Court to explain their positions and actions. This case illustrates, in his view, the limits of the Court's function, focused as it is on bilateral disputes. Had the Court been endowed with universal compulsory jurisdiction, all Members of the United Nations would have been subject to its jurisdiction. There would not have then existed obstacles to the Court's exercising its jurisdiction fully and thus contributing to the achievement of the purposes and goals of that Organization.

To his sincere and profound regret, Judge Tomka concludes that the absence of other nuclear powers in the proceedings prevents the Court from considering the Marshall Islands' claims in their proper multilateral context. Therefore, he considers that the Application is inadmissible and that the Court cannot proceed to the merits of the case.

Dissenting Opinion of Judge Bennouna

In the three cases brought by the Marshall Islands concerning the obligation to negotiate pursuant to Article VI of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons and under customary international law, the Court has declared that it lacks jurisdiction on the grounds of the non-existence of a dispute between the Parties. In doing so, the Court has preferred an exercise in pure formalism to the realism and flexibility expressed in its previous and consistent jurisprudence. Hence, whereas the existence of a dispute had until now been determined objectively, the Court has introduced a new subjective element in its three Judgments. By stopping the time of law and analysis at the date of submission of the Marshall Islands' Application and requiring that the Respondent must have been aware or could not have been "unaware that its views were 'positively opposed' by the applicant", the Court has shown excessive formalism at the expense of a flexible approach that favours the sound administration of justice.

Dissenting Opinion of Judge Cançado Trindade

1. In his Dissenting Opinion, composed of 21 parts, in the present case of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (Marshall Islands *versus* United Kingdom), Judge Cançado Trindade presents the foundations of his personal dissenting position, pertaining to the Court's decision, encompassing the approach pursued, the whole reasoning as well as the resolutory points. In doing so, Judge Cançado Trindade distances himself as much as he can from the position of the Court's majority.

2. In analysing, first of all, the issue of the existence of a dispute before the Hague Court, Judge Cançado Trindade examines in detail the *jurisprudence constante* of the Hague Court (PCIJ and ICJ), whereby a dispute exists when there is "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (not necessarily stated *expressis verbis*). Whether there exists a dispute is a matter for *"objective determination" by the Court* , and the mere denial of the existence of a dispute does not prove its non-existence.

3. Such has been the position of the Hague Court—both the PCIJ, as from the case of *Mavrommatis Palestine Concessions* (Judgment of 30 August 1924), and the ICJ, as from the Advisory Opinion (of 30 March 1950) on the *Interpretation of Peace Treaties*. Even along the last decade—he recalls—the Hague Court has deemed it fit to insist on its own faculty to proceed to the "objective determination" of the dispute, consistent with its *jurisprudence constante*, examined in detail in Judge Cançado Trindade's Dissenting Opinion (part II).

4. It was only very recently, in a passage of its Judgment on Preliminary Objections (of 01 April 2011) in the case of the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination—CERD*, that the ICJ at a certain moment has decided to apply to the facts of the case a higher threshold for the determination of the existence of a dispute, by proceeding to ascertain whether the applicant State had given the respondent State prior notice of its claim and whether the respondent State had opposed it. Judge Cançado Trindade warns that such new requirement "is not consistent with the PCIJ's and the ICJ's *jurisprudence constante* on the determination of the existence of a dispute" (para. 9).

5. Now, in the present cases of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, the three respondent States (United Kingdom, India and Pakistan), seek to rely on a requirement of prior notification of the claim, or the test of prior awareness of the applicant State's claim, for a dispute to exist under the ICJ's Statute or general international law. Yet—Judge Cançado Trindade further warns —

> "nowhere can such a requirement be found in the Court's *jurisprudence constante* as to the existence of a dispute: quite on the contrary, the ICJ has made clear that the position or the attitude of a party can be established by inference [case of *Land and Maritime Boundary between Cameroon and Nigeria*, Judgment on Preliminary Objections, of 11 June 1998]. Pursuant to the Court's approach, it is not necessary for the respondent to oppose previously the claim by an express statement, or to express acknowledgment of the existence of a dispute" (para. 10).

6. Judge Cançado Trindade next recalls that, in his earlier Dissenting Opinion (para. 161) in the Court's 2011 Judgment in the case of the *Application of the CERD Convention*, he criticized the Court's "formalistic reasoning" in determining the existence of a dispute, introducing a higher threshold that went beyond the *jurisprudence constante* of the PCIJ and the ICJ itself (paras. 11–12). There is no general requirement of prior notice of the Applicant State's intention to initiate proceedings before the ICJ. He adds that "*the purpose* of the need of determination of the existence of a dispute (and its object) before the Court is to enable this latter to exercise jurisdiction properly: it is not intended to protect the respondent State, but rather and more precisely to safeguard the proper exercise of the Court's judicial function" (para. 13).

7. Likewise, there is no such requirement of prior "exhaustion" of diplomatic negotiations (para. 14) before lodging a case with, and instituting proceedings before, the Court (case of *Land and Maritime Boundary between Cameroon and Nigeria*, Judgment on Preliminary Objections of 11 June 1998). In the present case opposing the Marshall Islands to United Kingdom, there were two sustained and distinct courses of conduct of the two contending parties, evidencing their distinct legal positions, which suffice for the determination of the existence of a dispute. The subject-matter of the dispute between the parties is whether United Kingdom has breached its obligation under customary international law to pursue in good faith and to conclude negotiations leading to nuclear disarmament in all its aspects under effective international control (para. 16).

8. In the present cases of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (*Marshall Islands* v. *United Kingdom/India/Pakistan*), the Court's majority has unduly heightened the threshold for establishing the existence of a dispute; it has laid down the "awareness" requirement, seemingly "undermining its own ability to infer the existence of a dispute from the conflicting courses of conduct of the contending parties" (para. 20).

9. In Judge Cançado Trindade's understanding, the view taken by the Court's majority in the present case "contradicts the Hague Court's (PCIJ and ICJ) own earlier case-law", in which it has taken a much less formalistic approach to the establishment of the existence of a dispute" (as to the PCIJ, cf., *inter alia*, case of *Mavrommatis Palestine Concessions*, Judgment of 30 August 1924; case of *Certain German Interests in Polish Upper Silesia*, Judgment (Jurisdiction) of 25 August 1925; case of *Interpretation of Judgments ns. 7 and 8 - Chorzów Factory*, Judgment of 16 December 1927; and, as to the ICJ, cf., *inter alia*, case of *East Timor*, Judgment of 30 June 1995; case of the *Application of the Convention against Genocide*, Preliminary Objections, Judgment of 11 July 1996; case of *Certain Property*, Preliminary Objections, Judgment of 10 February 2005) (para. 22).

10. In the cases of *East Timor* (1995) of the Application of the Convention against Genocide (1996) and of *Certain Property* (2005), the ICJ has considered that conduct post-dating the critical date (i.e., the date of the filing of the Application) supports a finding of the existence of a dispute between the parties. In the light of this approach taken by the ICJ itself in its earlier case-law, it is clear that a dispute exists in the *cas d'espèce* (paras. 24–25).

11. Moreover, the Court's majority makes *tabula rasa* of the requirement that "in principle" the date for determining the existence of the dispute is the date of filing of the application (case of *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, Preliminary Objections, Judgment of 17 March 2016; as already seen, in its case-law the ICJ has taken into account conduct post-dating that critical date (para. 27)).

12. In the present case—Judge Cançado Trindade proceeds—the Court's majority borrows the *obiter dicta* it made in the case of the *Application of the CERD Convention* (2011)—"unduly elevating the threshold for the determination of the existence of a dispute—in respect of a compromissory clause under that Convention (wrongly interpreted anyway, making abstraction of the object and purpose of the CERD Convention). In the present case, opposing the Marshall Islands to United Kingdom, worse still, the Court's majority takes that higher standard out of context, and applies it herein, in a case lodged with the Court on the basis of an optional clause declaration" (para. 28).

13. This higher threshold is, "besides formalistic, artificial", and it does not follow from the definition of a dispute in the Court's *jurisprudence constante* (para. 29). In applying the criterion of "awareness", the Court's majority formalistically requires a specific reaction of the respondent State to the claim made by the applicant State, "even in a situation

where, as in the *cas d'espèce*, there are two consistent and distinct courses of conduct on the part of the contending parties" (para. 29). Judge Cançado Trindade concludes, on this particular issue, that the formalistic raising, by the Court's majority, of the higher threshold for the determination of the existence of a dispute,

> "unduly creates a difficulty for the very *access to justice* (by applicants) at international level, in a case on a matter of concern to the whole of humankind. This is most regrettable" (para. 30).

14. In sequence, he then turns attention to the distinct series of United Nations General Assembly resolutions on nuclear weapons and *opinio juris* (part III), namely: *a*) United Nations General Assembly resolutions on Nuclear Weapons (1961–1981); *b*) United Nations General Assembly resolutions on Freeze of Nuclear Weapons (1982–1992); *c*) United Nations General Assembly resolutions Condemning Nuclear Weapons (1982–2015); *d*) United Nations General Assembly resolutions Following up the ICJ's 1996 Advisory Opinion (1996–2015). He recalls, that, first, in the course of the proceedings in the present case of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, the contending parties addressed United Nations General Assembly resolutions on the matter of nuclear disarmament (para. 31).

15. As to the *first series of United Nations General Assembly resolutions on Nuclear Weapons (1961–1981)*, the ground-breaking General Assembly resolution 1653 (XVI), of 24 November 1961, advanced its célèbre "Declaration on the Prohibition of the Use of Nuclear and Thermonuclear Weapons". There followed three Disarmament Decades (para. 32). In this first period under review (1961–1981), the United Nations General Assembly continuously paid special attention to disarmament issues and to nuclear disarmament in particular (para. 33). In 1978 and 1982, the United Nations General Assembly held two Special Sessions on Nuclear Disarmament (respectively, the 10th and 12th sessions), where the question of nuclear disarmament featured prominently amongst the themes discussed; it was stressed that the most immediate goal of disarmament is the elimination of the danger of a nuclear war (para. 34).

16. Judge Cançado Trindade recalls that the General Assembly repeatedly drew attention to the dangers of the nuclear arms race for humankind and the survival of civilization and expressed apprehension concerning the harmful consequences of nuclear testing for the acceleration of such arms race. Thus, the General Assembly reiterated its condemnation of all nuclear weapon tests, in whatever environment they may be conducted, and it urged NWS to suspend nuclear weapon tests in all environments (para. 35).

17. He further recalls that, in that period, the General Assembly also emphasized that NWS bear a special responsibility for fulfilling the goal of achieving nuclear disarmament (para. 36). At the 84th plenary meeting—he adds—following the 10th Special Session on Disarmament, the General Assembly declared that the use of nuclear weapons is a "violation of the Charter of the United Nations" and "a crime against humanity", and that the use of nuclear weapons should be prohibited, pending nuclear disarmament (para. 37).

18. As to *the second series of United Nations General Assembly Resolutions on Freeze of Nuclear Weapons (1982–1992)*, every year in that period of 1982–1992 (following up on the 10th and 12th Special Sessions on Nuclear Disarmament, held in 1978 and 1982, respectively), the General Assembly adopted resolutions calling for a nuclear-weapons freeze. Such resolutions on freeze of nuclear weapons note that existing arsenals of nuclear weapons are more than sufficient to destroy all life on earth. They express the conviction that lasting world peace can be based only upon the achievement of general and complete disarmament, under effective international control. In this connection, the aforementioned General Assembly resolutions note that the highest priority objectives in the field of disarmament have to be nuclear disarmament and the elimination of all weapons of mass destruction (para. 39).

19. They at last call upon NWS to agree to reach "a freeze on nuclear weapons", which would, *inter alia*, provide for "a simultaneous total stoppage of any further production of fissionable material for weapons purposes". Such nuclear-weapons freeze was not seen as an end in itself but as the most effective first step towards the reduction of nuclear arsenals, a comprehensive test ban, the cessation of the manufacture and deployment of nuclear weapons, and the cessation of the production of fissionable material for weapons purposes (para. 40).

20. After recalling the acknowledgment of the authority and legal value of General Assembly resolutions made in the course of the pleadings of late 1995 in the advisory proceedings before the ICJ (paras. 41–43), Judge Cançado Trindade points out that those resolutions continue to grow in number ever since and until today, "clearly forming", in his perception, "an *opinio juris communis* as to nuclear disarmament" (para. 44).

21. He then turns to *the longstanding series of General Assembly resolutions condemning nuclear weapons (1982–2015)*, wherein the General Assembly moved on straightforwardly to the condemnation of nuclear weapons warning against their threat to the survival of humankind (para. 46). Those General Assembly resolutions next significantly *reaffirm*, in their preambular paragraphs, year after year, that "the use of nuclear weapons would be a violation of the Charter of the United Nations and a crime against humanity" (para. 47).

22. Last but not least, Judge Cançado Trindade surveys *the series of United Nations General Assembly resolutions following up the ICJ 's 1996 Advisory Opinion (1996–2015)*, which begin by expressing the General Assembly's belief that "the continuing existence of nuclear weapons poses a threat to humanity" and that "their use would have catastrophic consequences for all life on earth", and, further, that "the only defence against a nuclear catastrophe is the total elimination of nuclear weapons and the certainty that they will never be produced again" (2nd preambular paragraph). The General Assembly resolutions reiteratedly reaffirm "the commitment of the international community to the realization of the goal of a nuclear-weapon-free world through the total elimination of nuclear weapons" (para. 52).

23. Those General Assembly significantly call upon *all States* to fulfil promptly the obligation leading to an early conclusion of a Convention prohibiting the development, production, testing, deployment, stockpiling, transfer, threat or use of nuclear weapons and providing for their elimination (para. 53). The aforementioned series of General Assembly resolutions further recognize, in recent years, "with satisfaction", in a preambular paragraph, that the Antarctic Treaty, the Treaties of Tlatelolco, Rarotonga, Bangkok and Pelindaba, and the Treaty on a Nuclear-Weapon-Free Zone in Central Asia, as well as Mongolia's nuclear-weapon-free status, are "gradually freeing the entire southern hemisphere and adjacent areas covered by those treaties from nuclear weapons" (para. 54).

24. More recent resolutions (from 2013 onwards) are significantly further expanded. They call upon all NWS to undertake concrete disarmament efforts, stressing that all States need to make special efforts to achieve and maintain a world without nuclear weapons. In their operative part, they underline the ICJ's unanimous conclusion, in its 1996 Advisory Opinion on the *Threat or Use of Nuclear Weapons*, that "there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control" (para. 55).

25. Those of General Assembly follow-up resolutions contain paragraphs referring to the obligation to pursue and conclude, in good faith, negotiations leading to nuclear disarmament, without any reference to the NPT or to States Parties to it; they rather refer to that obligation as a general one, not grounded on any treaty provision. *All States*, and not only States Parties to the NPT, are called upon to fulfil promptly that obligation, incumbent upon *all States*, to report (to the Secretary-General) on their compliance with the resolutions at issue. In sum, "references to *all States* are deliberate, and in the absence of any references to a treaty or other specifically-imposed international obligation, this thus points towards a customary law obligation to negotiate and achieve nuclear disarmament" (para. 56).

26. Like the United Nations General Assembly, the United Nations Security Council has also often dwelt upon the matter at issue (part IV). For example, in two of its resolutions (984/1995, of 11 April 1995; and 1887/2009 of 24 September 2009), the United Nations Security Council refers, in particular, to the obligation to pursue negotiations in good faith in relation to nuclear disarmament (para. 61). The Security Council also makes a general call, upon all United Nations member States, whether or not Parties to the NPT (para. 62). In Judge Cançado Trindade's perception,

> "the aforementioned resolutions of the Security Council, like those of the General Assembly (cf. *supra*), addressing all United Nations member States, provide significant elements of the emergence of an *opinio juris*, in support of the gradual formation of an obligation of customary international law, corresponding to the conventional obligation under Article VI of the NPT. In particular, the fact that the Security Council calls upon *all States*, and not only States Parties to the NPT, to pursue negotiations towards nuclear disarmament in good faith (or to join the NPT State Parties in this endeavour) is significant. It is an indication that the obligation is incumbent on all United Nations member States, irrespectively of their being or not Parties to the NPT" (para. 63).

27. The surveyed United Nations resolutions (of the General Assembly and the Security Council)—he adds—portray the United Nations' longstanding saga in the condemnation of nuclear weapons (part V), going back to its birth and earlier years (paras. 64–65). In 1956, the International Atomic Energy Agency (IAEA) was established. And half a decade later, in 1961, the General Assembly adopted a ground-breaking and historical resolution 1653 (XVI), of 24 November 1961, titled "Declaration on the Prohibition of the Use of Nuclear and Thermo-Nuclear Weapons", which "remains contemporary today, and, 55 years later, continues to require close attention" (para. 66).

28. Over half a century later, that lucid and poignant declaration appears endowed with permanent topicality, as the whole international community remains still awaiting for the conclusion of the propounded general Convention on the prohibition of nuclear and thermo-nuclear weapons: nuclear disarmament remains still a goal to be achieved by the United Nations today, as it was in 1961. The Comprehensive Nuclear-Test-Ban Treaty (CTBT), adopted on 24 September 1996, has not yet entered into force, although 164 States have ratified it to date (para. 67). Since the adoption of the CTBT in 1996, the Conference on Disarmament has been largely deadlocked, in the face of the invocation of divergent "security interests" (para. 73).

29. After all, in historical perspective, some advances have been attained in the last decades in respect of other weapons of mass destruction—as illustrated by the adoption of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (on 10 April 1972), as well as the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (on 13 January 1993); distinctly from the CTBT, these two Conventions have already entered into force (on 26 March 1975, and on 29 April 1997, respectively). Judge Cançado Trindade concludes, in this respect, that

> "If we look at conventional international law only, weapons of mass destruction (poisonous gases, biological and chemical weapons) have been outlawed; yet, nuclear weapons, far more destructive, have not been banned yet. This juridical absurdity nourishes the positivist myopia, or blindness, in inferring therefrom that there is no customary international obligation of nuclear disarmament. Positivists only have eyes for treaty law, for individual State consent, revolving in vicious circles, unable to see the pressing needs and aspirations of the international community as a whole, and to grasp the *universality* of contemporary international law—as envisaged by its 'founding fathers', already in the XVIth–XVIIth centuries—with its underlying fundamental principles (…).
>
> The truth is that, in our times, the obligation of nuclear disarmament has emerged and crystallized, in both conventional and customary international law, and the United Nations has been giving a most valuable contribution to this along the decades" (paras. 75–76).

30. In their arguments before the Court in the present case, the contending parties have presented their distinct arguments on the issue of United Nations resolutions on nuclear disarmament and the emergence of *opinio juris* (part VI). Judge Cançado Trindade is of the view that, despite their distinct patterns of voting, the United Nations General Assembly resolutions reviewed in the present Dissenting Opinion, taken altogether,

> "are not at all deprived of their contribution to the conformation of *opinio juris* as to the formation of a customary international law obligation of nuclear denuclearization. After all, they are resolutions of the United Nations General Assembly itself (and not only of the large majority of United Nations member States which voted in their favour); they are resolutions of the United Nations Organization itself, addressing a matter of common concern of humankind as a whole" (para. 83).

31. The contending parties had the opportunity to explain further their respective positions in the *cas d'espèce*, in their written responses to question put to them by Judge Cançado Trindade, in the public sitting of the Court of 16 March 2016 on whether the aforementioned United Nations General Assembly resolutions are constitutive of an expression of *opinio juris*, and, if so, what is their relevance to the formation of a customary international law obligation to pursue negotiations leading to nuclear disarmament, and what is their incidence upon the question of the existence of a dispute between the parties (paras. 84–88).

32. The presence of evil has marked human existence along the centuries (part VIII). Ever since the eruption of the nuclear age in August 1945, some of the world's great thinkers have been inquiring whether humankind has a future (paras. 89–97), and have been drawing attention to the imperative of respect for life and the relevance of humanist values (paras. 98–110). Also in international legal doctrine there have been those who have been stressing the needed prevalence of human conscience, the universal juridical conscience, over State voluntarism (paras. 111–114).

33. This is the position upheld also by Judge Cançado Trindade, to whom

> "it is the universal juridical conscience that is the ultimate material source of international law. (…) one cannot face the new challenges confronting the whole international community keeping in mind only State susceptibilities; such is the case with the obligation to render the world free of nuclear weapons, an imperative of *recta ratio* and not a derivative of the 'will' of States. In effect, to keep hope alive it is necessary to bear always in mind humankind as a whole" (para. 115).

34. Within the ICJ, Judge Cançado Trindade has made this point also in his Dissenting Opinion (paras. 488–489) in the case concerning the *Application of the Convention against Genocide* (Croatia *versus* Serbia, Judgment of 03 February 2015). He further ponders that "[t]he presence of evil has accompanied and marked human existence along the centuries", with the "increasing disregard for human life"; the "tragic message of the Book of *Genesis*", in his perception, "seems perennial, as contemporary as ever, in the current nuclear age" (paras. 117–118).

35. His next line of considerations pertain to the attention of the United Nations Charter to peoples, as shown in several of its provisions, and in its attention also to the safeguarding of values common to humankind, and to the respect for life and human dignity (part IX). The new vision advanced by the United Nations Charter, and espoused by the Law of the United Nations—he proceeds—has, in his perception,

> "an incidence upon judicial settlement of international disputes. Thus, the fact that the ICJ's mechanism for the handling of contentious cases is an inter-State one, does not mean that its reasoning should also pursue a strictly inter-State dimension; that will depend on the nature and substance of the cases lodged with it. And there have been several cases lodged with the Court that required a reasoning going well beyond the inter-State dimension. Such reasoning beyond the inter-State dimension is faithful to the United Nations Charter, the ICJ being 'the principal judicial organ of the United Nations'" (para. 121).

36. Likewise, the cycle of World Conferences of the United Nations along the nineties, in a commendable endeavour of the United Nations *to go beyond and transcend the purely inter-State dimension*, imbued of a spirit of solidarity, so as to consider the challenges for the future of humankind. The common denominator in those United Nations World Conferences—Judge Cançado Trindade adds—can be found in the recognition of the legitimacy of the concern of the international community as a whole with the conditions of living of all human beings everywhere. At the end of the decade and the dawn of the new millennium, the United Nations Millennium Declaration (2000) stated the determination "to eliminate the dangers posed by weapons of mass destruction" (paras. 125–127).

37. In sum, the nature of a case before the Court may well require a reasoning going beyond the strictly inter-State outlook; the present case concerning the obligation of nuclear disarmament requires attention to be focused on peoples, in pursuance of a humanist outlook, rather than on inter-State susceptibilities. The inter-State mechanism of adjudication of contentious cases before the ICJ does not at all imply that the Court's reasoning should likewise be strictly inter-State. Nuclear disarmament is a matter of concern to humankind as a whole.

38. Contrary to the reasoning of the Court's majority, the so-called *Monetary Gold* "principle" has no place in a case like the present one, and it "does not belong to the realm of the *prima principia*, being nothing more than a concession to State consent, within an outdated State voluntarist framework". The present case, in the perception of Judge Cançado Trindade, shows

> "the need to go beyond the strict inter-State outlook. The fact that the mechanism for the adjudication of contentious cases before the ICJ is an inter-State one, does not at all imply that the Court's reasoning should likewise be strictly inter State. In the present case concerning nuclear weapons and the obligation of nuclear disarmament, it is necessary to focus attention on peoples, rather than on inter-State susceptibilities. It is imperative to keep in mind the world population, in pursuance of a humanist outlook, in the light of the *principle of humanity*" (paras. 130–131).

39. The present case of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* stresses the utmost importance of general principles of international law, such as the principle of the juridical equality of States (part XI). General principles of law (*prima principia*) rest in the foundations of any legal system. They inform and conform its norms, guide their application, and draw attention to the prevalence of *jus necessarium* over *jus voluntarium* (cf. *infra*).

40. Factual inequalities and the strategy of "deterrence" cannot be made to prevail over the juridical equality of States; "deterrence" cannot keep on overlooking the distinct series of United Nations General Assembly resolutions, expressing an *opinio juris communis* in condemnation of nuclear weapons (part XII). As also sustained by general principles of international law and international legal doctrine—Judge Cançado Trindade adds—nuclear weapons are in breach of international law, of IHL and the ILHR, of the United Nations Charter, and of *jus cogens*, for the devastating effects and sufferings they can inflict upon humankind as a whole (paras. 138–139).

41. In his understanding, the ICJ should give "far greater weight to the *raison d'humanité*", rather than to the *raison d'État* nourishing "deterrence"; it should "keep in mind the human person and the peoples, for which States were created, instead of relying only on what one assumes to be the *raison d'*État". The *raison d'humanité*, in his understanding, "prevails surely over considerations of *Realpolitik*" (para. 139). He adds that, in its 1996 Advisory Opinion, the ICJ rightly acknowledged the importance of complete nuclear disarmament (asserted in the series of General Assembly resolutions) as an obligation of result, and not of mere conduct (para. 99), but

> "did not extract the consequences of that. Had it done so, it would have reached the conclusion that nuclear disarmament cannot be hampered by the conduct of a few States—the NWS—which maintain and modernize their own arsenals of nuclear weapons, pursuant to their strategy of 'deterrence'.
>
> The strategy of 'deterrence' has a suicidal component. Nowadays, in 2016, twenty years after the 1996 ICJ Advisory Opinion, and with the subsequent reiteration of the conventional and customary international legal obligation of nuclear disarmament, there is no longer any room for ambiguity. There is an *opinio juris communis* as to the illegality of nuclear weapons, and as to the well-established obligation of nuclear disarmament, which is an obligation of result and not of mere conduct. Such *opinio juris* cannot be erased by the dogmatic positivist insistence on an express prohibition of nuclear weapons; on the contrary, that *opinio juris* discloses that the invocation of the absence of an express prohibition is nonsensical, in relying upon the destructive and suicidal strategy of 'deterrence'" (paras. 140–141).

42. Judge Cançado Trindade concludes on this point that there is here, in effect, clearly formed, an *opinio juris communis* as to the illegality and prohibition of nuclear weapons, and the survival of humankind cannot be made to depend on the "will" and the insistence on "national security interests" of a handful of privileged States; the "universal juridical conscience stands well above the 'will' of individual States" (para. 146).

43. His next line of considerations pertains to the illegality of nuclear weapons and the obligation of nuclear disarmament (part XIII), encompassing: *a*) the condemnation of all weapons of mass destruction; *b*) the prohibition of nuclear weapons (the need of a people-centred approach, and the fundamental right to life); *c*) the absolute prohibitions of *jus cogens* and the humanization of international law; *d*) pitfalls of legal positivism. Judge Cançado Trindade stresses the need of a people-centred approach in this domain, keeping in mind the fundamental right to life (paras. 172–185). Attention is to be kept on the devastating and catastrophic consequences of the use of nuclear weapons.

44. He warns that, in the path towards nuclear disarmament, the peoples of the world cannot remain hostage of individual State consent. The absolute prohibitions of arbitrary deprivation of human life, of infliction of cruel, inhuman or degrading treatment, and of infliction of unnecessary suffering, are prohibitions of *jus cogens*, which have an incidence on ILHR, IHL, ILR and ICL, fostering the current historical process of *humanization* of international law (paras. 186–189).

45. He further warns that the positivist outlook unduly overlooks the *opinio juris communis* as to the illegality of all weapons of mass destruction, including nuclear weapons, and the obligation of nuclear disarmament, under contemporary international law (paras. 190–196). Conventional and customary international law go together—he adds—in the domain of the protection of the human person, as disclosed by the Martens clause, with an incidence on the prohibition of nuclear weapons (paras. 197–205).

46. To Judge Cançado Trindade, the existence of nuclear weapons is the contemporary tragedy of the nuclear age; today, more than ever, human beings need protection from themselves. Nuclear weapons have no ethics, and ethics cannot be separated from law, as taught by jusnaturalist thinking (part XV). He ponders that

> "In the domain of nuclear disarmament, we are faced today, within the conceptual universe of international law, with unexplainable insufficiencies, or anomalies, if not absurdities. For example, there are fortunately in our times Conventions prohibiting biological and chemical weapons (of 1972 and 1993), but there is to date no such comprehensive conventional prohibition of nuclear weapons, which are far more destructive. There is no such prohibition despite the fact that they are in clear breach of international law, of IHL and the ILHR, as well as of the Law of the United Nations.
>
> Does this make any sense? Can international law prescind from ethics? In my understanding, not at all. Just as law and ethics go together (in the line of jusnaturalist thinking), scientific knowledge itself cannot be dissociated from ethics. The production of nuclear weapons is an illustration of the divorce between ethical considerations and scientific and technological progress. Otherwise, weapons which can destroy millions of innocent civilians, and the whole of humankind, would not have been conceived.

> The principles of *recta ratio*, orienting the *lex praeceptiva*, emanate from human conscience, affirming the ineluctable relationship between law and ethics. Ethical considerations are to guide the debates on nuclear disarmament. Nuclear weapons, capable of destroying humankind as a whole, carry evil in themselves. They ignore civilian populations, they make abstraction of the principles of necessity, of distinction and of proportionality. They overlook the principle of humanity. They have no respect for the fundamental right to life. They are wholly illegal and illegitimate, rejected by the *recta ratio*, which endowed *jus gentium*, in its historical evolution, with ethical foundations, and its character of universality" (paras. 207–209).

47. In Judge Cançado Trindade's understanding, humankind is subject of rights (as propounded by the "founding fathers" of international law); in the realm of the humanized new *jus gentium*; as a subject of rights, humankind has been a potential victim of nuclear weapons already for a long time. This humanist vision is centred on peoples, keeping in mind the humane ends of States.

48. In his view, the contemporary tragedy of nuclear weapons cannot be addressed from "the myopic outlook of positive law alone"; nuclear weapons, and other weapons of mass destruction, have no ethics, have no ground on the law of nations (*le droit des gens*). They are in flagrant breach of its fundamental principles, and those of IHL, the ILHR, as well as the Law of the United Nations; they are a contemporary "manifestation of evil, in its perennial trajectory going back to the Book of *Genesis*". Jusnaturalist thinking, "always open to ethical considerations", identifies and discards the disrupting effects of the strategy of "deterrence" of fear creation and infliction; "humankind is victimized by this" (para. 213).

49. The next line of considerations of Judge Cançado Trindade concerns the *principle of humanity* (para. 221) and the universalist approach, with the *jus necessarium* transcending the limitations of *jus voluntarium* (part XVI). He recalls that, on several occasions, in his Individual Opinions both in the ICJ and, earlier on, in another international jurisdiction (the IACtHR), he underlined that

> "the law of nations (*droit des gens*), since its historical origins in the XVIth century, was seen as comprising not only States (emerging as they were), but also peoples, the human person (individually and in groups), and humankind as a whole. The strictly inter-State outlook was devised much later on, as from the Vattelian reductionism of the mid-XVIIIth century, which became *en vogue* by the end of the XIXth century and beginning of the XXth century, with the well-known disastrous consequences—the successive atrocities victimizing human beings and peoples in distinct regions of world,—along the whole XXth century. In the present nuclear age, extending for the last seven decades, humankind as a whole is threatened" (para. 219).

50. The conventional and customary obligation of nuclear disarmament—he proceeds—brings to the fore another aspect:

> "the issue of the *validity* of international legal norms is, after all, metajuridical. International law cannot simply remain indifferent to values, general principles of law and ethical considerations; it has, to start with, to identify what is *necessary*—such as a world free of nuclear weapons—in order to secure the survival of humankind. This *idée du droit* precedes positive international law, and is in line with jusnaturalist thinking. (…)
>
> It is clear to human conscience that those weapons, which can destroy the whole of humankind, are unlawful and prohibited. They are in clear breach of *jus cogens*" (paras. 227–229).

51. Judge Cançado Trindade then addresses other aspects of the matter at issue, mentioned by the contending parties in the present case of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*. He points out that *opinio juris communis necessitatis*, upholding a customary and conventional obligation of nuclear disarmament, has been finding expression, first, in the NPT Review Conferences, from 1975 to 2015 (part XVII).

52. Secondly, the same has happened in the relevant establishment of nuclear-weapon-free zones (part XVIII), to the ultimate benefit of humankind as a whole (para. 253). Basic considerations of humanity have surely been taken into account for the establishment of those zones, by the adoption of the 1967 Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (Tlatelolco), followed by four others of the kind, in distinct regions of the world, namely the 1985 South Pacific (Rarotonga) Nuclear-Free Zone Treaty, the 1995 Southeast Asia (Bangkok) Nuclear-Weapon-Free Zone Treaty, the 1996 African (Pelindaba) Nuclear Weapon-Free Zone Treaty, as well as the 2006 Central Asian (Semipalatinsk) Nuclear-Weapon-Free Zone Treaty (and their respective Protocols).

53. The establishment of those nuclear-weapon-free zones has, in effect, given expression to the growing disapproval of nuclear weapons by the international community as a whole (para. 246). To the establishment of aforementioned five nuclear-weapon-free zones other initiatives against nuclear weapons are to be added—Judge Cançado Trindade proceeds—such as the prohibitions of placement of nuclear weapons, and other kinds of weapons of mass destruction, in outer space, on the seabed, on the ocean floor and in the subsoil beyond the outer limit of the territorial seabed zone—"denuclearized" by the Treaties of Antarctica (1959), Outer Space (1967) and the Deep Sea Bed (1971), respectively, to which can be added the Treaty on the Moon and Other Celestial Bodies (1979), established a complete demilitarization thereon (para. 257).

54. The fact that the international community counts today on five nuclear-weapon-free zones, in relation to which States that possess nuclear weapons do have a particular responsibility, "reveals an undeniable advance of right reason, of the *recta ratio* in the foundations of contemporary international law". Moreover, the initiative of nuclear-weapon-free zones keeps on clearly gaining ground: in recent years, proposals are being examined for the setting up of new denuclearized zones of the kind, as well as of the so-called single-State zone (e.g., Mongolia). All this "further reflects the increasing disapproval, by the international community as a whole, of nuclear weapons, which, in view of their hugely

destructive capability, constitute an affront to right reason (*recta ratio*)" (para. 258).

55. And thirdly, the same has happened in respect of the recent Conferences of the Humanitarian Impact of Nuclear Weapons (part XIX—held, respectively, in Oslo in March 2013, in Nayarit in February 2014, and in Vienna in December 2014)—in their common cause of achieving and maintaining a nuclear-weapon-free world. This recent series of Conferences—examined by Judge Cançado Trindade—has drawn attention to the humanitarian effects of nuclear weapons, "restoring the central position of the concern for human beings and peoples"; it has thus "stressed the importance of the human dimension of the whole matter, and has endeavoured to awaken the conscience of the whole international community as well as to enhance the needed humanitarian coordination in the present domain" (para. 261).

56. Given their devastating effects, nuclear weapons should never have been conceived and produced. The Nayarit and Vienna Conferences participants heard the poignant testimonies of some *Hibakusha*—survivors of the atomic bombings of Hiroshima and Nagasaki—who presented their accounts of the overwhelming devastation inflicted on those cities and their inhabitants by the atomic blasts (including the victims' burning alive, and carbonized or vaporized, as well as the long-term effects of radiation, such as the birth of "monster-like babies", the continuous suffering from "thyroid cancer, liver cancer and all types of radiogenic cancerous illnesses", extending over the years, and killing survivors along seven decades) (paras. 269 and 277).

57. This series of recent Conferences on the Humanitarian Impact of Nuclear Weapons have contributed to a deeper understanding of the consequences and risks of a nuclear detonation, and have demonstrated their devastating immediate, mid- and long-term effects of the use and testing of nuclear weapons; they have focused to a larger extent on the legal framework (and gaps therein) with regard to nuclear weapons (paras. 280–281 and 283–287). In the struggle against nuclear weapons, a "Humanitarian Pledge" has ensued from the Vienna Conference, which, by April 2016, has been formally endorsed by 127 States (paras. 288–290).

58. Judge Cançado Trindade concludes on this point that all these recent initiatives (*supra*) have been

> "rightly drawing attention to the grave humanitarian consequences of nuclear weapons detonations. The reframing of the whole matter in a people-centred outlook appears to me particularly lucid, and necessary, keeping in mind the unfoundedness of the strategy of 'deterrence' and the catastrophic consequences of the use of nuclear weapons. (…)
>
> The obligation of nuclear disarmament being one of result, the 'step-by-step' approach cannot be extended indefinitely in time, with its insistence on the maintenance of the nuclear sword of Damocles. The 'step-by-step' approach has produced no significantly concrete results to date, seeming to make abstraction of the numerous pronouncements of the United Nations upholding the obligation of nuclear disarmament (cf. *supra*). After all, the absolute prohibition of nuclear weapons—which is multifaceted, is one of *jus cogens* (cf. *supra*). Such weapons, as the Conferences on the Humanitarian Impact of Nuclear Weapons have evidenced, are essentially inhumane, rendering the strategy of 'deterrence' unfounded and unsustainable" (paras. 291–292).

59. Moreover, those initiatives, reviewed in the present Dissenting Opinion (NPT Review Conferences, the establishment of nuclear-weapon-free zones, and the Conferences on the Humanitarian Impact of Nuclear Weapons)—referred to by the contending parties in the course of the proceedings before the ICJ in the present case of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*—"have gone beyond the inter-State outlook". In Judge Cançado Trindade's perception, "there is great need, in the present domain, to keep on looking beyond States, so as to behold peoples' and humankind's quest for survival in our times" (para. 295).

60. After recalling that nuclear weapons, "as from their conception, have been associated with overwhelming destruction" (para. 296), Judge Cançado Trindade proceeds to his final considerations (part XX). In his own understanding, *opinio juris communis*—to which United Nations General Assembly resolutions have contributed—has a much broader dimension than the subjective element of custom, being a key element in the formation of a law of conscience, so as to rid the world of the inhuman threat of nuclear weapons.

61. United Nations (General Assembly and Security Council) resolutions are adopted on behalf of the United Nations Organization itself (and not only of the States which voted in their favour); they are thus valid for *all* United Nations member States. Of the main organs of the United Nations, the contributions of the General Assembly, the Security Council and the Secretary-General to nuclear disarmament have been consistent and remarkable along the years. The ICJ, as the principal judicial organ of the United Nations, is to keep in mind basic considerations of humanity, with their incidence on questions of admissibility and jurisdiction, as well as of substantive law.

62. *Opinio juris* has already had a long trajectory in legal thinking, being today endowed with a wide dimension. Already in the Nineteenth century, the so-called "historical school" of legal thinking and jurisprudence, "in reaction to the voluntarist conception, gradually discarded the "will" of the States by shifting attention to *opinio juris*, requiring practice to be an authentic expression of the "juridical conscience" of nations and peoples". With the passing of time, the acknowledgment of conscience standing above the "will" developed further, as "a reaction against the reluctance of some States to abide by norms addressing matters of general or common interest of the international community" (para. 299). Judge Cançado Trindade adds that

> "*opinio juris* became a key element in the *formation* itself of international law, a *law of conscience*. This diminished the unilateral influence of the most powerful States, fostering international law-making in fulfilment of the public interest and in pursuance of the common good of the international community as a whole.
>
> The foundations of the international legal order came to be reckoned as independent from, and transcending, the 'will' of individual States*; opinio juris communis* came to give expression to the 'juridical conscience', no longer only of

nations and peoples—sustained in the past by the 'historical school'—but of the international community as a whole, heading towards the universalization of international law. It is, in my perception, this international law of conscience that turns in particular towards nuclear disarmament, for the sake of the survival of humankind" (paras. 300–301).

63. Judge Cançado Trindade further recalls that, along the years, he has consistently repudiated "voluntarist positivism", as he does now in the present Dissenting Opinion, in respect of "the customary and conventional international obligation to put an end to nuclear weapons", so as "to rid the world of their inhuman threat" (paras. 303–305). He then ponders that United Nations General Assembly or Security Council resolutions on the present matter, surveyed herein,

> "are adopted on behalf not of the States which voted in favour of them, but more precisely on behalf of the United Nations Organization itself (its respective organs), being thus *valid for all United Nations member States*. […] [T]he United Nations is endowed with an international legal personality of its own, which enables it to act at international level as a distinct entity, independently of individual member States; in this way, it upholds the juridical equality of all States, and mitigates the worrisome vulnerability of factually weaker States, such as the NNWS; in doing so, it aims—by multilateralism—at the common good, at the realization of common goals of the international community as a whole, such as nuclear disarmament.
>
> A small group of States—such as the NWS—cannot overlook or minimize those reiterated resolutions, extended in time, simply because they voted against them, or abstained. Once adopted, they are valid for all United Nations member States. They are resolutions of the United Nations Organization itself, and not only of the large majority of United Nations member States which voted in favour of them.
>
> United Nations General Assembly resolutions, reiteratedly addressing matters of concern to humankind as a whole (such as existing nuclear weapons), are in my view endowed with normative value. They cannot be properly considered from a State voluntarist perspective; they call for another approach, away from the strict voluntarist-positivist one" (paras. 306–307).

64. Those resolutions—he proceeds—"find inspiration in general principles of international law, which, for their part, give expression to values and aspirations of the international community as a whole, of all humankind". The values which find expression in those *prima principia* "inspire every legal order and, ultimately, lie in the foundations of this latter" (para. 308). The general principles of law (*prima principia*), in his perception,

> "confer upon the (national and international) legal order its ineluctable axiological dimension. Notwithstanding, legal positivism and political 'realism', in their characteristic subservience to power, incur into their basic mistake of minimizing those principles, which lie in the foundations of any legal system, and which inform and conform the norms and the action pursuant to them, in the search for the realization of justice. Whenever that minimization of principles has prevailed the consequences have been disastrous" (para. 309).

65. They have been contributing, in the last decades, to a vast *corpus juris* on matters of concern to the international community as a whole, overcoming the traditional inter-State paradigm of the international legal order. And this can no longer be overlooked in our days: the inter-State mechanism of the *contentieux* before the ICJ "cannot be invoked in justification for an inter-State reasoning". As "the principal judicial organ" of the United Nations,

> "the ICJ has to bear in mind not only States, but also 'we, the peoples', on whose behalf the United Nations Charter was adopted. In its international adjudication of contentious cases, like the present one of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, the ICJ has to bear in mind basic considerations of humanity, with their incidence on questions of admissibility and jurisdiction, as well as of substantive law" (para. 310).

66. Last but not least, in his epilogue (part XXI), Judge Cançado Trindade expresses the feeling of being in peace with his own conscience, in laying the foundations of his own personal position in the *cas d'espèce*, which "stands in clear and entire opposition to the view espoused by the Court's majority". In his understanding,

> "there is a dispute before the Court, which has jurisdiction to decide the case. There is a conventional and customary international law obligation of nuclear disarmament. Whether there has been a concrete breach of this obligation, the Court could only decide on the merits phase of the present case" (para. 311).

67. His dissenting position "is grounded not only on the assessment of the arguments produced before the Court by the contending parties, but above all on issues of principle and on fundamental values, to which I attach even greater importance" (para. 316). In conclusion—he adds—"[a] world with arsenals of nuclear weapons, like ours, is bound to destroy its past, dangerously threatens the present, and has no future at all. Nuclear weapons pave the way into nothingness" (para. 331). In his understanding,

> "the International Court *of Justice*, as the principal judicial organ of the United Nations, should, in the present Judgment, have shown sensitivity in this respect, and should have given its contribution to a matter which is a major concern of the vulnerable international community, and indeed of humankind as a whole" (para. 327).

Declaration of Judge Xue

Judge Xue votes in favour of the Judgment because she agrees with the decision of the Court to dismiss the case for lack of jurisdiction. Notwithstanding her vote, she wishes to make two points on the Judgment.

Her first point relates to the approach taken by the Court with regard to the existence of a dispute. In the Judgment, the Court finds that the evidence submitted to it fails to demonstrate that there existed between the Parties a dispute concerning the subject of the Application at the time the Marshall Islands instituted proceedings in the Court. Consequently, the condition for the Court's jurisdiction is not met. The Court reaches this conclusion primarily on the

ground that, in all the circumstances, the Marshall Islands never offered any particulars to the United Kingdom, either in words or by conduct, which could have made the United Kingdom aware that the Marshall Islands held a legal claim against it for breach of its international obligation to negotiate on nuclear disarmament.

Judge Xue notes that the Court does not deal with the other objections raised by the Respondent, but dismissed the case by solely relying on the finding that there did not exist a dispute between the Parties at the time of the filing of the Application. Therefore, it is not unpredicted that questions arise as to the propriety of this formal and restrictive approach. Given the Court's past practice of judicial flexibility in handling procedural defects, it may be arguable that the non-existence of a dispute between the Parties at the time of the filing of the Application could by itself constitute a solid ground for the Court to reject the case; the Marshall Islands might readily come back and file a new case to the same effect, as by now the dispute is indeed crystallized. For judicial economy, realism and flexibility seem called for under the present circumstances.

The reason for Judge Xue to support the Court's decision is threefold. First of all, in her opinion, there must be a minimum requirement for the Applicant to demonstrate to the Court that there existed a dispute between the Parties before the case is instituted. The evidence submitted by the Marshall Islands regarding the existence of a dispute between the Parties is noticeably insufficient. The Marshall Islands heavily relies on the positions expressed by the Parties during the current proceedings to demonstrate that one Party's claim was positively opposed by the other. As is pointed out by the Court, should that argument be accepted, it would virtually render the condition of the existence of a dispute without any meaning and value. More fundamentally, in her opinion, it would undermine the confidence of States in accepting the compulsory jurisdiction of the Court.

Secondly, even though prior notice and diplomatic exchanges are not required as a condition for the existence of a dispute, "surprise" litigation should nevertheless be discouraged. Any peaceful means of settlement, including judicial recourse, is aimed at the resolution of the dispute. Whenever the circumstances permit, a clear demonstration of a legal claim to the responsible party would facilitate the process of negotiation and settlement. The Court may take into account the post-application conduct of the parties as supplementary evidence to satisfy itself for the purpose of jurisdiction and admissibility, but judicial flexibility has to be exercised within a reasonable limit.

Thirdly, the Court's jurisdiction is built on mutuality and reciprocity. The present case is different in character from the previous cases where the Court took a flexible approach in dealing with some procedural defects. Judge Xue observes that the Marshall Islands did not institute the proceedings merely for the protection of its own interest, albeit a victim of nuclear weapons. Rather the case serves more the interest of the international community. Although the Court recognized obligations *erga omnes* in international law in the *Barcelona Traction case (Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33), it did not address the question of standing, *locus standi*, an issue that is yet to be developed in international law.

As to her second point, Judge Xue regrets very much that the Court does not proceed further to deal with some other objections raised by the Respondent. The United Kingdom argues, *inter alia*, that on the basis of the *Monetary Gold* rule, the alleged dispute cannot be decided by the Court in the absence of the other nuclear-weapon States. Moreover, it maintains that the alleged obligation to negotiate requires the participation of all nuclear-weapon States—and others. A decision binding the Marshall Islands and the United Kingdom therefore could not have the desired effect.

In her opinion, these objections deserve an immediate consideration of the Court at the preliminary stage, as the answer to them would have a direct effect on the jurisdiction of the Court and the admissibility of the Application. Had it done so, the Court would be in a better position to demonstrate that, so far as the questions of jurisdiction and admissibility are concerned, the Marshall Islands' Application is not merely defective in one procedural form.

She recalls the Court's Advisory Opinion in the *Legality of the Threat or Use of Nuclear Weapons* case, in which the Court stated that "any realistic search for general and complete disarmament, especially nuclear disarmament, necessitates the co-operation of *all States*" (*Legality of the Threat or the Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 264, para. 100; emphasis added) and that the obligation under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons is not a mere obligation of conduct, but an obligation to achieve a precise result.

Judge Xue observes that it has been twenty years since this Advisory Opinion was delivered. She notes that there has been a collective failure to deliver, but the issue for the present case is whether such a failure can be turned into a series of bilateral disputes, and addressed separately. She wonders whether such disagreement, as may exist between some nuclear-weapon States, on the one hand, and non-nuclear-weapon States, on the other, on the cessation of nuclear arms race and the negotiation process on nuclear disarmament, can be characterized as a dispute that falls within the meaning of Articles 36 and 38 of the Statute. She questions whether a dispute as such, assuming existent at the time of the filing of the application or crystallized subsequently, is justiciable for the Court to settle through contentious proceedings. In her view, the Court emphasizes a bit too much the way in which a dispute may be materialized, but does not give sufficient consideration to the nature of the dispute that the Marshall Islands alleges to have existed between the United Kingdom and itself.

Declaration of Judge Donoghue

Judge Donoghue notes that the criteria pursuant to which the Court decides on the existence of a dispute are not found in the Statute of the Court, but are instead contained in the reasoning of the Court's judgments. This calls for clarity in those criteria and for their consistent application. Judge

Donoghue considers that the Court's inquiry into the existence of a dispute in today's Judgment follows the reasoning contained in the recent jurisprudence of the Court.

As to the Marshall Islands' proposition that opposing statements made by the parties during the proceedings before the Court can suffice to establish the existence of a dispute, Judge Donoghue considers that in its recent judgments the Court has not found the existence of a dispute based solely on the parties' statements in Court, but instead has adhered to the principle that the evidence must show that a dispute existed as of the date of an application, as it does today.

Concerning the Marshall Islands' contention that the Court should infer the existence of a dispute from the juxtaposition of the Marshall Islands' statements with the Respondent's conduct, Judge Donoghue observes that the objective standard applied today to scrutinize the evidence is consistent with the recent case law of the Court. The essential question is whether the Applicant's statements referred to the subject-matter of its claim against the Respondent—i.e., "the issue brought before the Court" in the Application—with sufficient clarity that the Respondent "was aware, or could not have been unaware," of the Applicant's claim against it. As this was not the case, there was no reason to expect a response from the Respondent nor for the Court to infer opposition from the alleged unaltered course of conduct of the Respondent. Accordingly, there was no opposition of views, and no dispute, as of the date of the Application.

Declaration of Judge Gaja

Having reached the conclusion that there was no dispute between the Parties on the date when the Application was filed, the Court decides not to examine the other objections raised by the respondent States. Given that disputes have clearly arisen since that date, it would have been preferable for the Court to examine also other objections made by the respondent States which are likely to be litigated again should the Marshall Islands file new applications.

Separate opinion of Judge Sebutinde

The object and purpose of the United Nations Charter is the maintenance of international peace and security. It is in light of that object and purpose that the International Court of Justice (ICJ), as the principal judicial organ of the United Nations, discharges its mandate to decide inter-State disputes on the basis of international law. The object and purpose of the United Nations becomes apparent in view of the threat to international peace and security posed by nuclear weapons.

The subject-matter of the dispute between the Parties is the alleged breach by the United Kingdom (UK), of an international obligation under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and under customary international law to pursue in good faith and to bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control. Both the Republic of the Marshall Islands (RMI) and the UK filed optional clause declarations under Article 36, paragraph 2, of the Statute of the ICJ, in 2013 and 2004 respectively, accepting the compulsory jurisdiction of the Court. However, the existence of a dispute is a precondition for the exercise of that jurisdiction.

It is the role of the Court (and not the Parties) to objectively determine whether or not at the time the Application was filed, there was "a disagreement on a point of law or fact, or a conflict of legal views or interests" between the Parties, regarding the above-mentioned subject-matter. The Court's jurisprudence demonstrates that the Court has in the discharge of this function adopted a flexible approach attaching more importance to the substance of the evidence, including the conduct of the parties, rather than to matters of form or procedure. The approach and reasoning adopted by the majority in arriving at the conclusion that there is no dispute between the Parties in the present case, is not only both formalistic and procedural but is also inflexible in as far as it does not take due account of the conduct of the Parties. A more flexible, substantive approach examining the conduct of the Parties as relevant evidence, would have shown that the RMI and the UK clearly held opposing views regarding the subject-matter of the present dispute.

Lastly, by insisting that, in order for a dispute to exist, an applicant must prove that the respondent State "was aware or could not have been unaware that its views were positively opposed by the applicant", the majority has introduced a new legal test that is alien to the Court's established jurisprudence and that unduly raises the evidential threshold. Apart from unduly emphasizing form over substance, this new legal criterion of "awareness" introduces a degree of subjectivity into an equation that ought to remain objective, since it requires both an applicant and the Court to delve into the mind of a respondent State. The jurisprudence relied upon by the majority in adopting this new criterion is distinguishable and inapplicable to the present case.

Separate opinion of Judge Bhandari

In his separate opinion, Judge Bhandari recalls that he has concurred with the conclusions of the majority Judgment. However, he wishes to expand the basis of the reasoning of the Judgment, and proposes to deal with another aspect of the case, namely that, in the facts of this case, the Court ought to have dealt with the other preliminary objections raised by the United Kingdom because the issues raised in the case affect not only the Parties, but also the entire humanity.

Judge Bhandari stated that, according to the Statute of the Court and its jurisprudence, this Court can only exercise its jurisdiction in case of a dispute between the parties. Hence, the question to be decided is whether from the documents, pleadings and the conduct of the Parties it can be established that a dispute existed between them at the time of the filing of the Application in the terms prescribed by the applicable legal instruments and the Court's jurisprudence. He then refers to the relevant statutory provisions (Articles 36, paragraph 2, and 38, paragraph 1, of the Statute of the Court) and to the definition of "dispute". Thereafter, he recalls that,

in determining the existence of a dispute, the Court has reviewed in detail the Parties' diplomatic exchanges, documents and statements (*Georgia* v. *Russia* and *Belgium* v. *Senegal*) in order to establish whether there is "a disagreement on a point of law or fact, a conflict of legal views or of interests" (*Mavrommatis Palestine Concessions*). Further to the holding in the *South West Africa* cases, the criterion for the existence of a dispute is that the claim of one party be positively opposed by the other.

In his separate opinion, Judge Bhandari concludes that, on application of the Court's Statute and its jurisprudence, as well as the documents and pleadings placed before the Court, the irresistible conclusion is the absence of any dispute between the Parties, and consequently, on the facts of this case, this Court lacks jurisdiction to deal with this case. The majority Judgment, instead of looking into these aspects closely, chose to focus mainly on the lack of awareness of the Respondent of the impending dispute.

The Court has the freedom to choose any preliminary objection when examining its own jurisdiction and, in doing so, it usually chooses the most "direct and conclusive" (*Norwegian Loans*). In the instant case, by choosing the lack of awareness on the part of the Respondent as the main ground for the dismissal of the claim, the Court has not chosen the most "direct and conclusive" ground for dismissal, as the lack of awareness on the part of the Respondent can easily be cured by the Applicant by giving proper notice of the dispute to the Respondent. In that case, the Applicant could simply bring the case again before the Court. This would be an undesirable result and should be discouraged. The Parties have already submitted documents, pleadings and submissions *in extenso*. In the facts of this case, this Court ought to have examined the other preliminary objections. Otherwise, a re-submission of the case again would entail a waste of the efforts, time and resources already spent by the Parties and the Court in the treatment of this matter.

Consequently, Judge Bhandari considers in his separate opinion that, in the facts of this case, the Court should have examined the other preliminary objections taken by the Respondent, namely, lack of jurisdiction due to the absence of essential parties not party to the instant proceedings (*Monetary Gold* principle), that the Marshall Islands' claim is excluded in consequence of the Optional Clause Declarations of the Parties, and that the Marshall Islands' claim falls outside the judicial function of the Court and the Court should therefore decline to exercise jurisdiction over the claim. In relation to the *Monetary Gold* principle in particular, it is recalled that in its 1996 Advisory Opinion on nuclear weapons the Court considered that any realistic search for general and complete disarmament would require the co-operation of all States. These preliminary objections are substantial in character and ought to have been adjudicated by the Court.

Dissenting Opinion of Judge Robinson

Judge Robinson disagrees with the majority's conclusion that there is no dispute in this case.

The United Nations Charter has assigned the Court a special role, giving it a particular relevance in the maintenance of international peace and security through the exercise of its judicial functions. The Majority's decision today fails to demonstrate sensitivity to this role.

The Court's case law has been consistent in the approach to be adopted in determining the existence of a dispute; an approach that is not reflected in today's Judgment. The jurisprudence of the Court calls for an objective, flexible and pragmatic approach in determining the existence of a dispute. It is firmly established in the Court's jurisprudence that a dispute arises where, examined objectively, there are "clearly opposite views concerning the question of the performance or non-performance" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74) of a State's obligations. There is not a single case in the Court's case law that authorizes the majority's proposition that the determination of the existence of a dispute requires a finding of the respondent's awareness of the applicant's positive opposition to its views. While awareness may act as evidence that confirms the existence of a dispute, framing awareness as a prerequisite for a dispute is a departure from the empirical and pragmatic enquiry that the Court must undertake: an enquiry focused simply on whether or not the evidence reveals clearly opposite views.

The majority also misconstrues the plain meaning of its *dicta* and its own case law in concluding that post-Application evidence may act simply to confirm the existence of a dispute. The Court's approach to this question has been less definitive and uncompromising than the Majority would like to suggest. The Court has given itself room to afford significant weight to statements made during the proceedings, particularly the denial of allegations by the respondent, not just to confirm but to establish a dispute. This is entirely consistent with the flexible, pragmatic approach that is the hallmark of the Court's jurisprudence on this question. A respondent's opportunity to react is more properly addressed as a question of procedural due process rather than as an element of the dispute criterion.

Another reason for rejecting the majority decision is that it militates against the sound administration of justice, a principle that the Court has emphasized on more than one occasion. The Court spoke against an approach that would lead to, what it termed, the "needless proliferation of proceedings" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 443, para. 89). An odd result of the majority Judgment is that, given the basis on which the claim has been dismissed, the Applicant could, in theory, file another Application against the Respondent.

The facts of this case show that there was a dispute between the Applicant and the Respondent. Even though Judge Robinson disagrees with the majority's position that awareness is not a prerequisite for a finding that a dispute exists, it is hard to conclude that the Respondent "could not have been unaware" of the opposite views of the Parties.

The majority's holding today has placed an additional and unwarranted hurdle in the way of claims that may

proceed to be examined on the merits. In so doing, it has detracted from the potential of the Court to play the role envisaged for it as a standing body for the peaceful settlement of the disputes and through this function, as an important contributor to the maintenance of international peace and security. This conclusion is rendered even more telling by the subject-matter of the dispute before the Court today.

Dissenting Opinion of Judge Crawford

Judge Crawford disagreed with the "objective awareness" test for the existence of a dispute adopted by the majority. No such legal requirement was to be found in the Court's jurisprudence. An objective awareness test was difficult to distinguish from a formal notice requirement, which the Court had rejected. Moreover, the Court had traditionally exercised flexibility in determining the existence of a dispute. While Judge Crawford agreed that in principle the dispute should exist at the time the application was filed, a finding of a dispute could be based, *inter alia*, on post-application conduct or evidence, including the statements of the parties in the proceedings.

As well as disagreeing with the Court's statement of the law, Judge Crawford disagreed with its application to the facts. In particular, the dispute in question should have been characterized as a multilateral dispute, relying on *South West Africa (Preliminary Objections)* as authority for the proposition that such a dispute may crystallize in multilateral fora involving a plurality of States. In his view there was, at the least, an incipient dispute between the Applicant and the Respondent as at the date of the Application, given that the Marshall Islands had associated itself with one side of a multilateral disagreement with the nuclear-weapon States.

Since there was, at the date of the Application, a dispute between the Marshall Islands and the Respondent as to the latter's compliance with Article VI of the NPT or its customary international law equivalent, it was unnecessary to consider whether any deficiency could and should be remedied in the exercise of the *Mavrommatis* discretion, as recently articulated in *Croatia* v. *Serbia*.

Judge Crawford also referred to one of the other objections to jurisdiction and admissibility raised by the Respondent, the *Monetary Gold* objection. In his view this was a question for the merits stage. Whether it was necessary as a precondition for resolving the dispute for the Court to rule on the rights and obligations of third parties to the dispute would depend, *inter alia*, on the scope and application of Article VI of the NPT, or any parallel customary international law obligation.

Dissenting Opinion of Judge *ad hoc* Bedjaoui

I. Introduction

Judge *ad hoc* Bedjaoui voted against the operative clause adopted by the Court in the case between the Marshall Islands and the United Kingdom. He believes that a dispute does exist between the Marshall Islands and the Respondent.

He notes that although the Court has always adhered to a standard general definition of a legal dispute, it has not shown the same level of consistency in respect of the criteria it has itself identified for determining the existence of that dispute. The most significant break from its jurisprudence can be seen in the Judgment of 1 April 2011 in the *Georgia* v. *Russian Federation* case, and this was continued in the case concerning *Questions relating to the Obligation to Prosecute or Extradite*.

II. Traditionally less formalistic jurisprudence

Judge *ad hoc* Bedjaoui argues that the Court's present approach, which pays a heavy price for a certain degree of formalism, could rightly be regarded as a move away from its traditional jurisprudence.

He refers to the Court's clarity and resourcefulness in the exercise of both its advisory and contentious functions. The Court has successfully avoided falling prisoner to the letter of the Charter and the lacunae of international law. Judge *ad hoc* Bedjaoui gives a quick and simplified overview of the Court's jurisprudence, leaving him saddened at the impression that might be left by today's decision in the present case.

In his view, it is all the more vital that the Court should endeavour to clarify how it determines the existence of a dispute, since this is a fundamental question on which both its jurisdiction and the exercise of its jurisdiction directly depend. It is essential for the Court to show greater consistency when determining the criteria for establishing the existence of a dispute and when applying those criteria to each individual case. Failing to do so creates legal uncertainty for States and a certain level of confusion for readers, none of them knowing why one case may benefit from the Court's understanding, when another cannot aspire to do so.

Besides this first duty of consistency, Judge *ad hoc* Bedjaoui believes that the Court must also guard against fossilization. Being committed to the rational application of criteria does not preclude simultaneously remaining open to changing global concerns; it is by no means a case of the Court accepting every new idea, but of knowing when and how to limit, or, alternatively, to expand, the application of the criteria at the root of the *Mavrommatis* and *South West Africa* Judgments, and, above all, explaining each time why it is necessary to favour flexibility or formalism in that particular case.

To his mind, the greatest danger for the moment remains excessive formalism, especially when, as is the case here, it combines with a jurisprudence which is entirely unclear for the future. That evidently increases the risk of the arbitrary.

III. Notification/"awareness"?

Judge *ad hoc* Bedjaoui is of the opinion that while the Court has traditionally been reticent to make notification of the dispute by the applicant to the respondent a precondition for the institution of proceedings, since the 2011 decision there has been uncertainty obscuring the general view.

He laments the fact that the Court seems to establish a direct and—it would appear—automatic correlation between

awareness of an opposition of views and the existence of a dispute. He also points out that, in the Court's reasoning, what is essential is the fact that the respondent should "be aware". Judge *ad hoc* Bedjaoui wonders if we are not thus witnessing the resurrection by degrees of the "notification" concept.

However, if we accept the existence of this additional precondition, then why not apply it correctly? Judge *ad hoc* Bedjaoui maintains that the United Kingdom had to be "aware" of the Marshall Islands' anti-nuclear views in opposition to its own nuclear conduct, given, among other things, the history of the Marshall Islands and its 2013 and 2014 statements made at international events which were open to all. These statements were aimed at all States possessing nuclear weapons, without distinction, as everyone knows, and they did not exclude the United Kingdom.

Finally, Judge *ad hoc* Bedjaoui asks: how can the Respondent's level of "awareness" be assessed? And how could this unusual excursion into subjectivity be reconciled with the stated "objective" search for the existence of a dispute?

IV. Date of the existence of a dispute

Judge *ad hoc* Bedjaoui is pleased that, in the present Judgment, the Court appears to follow its traditional jurisprudence closely, according to which: "[i]n principle, the date for determining the existence of a dispute is the date on which the application is submitted to the Court".

However, in practice, the Court has refused, without convincing explanation, to take account of the evidence which arose after the date on which the proceedings were instituted and which attested to the existence of a dispute. In so doing, it establishes as an absolute dogma a solution that runs counter to its traditional approach, which was characterized by great flexibility, as reflected in its statement that the dispute must only "in principle" exist on the date that proceedings are instituted.

V. Procedural defects

As regards reparable procedural defects, whether it is the applicant or the respondent, whether it is a case of proceedings being instituted prematurely or of accessing the Court too early, Judge *ad hoc* Bedjaoui notes that the Court has created sound jurisprudence which has stood the test of time and demonstrated its flawless consistency over a period of almost 90 years. It is this jurisprudence that the 2011 Judgment started to destroy, with the deathblow being delivered by the *Belgium* v. *Senegal* case.

In the present proceedings, the Court has once again dispensed with its traditional jurisprudence, despite the latter's wisdom. Judge *ad hoc* Bedjaoui laments the fact that the majority of the Court considered the Marshall Islands' statements insufficient to crystallize the existence of a legal dispute. All the Marshall Islands needs to do tomorrow is to send a simple Note Verbale to the Respondent with a few lines expressing its opposition to the latter's nuclear policy, in order to be able to resubmit the then formalized dispute to the Court. It was neither coherent nor judicious for the Court to focus on easily reparable procedural defects, when it has long dealt with these with a welcome degree of flexibility.

VI. Proof by inference; proof by the interpretation of silence

Judge *ad hoc* Bedjaoui recalls that, contrary to the approach followed in this case, the Court has on other occasions demonstrated flexibility and common sense, turning a respondent's *silence* or *failure to respond* to good account and even proceeding by *simple deduction*, in order to conclude that a dispute exists.

In its present Judgment, the Court sweeps aside its traditional jurisprudence and takes the view that the 13 February 2014 statement, in which the Marshall Islands accused States possessing nuclear weapons of breaching their international obligations, "[g]iven its very general content and the context in which it was made, … did not call for a specific reaction by the United Kingdom". And thus, "[a]ccordingly, no opposition of views can be inferred from the absence of any such reaction". The Court seems to have ventured to substitute itself for the United Kingdom, in order to justify the latter's silence in its place and, moreover, with reasons that no one can be certain were shared by that State.

VII. Proof provided by the exchanges before the court

Judge *ad hoc* Bedjaoui is of the opinion that the Court has made little effort in the present case to take full account of the circumstances following the filing of the Marshall Islands' Application, once again moving away from its traditional jurisprudence.

He wonders how one can conclude that a dispute does not exist, when one Party is complaining before the Court that the other has long been in breach of its international obligations, and the other Party denies that its conduct constitutes a violation of those obligations. The exchanges that took place before the Court did not create the dispute anew. They merely "confirmed" its prior existence.

VIII. *Sui generis* nature of any nuclear dispute

Judge *ad hoc* Bedjaoui notes that the general historical background to the international community's efforts to bring about nuclear disarmament in itself foreshadows and signals the potential existence of a dispute. Indeed, the dispute submitted by the Marshall Islands, which aims at nothing short of protecting the human race from permanent annihilation by a terrifying weapon of mass destruction, should in itself have sounded an alarm for the Court. The Court declared 20 years ago that a twofold obligation exists to negotiate and to achieve nuclear disarmament. For 20 years, it heard no more of that appeal. And then, one day, a non-nuclear State wishes to find out from another State, one that possesses nuclear weapons, why this already considerable delay appears to be continuing for even longer.

This particular type of highly specific disagreement between a non-nuclear State and a nuclear State regarding the abolition of nuclear weapons is, in and of itself, the expression of a major dispute whose existence should *ipso facto* have

been obvious to the Court. The Marshall Islands is seeking an end to Article VI, an end to the NPT, through an end to nuclear weapons.

The 1968 Non-Proliferation Treaty was designed to be *purely temporary* and intended to cease to exist as soon as possible. It had to be temporary, since it clashes head-on with the sacrosanct principle of the sovereign equality of States by creating among them some that possess nuclear weapons and others, which are nonetheless equally sovereign, that had forever to forgo possessing such weapons in their turn. Another feature of this *unequal* Treaty is that it would become *unlawful* if it were to extend indefinitely in time. It has a temporary role of achieving nuclear disarmament, before ceasing to exist forever. This was, and still is, understood by one and all. The aim of the Treaty is to lead to nuclear disarmament, a necessary condition for a return to the sacrosanct equality of States. And while it is true that Article VI does not set a deadline, this does not mean, however, that it allows for negotiations that are open-ended with no guarantee of an outcome.

Lastly, since the NPT is built on an obvious inequality between two groups of States, an inequality that is offset by an obligation to negotiate disarmament, is it really unreasonable to think that the nuclear States, by not bringing negotiations to a conclusion, are in breach of their obligations towards all the non-nuclear-weapon States and should therefore expect to find their international responsibility engaged? Is it unreasonable to infer the existence, before the Court, of a "built-in" dispute?

IX. An objection not of an exclusively preliminary character?

Judge *ad hoc* Bedjaoui could perhaps have accepted, in a case as complex and important as this one between the Marshall Islands and the United Kingdom, a decision which reflected the Court's—after all highly legitimate—concern to avoid ruling prematurely on jurisdiction and admissibility. The Court might very well still require further clarification from the Parties. And knowing that, at this stage, it could not evaluate their conduct without addressing the merits, the Court might logically decide to wait for the merits stage before determining its position. In other words, the Court might have been more prudent to find that the question of the existence of a dispute was not of an exclusively preliminary character.

X. The train of undesirable consequences of this decision

Finally, Judge *ad hoc* Bedjaoui notes that the present decision has the unfortunate potential to unleash whole train of undesirable consequences, not only for the Respondent, which could find itself encouraged to withdraw its optional recognition of the Court's jurisdiction, but also for the Applicant, which has shouldered the cost of coming to the Court, as well as for the international community and the Court itself.

As regards the international community, the decisions handed down by the Court today reveal to international public opinion a world that is regrettably inconsistent, not only in terms of procedural jurisprudence, but also in respect of its substantive jurisprudence. What message is the Court leaving the international community when it decides, on what are exceedingly flimsy bases, moreover, to decline to exercise its jurisdiction in cases concerning the most crucial issues of nuclear disarmament, involving the very survival of the whole human race?

As for the Court itself, it risks being the fourth losing party, because by dismissing the Marshall Islands on the basis of a reparable procedural defect, it is undermining the sound administration of justice, on which its functioning depends. In these three cases, the Court seems to have been unable to break away from a formalism which sacrifices the merits to procedure, content to form, and the case to its subject-matter. Moreover, even though the Court has always declared that its aim is to give a fundamentally "objective" assessment of the evidence, it seems here to have made little attempt to avoid being subjective in its assessment of the evidence put forward by the Applicant, *itself organizing the Respondent's defence* and examining all of the Applicant's arguments with what appears to be a negative prejudice.

219. IMMUNITIES AND CRIMINAL PROCEEDINGS (EQUATORIAL GUINEA *v.* FRANCE) [PROVISIONAL MEASURES]

Order of 7 December 2016

On 7 December 2016, the International Court of Justice delivered its Order on the request for the indication of provisional measures submitted by Equatorial Guinea in the case concerning *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)*. In its Order, the Court indicated, unanimously, that France shall, pending a final decision in the case, take all measures at its disposal to ensure that the premises presented as housing the diplomatic mission of Equatorial Guinea at 42 avenue Foch in Paris enjoy treatment equivalent to that required by Article 22 of the Vienna Convention on Diplomatic Relations, in order to ensure their inviolability. The Court also unanimously rejected the request of France to remove the case from the General List.

The Court was composed as follows: Vice-President Yusuf, Acting President; President Abraham; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian; Judge *ad hoc* Kateka; Registrar Couvreur.

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The operative paragraph (para. 99) of the Order reads as follows:

"…

The Court,

I. Unanimously,

Indicates the following provisional measures:

France shall, pending a final decision in the case, take all measures at its disposal to ensure that the premises presented as housing the diplomatic mission of Equatorial Guinea at 42 avenue Foch in Paris enjoy treatment equivalent to that required by Article 22 of the Vienna Convention on Diplomatic Relations, in order to ensure their inviolability;

II. Unanimously,

Rejects the request of France to remove the case from the General List."

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Judge Xue appended a separate opinion to the Order of the Court; Judges Gaja and Gevorgian appended declarations to the Order of the Court; Judge *ad hoc* Kateka appended a separate opinion to the Order of the Court.

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Application and Request for the indication of provisional measures (paras. 1–19)

The Court begins by recalling that, by an Application filed in the Registry on 13 June 2016, Equatorial Guinea instituted proceedings against France with regard to a dispute concerning

> "the immunity from criminal jurisdiction of the Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and State Security [Mr. Teodoro Nguema Obiang Mangue], and the legal status of the building which houses the Embassy of Equatorial Guinea, both as premises of the diplomatic mission and as State property".

On 29 September 2016, Equatorial Guinea submitted a Request for the indication of provisional measures, asking, *inter alia*, that France suspend all the criminal proceedings brought against the Vice-President of Equatorial Guinea; that it ensure that the building located at 42 avenue Foch in Paris is treated as premises of Equatorial Guinea's diplomatic mission in France and, in particular, assure its inviolability; and that it refrain from taking any other measure that might aggravate or extend the dispute submitted to the Court.

Further to a request by Equatorial Guinea, the Vice-President of the Court, acting as President in the case, drew the attention of France, in accordance with Article 74, paragraph 4, of the Rules of Court, "to the need to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effects".

Factual background (paras. 20–30)

The Court then presents the background to the case. It explains that, beginning in 2007, some associations and private individuals lodged complaints with the Paris Public Prosecutor against certain African Heads of State and members of their families, in respect of acts of "misappropriation of public funds in their country of origin, the proceeds of which have allegedly been invested in France". The Court notes that one of these complaints, filed on 2 December 2008, by the association Transparency International France, was declared admissible by the French courts, and a judicial investigation was opened in respect of the handling of misappropriated public funds, complicity in the misappropriation of public funds, misuse of corporate assets and complicity in misuse of corporate assets, and concealment of each of these offences. It adds that the investigation focused in particular on the methods used to finance the acquisition of movable and immovable assets in France by several individuals, including the son of the President of Equatorial Guinea, Mr. Teodoro Nguema Obiang Mangue, who was at the time Minister for Agriculture and Forestry of Equatorial Guinea.

The Court states that the investigations more specifically concerned the way in which Mr. Teodoro Nguema Obiang Mangue acquired various objects of considerable value and a building located at 42 avenue Foch in Paris. It notes that, although he challenged the measures taken against him and invoked on a number of occasions the immunity from jurisdiction that he considered himself to enjoy in light of his functions, Mr. Teodoro Nguema Obiang Mangue was indicted. In addition, the building on avenue Foch was attached (*saisie pénale immobilière*), and various objects therein were seized.

Finally, the Court indicates that, at the end of the investigation, Mr. Teodoro Nguema Obiang Mangue was referred to the Paris *Tribunal correctionnel* to be tried for alleged offences committed between 1997 and October 2011. The trial is to be held from 2 to 12 January 2017.

I. Prima facie *jurisdiction* (paras. 31–70)

The Court first observes that, when a request for the indication of provisional measures is submitted to it, it need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case before deciding whether to indicate the measures requested; it need only satisfy itself that the provisions relied on by the Applicant appear, *prima facie*, to afford a basis on which its jurisdiction could be founded.

The Court states that Equatorial Guinea seeks to found the Court's jurisdiction, first, on Article 35 of the Convention against Transnational Organized Crime, in respect of its claim relating to the immunity of Mr. Teodoro Nguema Obiang Mangue, and, second, on the Optional Protocol to the Vienna Convention on Diplomatic Relations, in respect of its claim regarding the alleged inviolability of the premises at 42 avenue Foch. It notes that both Article 35, paragraph 2, of the Convention against Transnational Organized Crime and Article I of the Optional Protocol make the Court's jurisdiction conditional on the existence of a dispute arising out of the interpretation or application of the Convention to which they relate. It will therefore ascertain whether, *prima facie*, such a dispute existed on the date the Application was filed, since, as a general rule, it is on that date, according to the jurisprudence of the Court, that its jurisdiction must be determined.

(1) *The Convention against Transnational Organized Crime (paras. 41–50)*

The Court observes that Equatorial Guinea asserts that a dispute exists between the Parties concerning the application of Article 4 of the Convention against Transnational Organized Crime. That provision, entitled "Protection of sovereignty", reads as follows:

> "1. States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.
>
> 2. Nothing in this Convention entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law."

The Court notes that according to Equatorial Guinea, Article 4 of the Convention is not merely a "general guideline", in light of which the other provisions of the Convention should be interpreted. The principles of sovereign equality and non-intervention to which that Article refers encompass important rules of customary or general international law, in particular those relating to the immunities of States and the immunity of certain holders of high-ranking office in the State. In the Applicant's view, the rules in question are binding on States when they apply the Convention, since they are embodied in the above-mentioned principles. Equatorial Guinea thus claims that, when initiating proceedings against the Vice-President of Equatorial Guinea, France was obliged, in applying the Convention, to respect the rules relating to the immunity *ratione personae* of the Vice-President of Equatorial Guinea, deriving from Article 4 of that instrument.

For its part, France denies the existence of a dispute concerning the application of the Convention, and, consequently, that the Court has jurisdiction. In its view, the reference in Article 4 to the principles of sovereign equality and territorial integrity of States, and to that of non-intervention in the domestic affairs of other States, merely indicates the manner in which the other provisions of the Convention must be applied. It adds that the provisions of the Convention which Equatorial Guinea claims were not implemented in accordance with the principles set out in Article 4 of that instrument, for the most part, do nothing more than oblige States to legislate or regulate.

The Court observes that it is clear from the case file that the Parties have expressed differing views on Article 4 of the Convention against Transnational Organized Crime. Nonetheless, in order to determine, even *prima facie*, whether a dispute within the meaning of Article 35, paragraph 2, of the Convention exists, the Court cannot limit itself to noting that one of the Parties maintains that the Convention applies, while the other denies it. It must ascertain whether the acts complained of by Equatorial Guinea are *prima facie* capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain pursuant to Article 35, paragraph 2, of the Convention.

The Court notes that the obligations under the Convention consist mainly in requiring the States parties to introduce in their domestic legislation provisions criminalizing certain transnational offences and to take measures aimed at combatting these crimes. The Court indicates that the purpose of Article 4 of the Convention is to ensure that the States parties to the Convention perform their obligations in accordance with the principles of sovereign equality, territorial integrity of States and non-intervention in the domestic affairs of other States. In its view, the provision does not appear to create new rules concerning the immunities of holders of high-ranking office in the State or incorporate rules of customary international law concerning those immunities. Accordingly, any dispute which might arise with regard to "the interpretation or application" of Article 4 of the Convention could relate only to the manner in which the States parties perform their obligations under that Convention. It appears to the Court, however, that the alleged dispute does not relate to the manner in which France performed its obligations under the articles of the Convention invoked by Equatorial Guinea; rather, it appears to concern a distinct issue, namely whether the Vice-President of Equatorial Guinea enjoys immunity *ratione personae* under customary international law and, if so, whether France has violated that immunity by instituting proceedings against him.

Consequently, the Court considers that, *prima facie*, a dispute capable of falling within the provisions of the Convention against Transnational Organized Crime and

therefore concerning the interpretation or the application of Article 4 of that Convention does not exist between the Parties. Thus, it does not have *prima facie* jurisdiction under Article 35, paragraph 2, of that instrument to entertain Equatorial Guinea's request relating to the immunity of Mr. Teodoro Nguema Obiang Mangue.

(2) *The Optional Protocol to the Vienna Convention on Diplomatic Relations (paras. 51–70)*

The Court recalls that Article I of the Optional Protocol to the Vienna Convention on Diplomatic Relations, invoked by Equatorial Guinea in relation to its claim regarding the alleged inviolability of the premises at 42 avenue Foch, confers jurisdiction on the Court over disputes relating to the interpretation or application of the Vienna Convention on Diplomatic Relations. It further recalls that Equatorial Guinea claims that a dispute exists between the Parties regarding the application of Article 22 of the Vienna Convention, paragraph 3 of which provides that the "premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution". The Court will accordingly ascertain whether, on the date the Application was filed, a dispute arising out of the interpretation or application of the Vienna Convention appeared to exist between the Parties.

In this regard, the Court notes that the Parties do indeed appear to have differed, and still differ today, on the question of the legal status of the building located at 42 avenue Foch in Paris. While Equatorial Guinea has maintained at various times that the building houses the premises of its diplomatic mission and must therefore enjoy the immunities afforded under Article 22 of the Vienna Convention, France has consistently refused to recognize that this is the case, and claims that the property has never legally acquired the status of "premises of the mission". In the view of the Court, there is therefore every indication that, on the date the Application was filed, a dispute existed between the Parties as to the legal status of the building concerned.

In order to determine whether it has jurisdiction—even *prima facie*—the Court must also ascertain whether such a dispute is one over which it might have jurisdiction *ratione materiae* on the basis of Article I of the Optional Protocol. In this regard, the Court notes that the rights apparently at issue may fall within the scope of Article 22 of the Vienna Convention, which guarantees the inviolability of diplomatic premises, and that the acts alleged by the Applicant in respect of the building on avenue Foch appear to be capable of contravening such rights. Indeed, the premises which, according to Equatorial Guinea, house its diplomatic mission in France were searched on several occasions and were attached (*saisie pénale immobilière*); they could also be subject to other measures of a similar nature.

The Court considers that the aforementioned elements sufficiently establish, at this stage, the existence between the Parties of a dispute capable of falling within the provisions of the Vienna Convention and concerning the interpretation or application of Article 22 thereof. Consequently, the Court considers that it has *prima facie* jurisdiction under Article I of the Optional Protocol to the Vienna Convention to entertain this dispute. It is of the view that it may, on this basis, examine Equatorial Guinea's request for the indication of provisional measures, in so far as it concerns the inviolability of the building located at 42 avenue Foch in Paris. It adds that, since there is no manifest lack of jurisdiction, it cannot grant France's request to remove the case from the List.

II. The rights whose protection is sought and the measures requested (paras. 71–81)

The Court recalls that its power to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible. Moreover, a link must exist between the rights which form the subject of the proceedings before the Court on the merits of the case and the provisional measures being sought.

The Court thus first considers whether the rights claimed by Equatorial Guinea on the merits, and for which it is seeking protection, are plausible. Having found that it does not have *prima facie* jurisdiction to entertain the alleged violations of the Convention against Transnational Organized Crime, the Court addresses only Equatorial Guinea's alleged right to "the inviolability of the premises of its diplomatic mission", in respect of which Article 22 of the Vienna Convention is invoked.

The Court notes in this regard that Equatorial Guinea maintains that it acquired the building located at 42 avenue Foch on 15 September 2011 and has used it for its diplomatic mission in France as from 4 October 2011, which the Applicant claims to have indicated to the Respondent on several occasions. The Court further notes that Equatorial Guinea contends that, since that date, the building in question has been searched a number of times and has been attached (*saisie pénale immobilière*)—acts which, in the view of the Applicant, infringe the inviolability of those premises.

The Court is of the opinion that, given that the right to the inviolability of diplomatic premises is a right contained in Article 22 of the Vienna Convention, that Equatorial Guinea claims that it has used the building in question as premises of its diplomatic mission in France since 4 October 2011, and that France acknowledges that, from the summer of 2012, certain services of the Embassy of Equatorial Guinea appear to have been transferred to 42 avenue Foch, it appears that Equatorial Guinea has a plausible right to ensure that the premises which it claims are used for the purposes of its mission are accorded the protections required by Article 22 of the Vienna Convention.

The Court then turns to the issue of the link between the rights claimed and the provisional measures requested. In this regard, it considers that, by their very nature, these measures are aimed at protecting the right to the inviolability of the building which Equatorial Guinea presents as housing the premises of its diplomatic mission in France. It concludes that

a link exists between the right claimed by Equatorial Guinea and the provisional measures being sought.

III. Risk of irreparable prejudice and urgency (paras. 82–91)

The Court recalls that it has the power to indicate provisional measures when irreparable prejudice could be caused to rights in dispute, but that that power will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights concerned.

Observing once again that the record before the Court shows that France does not accept that the building forms part of the premises of Equatorial Guinea's diplomatic mission in France, and that it refuses to grant it the immunity—and thus the corresponding protection—afforded to such premises under the Vienna Convention, the Court considers that there is a continuous risk of intrusion. It notes that while the Parties disagree as to whether any searches have been conducted recently, they recognize that such acts did indeed occur in 2011 and 2012. And, given that it is possible that, during the hearing on the merits, the *Tribunal correctionnel* may, of its own initiative or at the request of a party, request further investigation or an expert opinion, it is not inconceivable that the building on avenue Foch will be searched again. If that were to happen, and if it were established that the building houses the premises of Equatorial Guinea's diplomatic mission, the daily activities of that mission—the representation of a sovereign State—would risk being seriously impeded, as a result, for example, of the presence of police officers or the seizure of documents, some of which might be highly confidential.

The Court considers that it follows from the foregoing that there is a real risk of irreparable prejudice to the right to inviolability of the premises that Equatorial Guinea presents as being used as the premises of its diplomatic mission in France. Indeed, any infringement of the inviolability of the premises may not be capable of remedy, since it might not be possible to restore the situation to the *status quo ante*. Furthermore, that risk is imminent, in so far as the acts likely to cause such a prejudice to the rights claimed by Equatorial Guinea could occur at any moment. The criterion of urgency is therefore also satisfied in the present case.

The Court recalls that Equatorial Guinea also asks it to indicate provisional measures in respect of items previously located on the premises of 42 avenue Foch, some of which have been removed by French authorities. As to these items, the Court observes that Equatorial Guinea failed to demonstrate the risk of irreparable prejudice and the urgency that the Court has identified in respect of the premises at 42 avenue Foch. Accordingly, it finds no basis to indicate provisional measures in respect of these items.

IV. Conclusion and measures to be adopted (paras. 92–98)

The Court concludes from all the above considerations that the conditions required by its Statute for it to indicate provisional measures in respect of the building located at 42 avenue Foch in Paris have been met. It is of the view that, pending a final decision in the case, the premises presented as housing the diplomatic mission of Equatorial Guinea at 42 avenue Foch in Paris should enjoy treatment equivalent to that required by Article 22 of the Vienna Convention, in order to ensure their inviolability. With regard to the attachment (*saisie pénale immobilière*) of the building at 42 avenue Foch and the risk of confiscation, the Court notes that there is a risk that such confiscation may occur before the date on which the Court reaches its final decision. It therefore considers that, in order to preserve the respective rights of either Party, the execution of any measure of confiscation is to be stayed until the Court takes that decision. Finally, although Equatorial Guinea has requested it to indicate measures aimed at ensuring the non-aggravation of the dispute, the Court states that, in this case, given the measures it has decided to take, the Court does not deem it necessary to indicate additional measures of that nature.

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Separate opinion of Judge Xue

Judge Xue wishes at this preliminary stage to place on record her reservation to the Court's interpretation, albeit not yet definitive, of Article 4 of the United Nations Convention against Transnational Organized Crime (hereinafter "the Convention").

She recalls that the Court states in paragraph 49 of the Order that Article 4 does not create any new rules on immunities of holders of high-ranking office of a State. Accordingly, any dispute concerning the interpretation or application of Article 4 could relate only to the manner in which a State party performs its obligations under the Convention. The Court is of the view that the alleged dispute between the Parties appears to concern a distinct issue which is not capable of falling within the provisions of the Convention. Thus it does not have jurisdiction *prima facie* under Article 35, paragraph 2, of the Convention.

Judge Xue considers that this interpretation begs a number of questions. First, the intention of the States parties, as reflected in the *travaux préparatoires* of Article 4, not to create new rules of immunities of customary international law in the Convention cannot be interpreted to mean that the existing rules on the same subject-matter are precluded in the application of the Convention. On the contrary, as a guideline, Article 4 provides a legal framework within which the other provisions are to be implemented. What is governed under the principle of sovereign equality of States under general international law should remain intact and applicable, when circumstances of a case so require. Rules of jurisdictional immunity of State and its property and jurisdictional immunity of high-ranking officials in foreign courts are, among others, two relevant régimes that directly derive from that principle.

Secondly, the question of jurisdictional immunity *ratione personae* bears on "the manner" in which a State party performs its obligations under the Convention. It is no less relevant to the principle of sovereign equality than an operation being conducted in a foreign territory. In the present case, Mr. Teodoro Nguema Obiang Mangue is a foreign national holding high-ranking office in his country. Although all the acts alleged by Equatorial Guinea were carried out in the French territory and under the French internal law, the

essence of the dispute between the Parties is the applicability of the Convention.

Thirdly, whether an incumbent President or a Vice-President of a State enjoys jurisdictional immunity in foreign courts under customary international law is not a "distinct issue" that does not fall within the provisions of the Convention. In implementing its obligations under Article 6 (criminalization of laundering of the proceeds of crime), Article 12 (measures to enable confiscation and seizure), Article 14 (disposal of confiscated proceeds of crime or property), and Article 18 (mutual legal assistance), a State party may have to act differently if rules of jurisdictional immunities apply. The dispute in the present case appears to concern that very question.

Given the above considerations, she maintains the view that the Court has, *prima facie*, jurisdiction under Article 35, paragraph 2, of the Convention.

Declaration of Judge Gaja

In its orders on provisional measures the Court, when it indicates some measures, does not state in the operative part (*dispositif*) that it rejects some other requests. In the present case, no reference is made in the *dispositif* to the request concerning the immunity of Mr. Teodoro Nguema Obiang Mangue, even if a large part of the Order discusses that issue. In the interest of greater transparency, the *dispositif* of orders on provisional measures should include the decision on all the main issues and the names of the judges who voted in favour and against.

Declaration of Judge Gevorgian

Judge Gevorgian concurs with the conclusions and reasoning of the Order. At the same time, with regard to paragraph 49 of the Order, he finds it necessary to clarify that the rules on the immunity of State officials from foreign criminal jurisdiction derive from the principle of sovereign equality mentioned in Article 4 of the Palermo Convention. In his view, this is supported by the recent work of the International Law Commission and the Court's case law.

Separate opinion of Judge *ad hoc* Kateka

1. While Judge Kateka is in favour of the provisional measure granted by the Court, his opinion differs from the Court's Order in two main aspects. First, while he acknowledges the Court's jurisprudence on the *prima facie* jurisdiction of the Court, he considers that the threshold for *prima facie* jurisdiction is low. As such, Judge Kateka is unable to agree with the Court's interpretation of Article 4 of the United Nations Convention against Transnational Organized Crime (the Palermo Convention) and its conclusion that it has no *prima facie* jurisdiction under Article 35 (2) of the said Convention. Specifically, he takes issue with the finding of the Court that a dispute capable of falling within the provisions of the Palermo Convention, and therefore concerning the interpretation or application of Article 4 of that Convention, does not exist between the Parties.

2. Judge Kateka disagrees with the Court that Article 4 relates only to the manner in which States parties perform their obligations under the Palermo Convention and that it does not incorporate any rules of customary international law concerning the immunities of holder of high-ranking office in the State, considering that the Court did not examine Article 4 in its proper context. Judge Kateka compared the legislative history of Article 4 of the Palermo Convention, in conjunction with that of Article 2 (2) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, which is similarly drafted in order to demonstrate that Article 4 of the Palermo Convention is self-standing and can create obligations for States parties.

3. After considering the arguments of both Equatorial Guinea and France on Article 4 of the Palermo Convention, Judge Kateka points out that the Vice-President of Equatorial Guinea is prosecuted in France for a series of crimes, including money laundering, criminalization of which is required by Article 6 of the Palermo Convention. This crime falls within the scope of the Palermo Convention, under Article 3 (1), because it is not only a "serious crime" that is "transnational in nature", but also it is an offence listed under Article 6 of the Convention. In his view, the requirement of an "organized criminal group" is met because some of the charges brought against the Vice-President of Equatorial Guinea include "complicity", which by definition requires the involvement of others.

4. Concluding on his first point of divergence with the Court's Order, Judge Kateka argues that the procedural conditions set out in Article 35 (2) of the Palermo Convention are met due to the refusal of France to negotiate with Equatorial Guinea for the settlement of the dispute. In sum, a dispute exists between the Parties, which concerns the interpretation and application of Article 4 of the Palermo Convention, therefore meeting the *prima facie* jurisdiction threshold and as such the Court should have entertained the request by Equatorial Guinea relating to the immunity *ratione personae* of the Vice-President. Moreover, Judge Kateka is of the view that the right of Equatorial Guinea to the immunity of its Vice-President, who is number two in the Government, plausibly exists under the Palermo Convention. The criterion of urgency is met given that real and imminent risk will be caused to the right of Equatorial Guinea in light of the fact that a criminal trial will be conducted before the Paris *Tribunal correctionnel* in January 2017 against the Vice-President, whose functions would be compromised.

5. Secondly, Judge Kateka finds the provisional measure indicated by the Court inadequate. He criticizes the wording adopted by the Court, namely that France shall take all measures at its disposal to ensure that the premises presented as housing the diplomatic mission of Equatorial Guinea at 42 avenue Foch in Paris enjoy treatment "equivalent to that required by Article 22 of the Vienna Convention on Diplomatic Relations". He disagrees with the use of the term "equivalent", pointing out that the requirements of Article 22 are clear: the premises of the mission shall be inviolable. The Court should therefore have issued an unequivocal measure as requested by Equatorial Guinea, namely that "France ensure that the building located at 42 avenue Foch in Paris is treated as premises of Equatorial Guinea's diplomatic mission in France and, in particular, assure its inviolability …".

220. MARITIME DELIMITATION IN THE INDIAN OCEAN (SOMALIA *v.* KENYA) [PRELIMINARY OBJECTION]

Judgment of 2 February 2017

On 2 February 2017, the International Court of Justice delivered its Judgment on the preliminary objections raised by Kenya in the case concerning *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya)*, in which it rejected the preliminary objections raised by Kenya and found that it had jurisdiction to entertain the Application filed by Somalia and that the Application was admissible.

The Court was composed as follows: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian; Judge *ad hoc* Guillaume; Registrar Couvreur.

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The operative paragraph (para. 145) of the Judgment reads as follows:

"…

The Court,

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

Rejects the first preliminary objection raised by the Republic of Kenya in so far as it is based on the Memorandum of Understanding of 7 April 2009;

In favour: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Crawford, Gevorgian;

Against: Judges Bennouna, Robinson; Judge *ad hoc* Guillaume;

(b) by fifteen votes to one,

Rejects the first preliminary objection raised by the Republic of Kenya in so far as it is based on Part XV of the United Nations Convention on the Law of the Sea;

In favour: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Crawford, Gevorgian; Judge *ad hoc* Guillaume;

Against: Judge Robinson;

(2) by fifteen votes to one,

Rejects the second preliminary objection raised by the Republic of Kenya;

In favour: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Crawford, Gevorgian; Judge *ad hoc* Guillaume;

Against: Judge Robinson;

(3) by thirteen votes to three,

Finds that it has jurisdiction to entertain the Application filed by the Federal Republic of Somalia on 28 August 2014 and that the Application is admissible.

In favour: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Crawford, Gevorgian;

Against: Judges Bennouna, Robinson; Judge *ad hoc* Guillaume."

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Vice-President Yusuf appended a declaration to the Judgment of the Court; Judge Bennouna appended a dissenting opinion to the Judgment of the Court; Judges Gaja and Crawford appended a joint declaration to the Judgment of the Court; Judge Robinson appended a dissenting opinion to the Judgment of the Court; Judge *ad hoc* Guillaume appended a dissenting opinion to the Judgment of the Court.

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I. Introduction (paras. 15–30)

The Court first notes that Somalia and Kenya are adjacent States on the coast of East Africa. Somalia is located in the Horn of Africa. It borders Kenya to the south-west, Ethiopia to the west and Djibouti to the north-west. Somalia's coastline faces the Gulf of Aden to the north and the Indian Ocean to the east. Kenya, for its part, shares a land boundary with Somalia to the northeast, Ethiopia to the north, South Sudan to the north-west, Uganda to the west and Tanzania to the south. Its coastline faces the Indian Ocean. Both States signed the United Nations Convention on the Law of the Sea (UNCLOS) on 10 December 1982. Kenya and Somalia ratified UNCLOS on 2 March and 24 July 1989, respectively, and the Convention entered into force for the Parties on 16 November 1994. Under Article 76, paragraph 8, of UNCLOS, a State party to the Convention intending to establish the outer limits of its continental shelf beyond 200 nautical miles shall submit information on such limits to the Commission on the Limits of the Continental Shelf (CLCS). The role of the Commission is to make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf beyond 200 nautical miles. With regard to disputed maritime areas, under Annex I of the CLCS Rules of Procedure, entitled "Submissions in case of a dispute between States with opposite or adjacent coasts or in other cases of unresolved land or maritime disputes", the Commission requires the prior consent of all States concerned before it will consider submissions regarding such areas.

The Court recalls that, on 7 April 2009, the Kenyan Minister for Foreign Affairs and the Somali Minister for National Planning and International Cooperation signed a "Memorandum of Understanding between the Government of the Republic of Kenya and the Transitional Federal Government of the Somali Republic to grant to each other No-Objection in respect of submissions on the Outer Limits of the Continental Shelf beyond 200 Nautical Miles

to the Commission on the Limits of the Continental Shelf". On 14 April 2009, Somalia submitted to the Secretary-General of the United Nations preliminary information indicative of the outer limits of the continental shelf beyond 200 nautical miles. On 6 May 2009, Kenya deposited with the CLCS its submission with respect to the continental shelf beyond 200 nautical miles. In June 2009, the MOU was submitted by Kenya to the Secretariat of the United Nations for registration and publication pursuant to Article 102 of the Charter of the United Nations. The Secretariat registered it on 11 June 2009, and published it in the *United Nations Treaty Series*. In the following years, both Parties raised and withdrew objections to the consideration of each other's submissions by the CLCS. Those submissions are now under consideration.

On 28 August 2014, Somalia instituted proceedings against Kenya before the Court, requesting the latter to determine, on the basis of international law, the complete course of the single maritime boundary dividing all the maritime areas appertaining to Somalia and to Kenya in the Indian Ocean, including the continental shelf beyond 200 nautical miles. As basis for the Court's jurisdiction, Somalia invoked the declarations recognizing the Court's jurisdiction as compulsory made by the two States. Kenya, however, raised two preliminary objections: one concerning the jurisdiction of the Court, the other the admissibility of the Application.

II. The first preliminary objection: the jurisdiction of the Court (paras. 31–134)

In its first preliminary objection, Kenya argues that the Court lacks jurisdiction to entertain the present case as a result of one of the reservations to its declaration accepting the compulsory jurisdiction of the Court, which excludes disputes in regard to which the parties have agreed "to have recourse to some other method or methods of settlement". It asserts that the MOU constitutes an agreement to have recourse to another method of settlement. It adds that the relevant provisions of UNCLOS on dispute settlement also amount to an agreement on the method of settlement.

The Court first considers the MOU and whether that instrument falls within the scope of Kenya's reservation. It begins by examining the legal status of the MOU under international law. It explains that should it find the MOU valid, the Court will embark on its interpretation and outline what effects, if any, the MOU has in respect of the jurisdiction of the Court in this case. If the Court reaches the conclusion that the MOU does not render Kenya's reservation to its optional clause declaration under Article 36, paragraph 2, of the Court's Statute applicable in the present case, it will then address Kenya's submission that the case falls outside the Court's jurisdiction because of the provisions of Part XV of UNCLOS.

A. The Memorandum of Understanding (paras. 36–106)

1. The legal status of the MOU under international law (paras. 36–50)

The Court considers that in order to determine whether the MOU has any effect with respect to its jurisdiction, it is appropriate first to address the issue whether the MOU constitutes a treaty in force between the Parties.

Under the customary international law of treaties, which is applicable in this case since neither Somalia nor Kenya is a party to the 1969 Vienna Convention on the Law of Treaties, an international agreement concluded between States in written form and governed by international law constitutes a treaty. The MOU is a written document, in which the Parties record their agreement on certain points governed by international law. The inclusion of a provision addressing the entry into force of the MOU is indicative of the instrument's binding character. Kenya considered the MOU to be a treaty, having requested its registration in accordance with Article 102 of the Charter of the United Nations, and Somalia did not protest that registration until almost five years thereafter. Furthermore, it is clear from the actual terms of the MOU, which make express provision for it to enter into force upon signature, and the terms of the authorization given to the Somali Minister, that this signature expressed Somalia's consent to be bound by the MOU under international law. The Court concludes that the MOU is a valid treaty that entered into force upon signature and is binding on the Parties under international law.

2. The interpretation of the MOU (paras. 51–105)

The Court turns to the interpretation of the MOU. This instrument consists of seven paragraphs, which are unnumbered. In order to facilitate references to the paragraphs, the Court considered it convenient to insert numbering in its analysis.

In interpreting the MOU, the Court applies the rules on interpretation to be found in Articles 31 and 32 of the Vienna Convention, which it has consistently considered to be reflective of customary international law. Article 31, paragraph 1, of the Vienna Convention provides that "[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". These elements of interpretation—ordinary meaning, context and object and purpose—are to be considered as a whole. Paragraph 2 of Article 31 sets out what is to be regarded as context. Article 31, paragraph 3, provides that there shall be taken into account, together with the context, any subsequent agreement between the parties regarding the interpretation or application of the treaty, any subsequent practice which establishes such an agreement, and any relevant rules of international law applicable in the relations between the parties.

The sixth paragraph of the MOU is at the heart of the first preliminary objection under consideration. It is, however, difficult to understand that paragraph without a prior analysis of the text of the MOU as a whole, which provides the context in which any particular paragraph should be interpreted and gives insight into the object and purpose of the MOU. The Court therefore proceeds first of all to such an analysis, before examining the sixth paragraph.

The Court observes that the title of the MOU and its first five paragraphs indicate the purpose of ensuring that the CLCS could proceed to consider submissions made by Somalia and Kenya regarding the outer limits of the continental shelf beyond 200 nautical miles, and to issue recommendations thereon, notwithstanding the existence of a

maritime dispute between the two States, thus preserving the distinction between the ultimate delimitation of the maritime boundary and the CLCS process leading to delineation. The sixth paragraph, on which the Parties' arguments focused in particular since Kenya contends that it contains the agreed dispute settlement method regarding the Parties' maritime boundary, provides that delimitation in the disputed areas "shall be agreed between the two coastal States on the basis of international law after the Commission has concluded its examination of the separate submissions made by each of the two coastal States and made its recommendations …". The question for the Court is whether the Parties, in that sixth paragraph, agreed on a method of settlement of their delimitation dispute other than by way of proceedings before the Court, and agreed to wait for the CLCS's recommendations before any such settlement could be reached.

The subject-matter of the sixth paragraph of the MOU relates to "[t]he delimitation of maritime boundaries in the areas under dispute, including the delimitation of the continental shelf beyond 200 nautical miles …". The use of the word "including" implies that the Parties intended something more to be encompassed by delimitation in "the areas under dispute" than delimitation in respect of the continental shelf beyond 200 nautical miles. The Parties have explicitly given a meaning to the term the "area under dispute" as the area in which the claims of the two Parties to the continental shelf overlap, without differentiating between the shelf within and beyond 200 nautical miles. In addition, the text as a whole makes it apparent that the MOU was concerned, in so far as it addressed delimitation, solely with the area of the continental shelf, both within and beyond 200 nautical miles from the two States' respective coasts. The sixth paragraph therefore relates only to delimitation of the continental shelf, "including the delimitation of the continental shelf beyond 200 nautical miles", and not to delimitation of the territorial sea, nor to delimitation of the exclusive economic zone. Accordingly, even if, as Kenya suggests, that paragraph sets out a method of settlement of the Parties' maritime boundary dispute, it would only apply to their continental shelf boundary, and not to the boundaries of other maritime zones.

The Court turns to the question of whether the sixth paragraph, by providing that the delimitation of the continental shelf between the Parties "shall be agreed … on the basis of international law after the Commission has concluded its examination of [their] separate submissions … and made its recommendations …", sets out a method of settlement of the Parties' maritime boundary dispute with respect to that area.

The Court recalls that, according to the applicable rule of customary international law, the sixth paragraph of the MOU must be interpreted in good faith in accordance with the ordinary meaning given to its terms in their context and in light of the object and purpose of the MOU. Pursuant to Article 31, paragraph 3 *(c)* of the Vienna Convention, "[a]ny relevant rules of international law applicable in the relations between the parties" should be taken into account, together with the context. In this case, both Somalia and Kenya are parties to UNCLOS, which is expressly mentioned in the MOU. UNCLOS therefore contains such relevant rules. Moreover, given that the sixth paragraph of the MOU concerns the delimitation of the continental shelf, Article 83 of UNCLOS, entitled "Delimitation of the continental shelf between States with opposite or adjacent coasts", is particularly relevant.

The Court considers that it is reasonable to read the sixth paragraph of the MOU in light of Article 83, paragraph 1, of UNCLOS. In that context, the reference to delimitation being undertaken by agreement on the basis of international law, which is common to the two provisions, is not prescriptive of the method of dispute settlement to be followed and does not preclude recourse to dispute settlement procedures in case agreement could not be reached. The sixth paragraph of the MOU goes beyond the wording of Article 83, paragraph 1, by inclusion of the second part of the clause under consideration, providing that "delimitation … shall be agreed … *after* the Commission has concluded its examination … and made its recommendations …". It is clear from the case file that Kenya did not consider itself bound by the wording of the sixth paragraph to wait for the CLCS's recommendations before engaging in negotiations on maritime delimitation, or even reaching agreements thereon, and could at least commence the process of delimitation before that of delineation was complete. However, Kenya has advanced the argument that negotiations on maritime delimitation could not be finalized and, therefore, that no final agreement could be reached, until after the recommendations of the CLCS had been received. It may be the case that, as the Parties agree, the endpoint of their maritime boundary in the area beyond 200 nautical miles cannot be definitively determined until after the CLCS's recommendations have been received and the outer limits of the continental shelf beyond 200 nautical miles established on the basis of those recommendations. This is consistent with Article 76, paragraph 8, of UNCLOS. A lack of certainty regarding the outer limits of the continental shelf, and thus the precise location of the endpoint of a given boundary in the area beyond 200 nautical miles, does not, however, necessarily prevent either the States concerned or the Court from undertaking the delimitation of the boundary in appropriate circumstances before the CLCS has made its recommendations.

The Court does not consider that the sixth paragraph of the MOU can be interpreted as precluding the Parties from reaching an agreement on their maritime boundary, or either of them from resorting to dispute settlement procedures regarding their maritime boundary dispute, before receipt of the CLCS's recommendations. The Parties could have reached an agreement on their maritime boundary at any time by mutual consent. Moreover, read in light of Article 83, paragraph 1, of UNCLOS, the use of the phrase "shall be agreed" in the sixth paragraph does not mean that the Parties have an obligation to conclude an agreement on a continental shelf boundary; it rather means that the Parties are under an obligation to engage in negotiations in good faith with a view to reaching an agreement. The Parties agree that the sixth paragraph did not prevent them from engaging in such negotiations before receipt of the CLCS's recommendations. There is no temporal restriction contained in the sixth paragraph on fulfilling this obligation to negotiate. The fact that the Parties set an objective as to the time for concluding an agreement does not, given that this paragraph is not prescriptive of a method of settlement to be followed, prevent a Party from resorting

to dispute settlement procedures prior to receiving the recommendations of the CLCS. Furthermore, both Somalia and Kenya are parties to UNCLOS, which contains in Part XV comprehensive provisions for dispute resolution, and both States have optional clause declarations in force. The Court does not consider that, in the absence of express language to that effect, the Parties can be taken to have excluded recourse to such procedures until after receipt of the CLCS's recommendations. Finally, the MOU repeatedly indicates that the CLCS process leading to delineation is to be without prejudice to delimitation, treating the two as distinct.

In summary, the Court observes the following in respect of the interpretation of the MOU. First, its object and purpose was to constitute a no-objection agreement, enabling the CLCS to make recommendations notwithstanding the existence of a dispute between the Parties regarding the delimitation of the continental shelf. Secondly, the sixth paragraph relates solely to the continental shelf, and not to the whole maritime boundary between the Parties, which suggests that it did not create a dispute settlement procedure for the determination of that boundary. Thirdly, the MOU repeatedly makes clear that the process leading to the delineation of the outer limits of the continental shelf beyond 200 nautical miles is to be without prejudice to the delimitation of the maritime boundary between the Parties, implying—consistently with the jurisprudence of this Court—that delimitation could be undertaken independently of a recommendation of the CLCS. Fourthly, the text of the sixth paragraph of the MOU reflects that of Article 83, paragraph 1, of UNCLOS, suggesting that the Parties intended to acknowledge the usual course that delimitation would take under that Article, namely engaging in negotiations with a view to reaching agreement, and not to prescribe a method of dispute settlement. Fifthly, the Parties accept that the sixth paragraph did not prevent them from undertaking such negotiations, or reaching certain agreements, prior to obtaining the recommendations of the CLCS.

Given the foregoing, the Court considers that the sixth paragraph of the MOU reflected the expectation of the Parties that, in light of Article 83, paragraph 1, of UNCLOS, they would negotiate their maritime boundary in the area of the continental shelf after receipt of the CLCS's recommendations, keeping the two processes of delimitation and delineation distinct. As between States parties to UNCLOS, such negotiations are the first step in undertaking delimitation of the continental shelf. The Court does not, however, consider that the text of the sixth paragraph, viewed in light of the text of the MOU as a whole, the object and purpose of the MOU, and in its context, could have been intended to establish a method of dispute settlement in relation to the delimitation of the maritime boundary between the Parties. It neither binds the Parties to wait for the outcome of the CLCS process before attempting to reach agreement on their maritime boundary, nor does it impose an obligation on the Parties to settle their maritime boundary dispute through a particular method of settlement.

In line with Article 32 of the Vienna Convention, the Court has examined the *travaux préparatoires*, however limited, and the circumstances in which the MOU was concluded, which it considers confirm that the MOU was not intended to establish a procedure for the settlement of the maritime boundary dispute between the Parties.

3. Conclusion on whether the reservation contained in Kenya's declaration under Article 36, paragraph 2, is applicable by virtue of the MOU (para. 106)

The Court concludes that the MOU does not constitute an agreement "to have recourse to some other method or methods of settlement" within the meaning of Kenya's reservation to its Article 36, paragraph 2, declaration, and consequently this case does not, by virtue of the MOU, fall outside the scope of Kenya's consent to the Court's jurisdiction.

B. Part XV of the United Nations Convention on the Law of the Sea (paras. 107–133)

The Court next considers whether Part XV of UNCLOS (entitled "Settlement of disputes") amounts to an agreement on a method of settlement for the maritime boundary dispute within the meaning of Kenya's reservation.

It first recalls that Part XV, entitled "Settlement of disputes", comprises three sections. Section 1 sets out general provisions regarding the peaceful settlement of disputes. It requires States parties to settle disputes concerning the interpretation or application of the Convention by peaceful means (Art. 279) but expressly provides that they are free to employ "any peaceful means of their own choice" (Art. 280). States parties may agree between themselves to a means of settlement that does not lead to a binding decision of a third party (e.g., conciliation). However, if no settlement has been reached by recourse to such means, either of those States parties may submit the dispute to the court or tribunal having jurisdiction under Section 2 of Part XV, unless their agreement to such means of settlement excludes the procedures entailing a binding decision in Section 2 (Art. 281, para. 1). Finally, while Article 282 makes no express reference to an agreement to the Court's jurisdiction resulting from optional clause declarations, it nevertheless provides that an agreement to submit a dispute to a specified procedure that applies in lieu of the procedures provided for in Section 2 of Part XV may not only be contained in a "general, regional or bilateral agreement", but may also be reached "otherwise".

The phrase "or otherwise" in Article 282 thus encompasses agreement to the jurisdiction of the Court resulting from optional clause declarations. Both Kenya and Somalia recognize this interpretation of Article 282 and agree that if two States have accepted the Court's jurisdiction under the optional clause with respect to a dispute concerning the interpretation or application of UNCLOS, such agreement would apply to the settlement of that dispute in lieu of procedures contained in Section 2 of Part XV. It is equally clear that if a reservation to an optional clause declaration excluded disputes concerning a particular subject, there would be no agreement to the Court's jurisdiction falling within Article 282, so the procedures provided for in Section 2 of Part XV would apply to those disputes, subject to the limitations and exceptions that result from the application of Section 3.

In the present case, however, the Court must decide whether Article 282 should be interpreted so that an optional clause declaration containing a reservation such as that

of Kenya falls within the scope of that Article. The *travaux préparatoires* of UNCLOS make clear that the negotiators gave particular attention to optional clause declarations when drafting Article 282, ensuring, through the use of the phrase "or otherwise", that agreements to the Court's jurisdiction based on optional clause declarations fall within the scope of Article 282.

Article 282 should therefore be interpreted so that an agreement to the Court's jurisdiction through optional clause declarations falls within the scope of that Article and applies "in lieu" of procedures provided for in Section 2 of Part XV, even when such declarations contain a reservation to the same effect as that of Kenya. The contrary interpretation would mean that, by ratifying a treaty which gives priority to agreed procedures resulting from optional clause declarations (pursuant to Article 282 of UNCLOS), States would have achieved precisely the opposite outcome, giving priority instead to the procedures contained in Section 2 of Part XV. Consequently, under Article 282, the optional clause declarations of the Parties constitute an agreement, reached "otherwise", to settle in this Court disputes concerning interpretation or application of UNCLOS, and the procedure before this Court shall thus apply "in lieu" of procedures provided for in Section 2 of Part XV.

As previously noted, Kenya's acceptance of the Court's jurisdiction extends to "all disputes", except those for which the Parties have agreed to resort to a method of settlement other than recourse to the Court. In the present case, Part XV of UNCLOS does not provide for such other method of dispute settlement. Accordingly, this dispute does not, by virtue of Part XV of UNCLOS, fall outside the scope of Kenya's optional clause declaration.

A finding that the Court has jurisdiction gives effect to the intent reflected in Kenya's declaration, by ensuring that this dispute is subject to a method of dispute settlement. By contrast, because an agreed procedure within the scope of Article 282 takes precedence over the procedures set out in Section 2 of Part XV, there is no certainty that this intention would be fulfilled were this Court to decline jurisdiction.

C. Conclusion (para. 134)

In light of the Court's conclusion that neither the MOU nor Part XV of UNCLOS falls within the scope of the reservation to Kenya's optional clause declaration, the Court finds that Kenya's preliminary objection to the jurisdiction of the Court must be rejected.

III. The second preliminary objection: the admissibility of Somalia's Application (paras. 135–144)

The Court then considers Kenya's preliminary objection to the admissibility of Somalia's Application. In support of its contention that the Application is inadmissible, Kenya makes two arguments.

First, Kenya claims that the Application is inadmissible because the Parties had agreed in the MOU to negotiate delimitation of the disputed boundary, and to do so only after completion of CLCS review of the Parties' submissions. The Court having previously found that the MOU did not contain such an agreement, it must also reject this aspect of Kenya's second preliminary objection.

Secondly, Kenya states that the Application is inadmissible because Somalia breached the MOU by objecting to CLCS consideration of Kenya's submission, only to consent again immediately before filing its Memorial. According to Kenya, the withdrawal of consent was a breach of Somalia's obligations under the MOU that gave rise to significant costs and delays. Kenya also contends that a State "seeking relief before the Court must come with clean hands" and that Somalia has not done so. The Court observes that the fact that an applicant may have breached a treaty at issue in the case does not *per se* affect the admissibility of its application. Moreover, the Court notes that Somalia is neither relying on the MOU as an instrument conferring jurisdiction on the Court nor as a source of substantive law governing the merits of this case. Thus, Somalia's objection to CLCS consideration of Kenya's submission does not render the Application inadmissible.

In light of the foregoing, the Court finds that the preliminary objection to the admissibility of Somalia's Application must be rejected.

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Declaration of Vice-President Yusuf

1. Vice-President Yusuf agrees with the Court's decision on the preliminary objections raised by Kenya and the reasoning that led the Court to its decision. Nevertheless, the circumstances in which the present dispute regarding the jurisdiction of the Court has arisen call for some observations to be made.

2. The Memorandum of Understanding ("MOU") in this case was drafted, as a matter of fact, by Ambassador Hans Wilhelm Longva of Norway in the context of assistance provided by Norway to African States, which enabled them to make submissions or submit preliminary information to the Commission on the Limits of the Continental Shelf ("CLCS") within the time-limits prescribed by the States parties to the United Nations Convention on the Law of the Sea.

3. Many African States lack the requisite geological, geophysical, and hydrological technical expertise to compile a submission to the CLCS; in this respect, Norway's assistance was invaluable. However, this technical assistance should be distinguished from the drafting and conclusion of the MOU, which is a legal and policy matter that could have easily been directly negotiated by the two neighbouring States.

4. More than 50 years after their independence, it is surprising that Somalia and Kenya are in dispute over an agreement that they neither negotiated nor drafted. International law in the twenty-first century is more important than ever; its effects pervade the daily lives of people throughout the world. As the scope of international law has increased, so too has the importance of ensuring that each State actively participates in the creation of international legal instruments and rules which affect its peoples and resources, and understands the obligations that it takes on.

5. No Government can afford today to put its signature to a bilateral legal instrument which it has neither carefully negotiated nor to which it has hardly contributed. This applies especially to African Governments, which, due to their painful historical experience with international legal agreements concluded with foreign powers, should pay particular attention to the contents of such agreements.

Dissenting opinion of Judge Bennouna

In the case brought by Somalia concerning maritime delimitation in the Indian Ocean, the Court has rejected Kenya's first preliminary objection concerning the existence of another method of dispute settlement under paragraph 6 of the memorandum. The issue being one of interpretation of that paragraph, the Court referred to the general rule of interpretation enshrined in Article 31 of the Vienna Convention on the Law of Treaties. It lays down, as a starting point, the ordinary meaning of the terms of the treaty. But the Court proceeded differently and assumed that paragraph 6 was difficult to understand without an overall analysis of the context in which it should be interpreted, as well as its object and purpose. In doing so, the Court reversed the general rule of interpretation and reached the conclusion that the sixth paragraph did not constitute another method of settlement of the maritime dispute and therefore did not trigger Kenya's reservation. The reasoning by analogy between paragraph 6 and Article 83 of UNCLOS has led the Court to erroneous conclusions since these provisions are not comparable. In particular, unlike Article 83 of UNCLOS, paragraph 6 contains a precise time constraint. Ultimately, the Court has come to give a different meaning to the terms of the sixth paragraph which is unrelated to their ordinary meaning, holding that they do not establish a dispute settlement procedure likely to fall within the scope of Kenya's reservation.

Joint declaration of Judges Gaja and Crawford

Judges Gaja and Crawford disagreed with the reasons of the majority on issues of both jurisdiction and admissibility concerning the MOU.

On jurisdiction, they reasoned that paragraph 6 of the MOU, by setting an obligation to negotiate, would not affect the Court's jurisdiction unless it fell within Kenya's optional clause reservation. The words "other method … of settlement" in Kenya's reservation contemplate a method of resolving the dispute. But negotiations in good faith may not result in such a resolution. In order for negotiations to be caught by Kenya's reservation, either the Parties must have agreed to reach an agreement by negotiation (i.e., a *pactum de contrahendo*) or negotiation would have to be stipulated as the exclusive method of settlement. The Parties agree that paragraph 6 of the MOU does not impose an obligation to reach an agreement. Neither is there any ground for suggesting that the Parties intended to exclude resort to other methods of settlement if negotiations failed. Thus paragraph 6 was not caught by Kenya's optional clause reservation.

On admissibility, Judges Gaja and Crawford reasoned that paragraph 6 of the MOU bound each party to refrain from taking unilateral action to trigger dispute settlement before the CLCS had made its recommendation. However, the Parties were free to derogate from this time-limit, which they did in 2014 by commencing negotiations without reserving their position under paragraph 6. By doing so, they set aside the time-limit in paragraph 6, making the Application of Somalia admissible.

Dissenting opinion of Judge Robinson

Judge Robinson disagrees with the majority's rejection of Kenya's first preliminary objection. However, the opinion focuses on the rejection of the second basis advanced by Kenya for its first preliminary objection since, in his view, it is more problematic because of the very serious implications it has for the interpretation and application of the carefully elaborated provisions of Part XV of UNCLOS.

Under Article 36, paragraph 2, of the Court's Statute, both Kenya and Somalia accepted the Court's jurisdiction subject to certain reservations. With regard to the reservation relevant to this case, Kenya accepted the Court's jurisdiction over all disputes other than: "Disputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method or methods of settlement".

Given this lucid and unambiguous text, Judge Robinson argues that it is wholly unreasonable for the majority to conclude that the optional clause declarations between Kenya and Somalia constitute an agreement that falls within the scope of Article 282 when Part XV of UNCLOS sets out in Article 287 other methods of settlement.

Judge Robinson takes issue with the numerical criterion—the majority's conclusion relies on the fact that "more than half of the then-existing optional clause declarations" contained the Kenyan-type reservation—used by the majority to determine whether the *travaux préparatoires* can be construed as excluding the Kenyan-type reservation. He suggests that what is required is a qualitative evaluation of the impact of Kenya's reservation on the optional clause declarations of both States and that the signal failure of the majority decision is its refusal to carry out such an evaluation. In his view, such an evaluation clearly shows that the consensual bond required for optional clause declarations to found the jurisdiction of the Court cannot take root in the environment created by Kenya's reservation and that, therefore, there is no agreed procedure within the terms of Article 282 of UNCLOS to be applied in lieu of the procedures in Part XV.

He concludes that the net effect of the majority Judgment is to turn Article 287, paragraph 3, of UNCLOS on its head by treating the ICJ as the default mechanism when that provision assigns that role to the Annex VII Tribunal referred to in Article 287, paragraph 1, subparagraph *(c)*.

Dissenting opinion of Judge ad hoc Guillaume

Judge *ad hoc* Guillaume disagrees with the Court's decision to reject the first preliminary objection raised by Kenya in so far as it is based on the Memorandum of Understanding (MOU) of 7 April 2009. He takes the view that paragraph 6 of the MOU, interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of the MOU's object and purpose, establishes a method of settlement for the maritime delimitation dispute between Somalia and Kenya. By agreeing to it, the Parties undertook to negotiate with a view to reaching an agreement once the Commission on the Limits had reviewed their respective submissions concerning the outer limits of the continental shelf beyond 200 nautical miles.

Judge *ad hoc* Guillaume further considers that the discussions held by the Parties in 2014 cannot be construed as a subsequent agreement on the interpretation of paragraph 6 of the MOU, or as the expression of a renunciation by Kenya of its rights under that paragraph. Finally, in his view it cannot be argued that the obligation to negotiate contained in paragraph 6 has been exhausted.

Judge *ad hoc* Guillaume therefore concludes that, in view of Kenya's reservation to its declaration made under Article 36, paragraph 2, of the Statute—which excludes disputes in regard to which the parties to the dispute have agreed to have recourse to some other method of settlement—the Court should have found that it lacks jurisdiction.

221. APPLICATION OF THE INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM AND OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (UKRAINE *v.* RUSSIAN FEDERATION) [PROVISIONAL MEASURES]

Order of 19 April 2017

On 19 April 2017, the International Court of Justice delivered its Order on the request for the indication of provisional measures submitted by Ukraine in the case concerning *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation).* In its order, the Court indicated various provisional measures.

The Court was composed as follows: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford; Judges *ad hoc* Pocar, Skotnikov; Registrar Couvreur.

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The operative paragraph (para. 106) of the Order reads as follows:

"…

The Court,

Indicates the following provisional measures:

(1) With regard to the situation in Crimea, the Russian Federation must, in accordance with its obligations under the International Convention on the Elimination of all the Forms of Racial Discrimination,

(a) By thirteen votes to three,

Refrain from maintaining or imposing limitations on the ability of the Crimean Tatar Community to conserve its representative institutions, including the *Mejlis*;

In favour: President Abraham; Vice-President Yusuf; Judges Owada, Bennouna, Cançado Trindade, Greenwood, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford; Judge *ad hoc* Pocar;

Against: Judges Tomka, Xue; Judge *ad hoc* Skotnikov;

(b) Unanimously,

Ensure the availability of education in the Ukrainian language;

(2) Unanimously,

Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve."

*

* *

Judge Owada appended a separate opinion to the Order of the Court; Judge Tomka appended a declaration to the Order of the Court; Judges Cançado Trindade and Bhandari appended separate opinions to the Order of the Court; Judge Crawford appended a declaration to the Order of the Court; Judges *ad hoc* Pocar and Skotnikov appended separate opinions to the Order of the Court.

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I. Introduction (paras. 1–16)

The Court recalls that, on 16 January 2017, Ukraine instituted proceedings against the Russian Federation with regard to alleged violations of the International Convention for the Suppression of the Financing of Terrorism (ICSFT) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). On the same day, Ukraine submitted a request for the indication of provisional measures, aimed at safeguarding the rights it claims under those two conventions pending the Court's decision on the merits.

With respect to ICSFT, in paragraph 23 of its Request for the indication of provisional measures, Ukraine asked the Court to indicate the following provisional measures:

"*(a)* The Russian Federation shall refrain from any action which might aggravate or extend the dispute under the Terrorism Financing Convention before the Court or make this dispute more difficult to resolve.

(b) The Russian Federation shall exercise appropriate control over its border to prevent further acts of terrorism financing, including the supply of weapons from the territory of the Russian Federation to the territory of Ukraine.

(c) The Russian Federation shall halt and prevent all transfers from the territory of the Russian Federation of money, weapons, vehicles, equipment, training, or personnel to groups that have engaged in acts of terrorism against civilians in Ukraine, or that the Russian Federation knows may in the future engage in acts of terrorism against civilians in Ukraine, including but not limited to the 'Donetsk People's Republic', the 'Luhansk People's Republic', the 'Kharkiv Partisans', and associated groups and individuals.

(d) The Russian Federation shall take all measures at its disposal to ensure that any groups operating in Ukraine that have previously received transfers from the territory of the Russian Federation of money, weapons, vehicles, equipment, training, or personnel will refrain from carrying out acts of terrorism against civilians in Ukraine."

With respect to CERD, in paragraph 24 of its Request for the indication of provisional measures, Ukraine asks the Court to indicate the following provisional measures:

"*(a)* The Russian Federation shall refrain from any action which might aggravate or extend the dispute under CERD before the Court or make it more difficult to resolve.

(b) The Russian Federation shall refrain from any act of racial discrimination against persons, groups of persons, or institutions in the territory under its effective control, including the Crimean peninsula.

(c) The Russian Federation shall cease and desist from acts of political and cultural suppression against the Crimean Tatar people, including suspending the decree banning the *Mejlis* of the Crimean Tatar People and refraining from enforcement of this decree and any similar measures, while this case is pending.

(d) The Russian Federation shall take all necessary steps to halt the disappearance of Crimean Tatar individuals and to promptly investigate those disappearances that have already occurred.

(e) The Russian Federation shall cease and desist from acts of political and cultural suppression against the ethnic Ukrainian people in Crimea, including suspending restrictions on Ukrainian-language education and respecting ethnic Ukrainian language and educational rights, while this case is pending."

The Court is fully aware of the context in which the present case has been brought before it, in particular the fighting taking place in large parts of eastern Ukraine and the destruction, on 17 July 2014, of Malaysia Airlines Flight MH17 while it was flying over Ukrainian territory *en route* between Amsterdam and Kuala Lumpur, which have claimed a large number of lives. Nevertheless, the case before the Court is limited in scope. In respect of the events in the eastern part of its territory, Ukraine has brought proceedings only under the ICSFT. With regard to the events in Crimea, Ukraine's claim is based solely upon CERD and the Court is not called upon, as Ukraine expressly recognized, to rule upon any issue other than allegations of racial discrimination made by the latter.

II. Prima facie *jurisdiction* (paras. 17–62)

The Court begins by observing that, when a request for the indication of provisional measures is submitted to it, it need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case. In the present case, it notes that Ukraine seeks to found the jurisdiction of the Court on Article 24, paragraph 1, of the ICSFT and on Article 22 of CERD. The Court must therefore first seek to determine whether the jurisdictional clauses contained in these instruments *prima facie* confer upon it jurisdiction to rule on the merits of the case, enabling it—if the other necessary conditions are fulfilled—to indicate provisional measures.

1. Existence of a dispute concerning the interpretation or application of the ICSFT and CERD (paras. 22–39)

After observing that Ukraine and the Russian Federation are parties to both conventions at issue in the present case, the Court points out that both Article 24, paragraph 1, of the ICSFT and Article 22 of CERD make the Court's jurisdiction conditional on the existence of a dispute arising out of the interpretation or application of the respective convention. At this stage of the proceedings, the Court must therefore examine (1) whether the record shows a disagreement on a point of law or fact between the two States; and (2) whether that disagreement concerns "the interpretation or application" of the respective convention.

(a) The International Convention for the Suppression of the Financing of Terrorism (paras. 24–31)

The Court considers that, as it appears from the record of the proceedings, the Parties differ on the question of whether the events which occurred in eastern Ukraine starting from the spring of 2014 have given rise to issues relating to their rights and obligations under the ICSFT. It notes that Ukraine contends that the Russian Federation has failed to respect its obligations under Articles 8, 9, 10, 11, 12 and 18. In particular, Ukraine maintains that the Russian Federation has failed to take appropriate measures to prevent the financing of terrorism in Ukraine by public and private actors on the territory of the Russian Federation and that it has repeatedly refused to investigate, prosecute, or extradite "offenders within its territory brought to its attention by Ukraine". The Russian Federation positively denies that it has committed any of the violations set out above.

The Court considers that at least some of the allegations made by Ukraine appear to be capable of falling within the scope of the ICSFT *ratione materiae*. It is of the view that the above-mentioned elements are sufficient at this stage to establish *prima facie* the existence of a dispute between the Parties concerning the interpretation and application of the ICSFT. During the hearings, the question of the definition of "funds" in Article 1, paragraph 1, of the Convention was raised. The question was also raised whether acts of financing of terrorist activities by the State itself fall within the scope of the Convention. For the purposes of determining the existence of a dispute relating to the Convention, the Court considers that it does not need to make any pronouncement on these issues.

(b) The International Convention on the Elimination of All Forms of Racial Discrimination (paras. 32–39)

The Court considers that, as evidenced by the documents before it, the Parties differ on the question of whether the events which occurred in Crimea starting from late February 2014 have given rise to issues relating to their rights and obligations under CERD. The Court notes that Ukraine has claimed that the Russian Federation violated its obligations under this Convention by systematically discriminating against and mistreating the Crimean Tatars and ethnic Ukrainians in Crimea, suppressing the political and cultural expression of Crimean Tatar identity, banning the *Mejlis*, preventing Crimean Tatars and ethnic Ukrainians from gathering to celebrate and commemorate important cultural events, and by suppressing the Crimean Tatar language and Ukrainian-language education. The Russian Federation has positively denied that it has committed any of the violations set out above.

The Court is of the view that the acts referred to by Ukraine, in particular the banning of the *Mejlis* and the alleged restrictions upon the cultural and educational rights of Crimean Tatars and ethnic Ukrainians, appear to be capable of falling within the scope of CERD *ratione materiae*. In its opinion, the above-mentioned elements are sufficient at this stage to establish *prima facie* the existence of a dispute

between the Parties concerning the interpretation and application of CERD.

2. Procedural preconditions (paras. 40–61)

The Court further notes that the ICSFT and CERD set out procedural preconditions to be fulfilled prior to the seisin of the Court. Thus, under Article 24, paragraph 1, of the ICSFT, a dispute that "cannot be settled through negotiation within a reasonable time" shall be submitted to arbitration at the request of one of the parties, and may be referred to the Court only if the parties are unable to agree on the organization of the arbitration within six months from the date of the request. Under Article 22 of CERD, the dispute referred to the Court must be a dispute "not settled by negotiation or by the procedures expressly provided for in this Convention". In addition, Article 22 states that the dispute may be referred to the Court at the request of one of the parties thereto only if the parties have not agreed to another mode of settlement. The Court notes that neither Party contests that this latter condition is fulfilled in the case.

Regarding the negotiations to which both compromissory clauses refer, the Court observes that negotiations are distinct from mere protests or disputations and require a genuine attempt by one of the parties to engage in discussions with the other party, with a view to resolving the dispute. Where negotiations are attempted or have commenced, the precondition of negotiation is only met when the attempt to negotiate has been unsuccessful or where negotiations have failed, become futile or deadlocked. In order to meet the precondition of negotiation contained in the compromissory clause of a treaty, the subject-matter of the negotiations must relate to the subject-matter of the dispute, which, in turn, must concern the substantive obligations contained in the treaty in question.

At this stage of the proceedings, the Court first has to assess whether it appears that Ukraine genuinely attempted to engage in negotiations with the Russian Federation, with a view to resolving their dispute concerning the latter's compliance with its substantive obligations under the ICSFT and CERD, and whether Ukraine pursued these negotiations as far as possible. With regard to the dispute under the ICSFT, if the Court finds that negotiations took place but failed, it will also have to examine whether, prior to the seisin of the Court, Ukraine attempted to settle this dispute through arbitration, under the conditions provided for in Article 24, paragraph 1, of the Convention. With regard to CERD, along with the precondition of negotiation, Article 22 includes another precondition, namely the use of "the procedures expressly provided in the Convention". In this context, the Court will need to determine whether, for the purposes of its decision on the request for the indication of provisional measures, it is necessary to examine the question of the relationship between both preconditions and Ukraine's compliance with the second one.

(a) The International Convention for the Suppression of the Financing of Terrorism (paras. 47–54)

The Court notes that it appears from the record of the proceedings that issues relating to the application of the ICSFT with regard to the situation in eastern Ukraine have been raised in bilateral contacts and negotiations between the Parties. Diplomatic exchanges have taken place, in which Ukraine specifically referred to alleged breaches by the Russian Federation of its obligations under the ICSFT. Over a period of two years, the Parties also held four in-person negotiating sessions specifically addressed to the ICSFT. These facts demonstrate that, prior to the filing of the Application, Ukraine and the Russian Federation had engaged in negotiations concerning the latter's compliance with its substantive obligations under the ICSFT. It appears from the facts on the record that these issues could not then be resolved by negotiations.

With regard to the precondition relating to the submission of the dispute to arbitration, the Court notes that by a Note Verbale dated 19 April 2016, Ukraine submitted a request for arbitration to the Russian Federation. The Russian Federation responded by means of a Note Verbale dated 23 June 2016, in which it offered to discuss "issues concerning setting up" the arbitration at a meeting it suggested should be held a month later. By a Note Verbale dated 31 August 2016, Ukraine proposed to the Russian Federation to resort to the mechanism of an *ad hoc* chamber of this Court. In its Note Verbale to Ukraine, dated 3 October 2016, the Russian Federation rejected this proposal and submitted its own draft arbitration agreement and accompanying rules of procedure. At a meeting on 18 October 2016, the Parties discussed the organization of the arbitration but no agreement was reached. Further exchanges between the Parties did not resolve the impasse. It appears that, within six months from the date of the arbitration request, the Parties were unable to reach an agreement on its organization.

The Court is of the view that the above-mentioned elements are sufficient at this stage to establish, *prima facie*, that the procedural preconditions under Article 24, paragraph 1, of the ICSFT for the seisin of the Court have been met.

(b) The International Convention on the Elimination of All Forms of Racial Discrimination (paras. 55–61)

The Court recalls that it has earlier concluded that the terms of Article 22 of CERD established preconditions to be fulfilled before the seisin of the Court. It notes that, as evidenced by the record of the proceedings, issues relating to the application of that Convention with regard to the situation in Crimea have been raised in bilateral contacts and negotiations between the Parties, which have exchanged numerous diplomatic Notes and held three rounds of bilateral negotiations on this subject. These facts demonstrate that, prior to the filing of the Application, Ukraine and the Russian Federation engaged in negotiations regarding the question of the latter's compliance with its substantive obligations under CERD. It appears from the record that these issues had not been resolved by negotiations at the time of the filing of the Application.

Article 22 of CERD also refers to "the procedures expressly provided for" in the Convention. According to Article 11 of the Convention, "if a State Party considers that another State Party is not giving effect to the provisions of this Convention", the matter may be brought to the attention of the CERD Committee. Neither Party claims that the issues

in dispute have been brought to the attention of the CERD Committee. Although both Parties agree that negotiations and recourse to the procedures referred to in Article 22 of CERD constitute preconditions to be fulfilled before the seisin of the Court, they disagree as to whether these preconditions are alternative or cumulative. The Court considers that it need not make a pronouncement on the issue at this stage of the proceedings. Consequently, the fact that Ukraine did not bring the matter before the CERD Committee does not prevent the Court from concluding that it does have *prima facie* jurisdiction.

The Court considers, in view of all of the foregoing, that the procedural preconditions under Article 22 of CERD for the seisin of the Court have, *prima facie*, been complied with.

3. Conclusion as to prima facie jurisdiction (para. 62)

In light of the foregoing, the Court considers that, *prima facie*, it has jurisdiction pursuant to Article 24, paragraph 1, of the ICSFT and Article 22 of CERD to deal with the case to the extent that the dispute between the Parties relates to the "interpretation or application" of the respective convention.

III. The rights whose protection is sought and the measures requested (paras. 63–86)

The Court recalls that its power to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible. Moreover, a link must exist between the rights whose protection is sought and the provisional measures being requested.

1. The International Convention for the Suppression of the Financing of Terrorism (paras. 65–77)

The Court notes that the ICSFT imposes a number of obligations on States parties with regard to the prevention and suppression of the financing of terrorism. However, for the purposes of its request for the indication of provisional measures, Ukraine invokes its rights and the respective obligations of the Russian Federation solely under Article 18 of the Convention. Article 18 states in substance that States parties are obliged to co-operate to prevent the financing of terrorism, i.e., the provision or collection of funds with the intention that they should be used or in the knowledge that they are to be used in order to carry out acts of terrorism as defined in Article 2 of the Convention. Consequently, in the context of a request for the indication of provisional measures, a State party to the Convention may rely on Article 18 to require another State party to co-operate with it in the prevention of certain types of acts only if it is plausible that such acts constitute offences under Article 2 of the ICSFT.

The Court observes that the acts to which Ukraine refers have given rise to the death and injury of a large number of civilians. However, in order to determine whether the rights for which Ukraine seeks protection are at least plausible, it is necessary to ascertain whether there are sufficient reasons for considering that the elements set out in Article 2, such as intention and knowledge, as well as the element of purpose, are present. The Court is of the view that, at this stage of the proceedings, Ukraine has not put before it evidence which affords a sufficient basis to find it plausible that these elements are present. Therefore, it concludes that the conditions required for the indication of provisional measures in respect of the rights alleged by Ukraine on the basis of the ICSFT are not met. The Court points out that this conclusion is without prejudice to the Parties' obligation to comply with the requirements of the ICSFT, and, in particular, Article 18 thereof.

2. The International Convention on the Elimination of All Forms of Racial Discrimination (paras. 78–86)

The Court notes that CERD imposes a number of obligations on States parties with regard to the elimination of racial discrimination in all its forms and manifestations. For the purposes of CERD, the term "racial discrimination" includes discrimination on the basis of ethnic origin. The Court observes that there is a correlation between respect for individual rights, the obligations of States parties under CERD and the right of States parties to seek compliance therewith.

The Court notes that Articles 2 and 5 of CERD are intended to protect individuals from racial discrimination. Consequently, in the context of a request for the indication of provisional measures, a State party to CERD may avail itself of the rights under Articles 2 and 5 only if it is plausible that the acts complained of constitute acts of racial discrimination under the Convention. In the present case, on the basis of the evidence presented before the Court by the Parties, it appears that some of the acts complained of by Ukraine fulfil this condition of plausibility. This is the case with respect to the banning of the *Mejlis* and the alleged restrictions on the educational rights of ethnic Ukrainians.

The Court turns to the issue of the link between the rights claimed and the provisional measures requested. It observes that the provisional measures sought by Ukraine are aimed at preventing the Russian Federation from committing acts of racial discrimination against persons, groups of persons, or institutions in the Crimean peninsula (point *(b)*); preventing acts of political and cultural suppression against the Crimean Tatar people, including suspending the decree banning the *Mejlis* (point *(c)*); preventing the disappearance of Crimean Tatar individuals and ensuring prompt investigation of disappearances that have already occurred (point *(d)*); and preventing acts of political and cultural suppression against the ethnic Ukrainian people in Crimea, including suspending restrictions on Ukrainian-language education (point *(e)*). As the Court has already recalled, there must be a link between the measures which are requested and the rights which are claimed to be at risk of irreparable prejudice. In the current proceedings, this is the case with respect to the measures aimed at safeguarding the rights of Ukraine under Articles 2 and 5 of CERD, with regard to the ability of the Crimean Tatar community to conserve its representative institutions and with regard to the need to ensure the availability of Ukrainian-language education in schools in Crimea.

IV. Risk of irreparable prejudice and urgency (paras. 87–98)

Taking account of its earlier conclusion that the conditions required for the indication of provisional measures in respect of the rights invoked by Ukraine on the basis of the ICSFT are not met, the Court considers that the issue of the risk of irreparable prejudice and urgency arises only in relation to the provisional measures sought with regard to CERD.

The Court recalls that it has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of judicial proceedings, but that this power will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights in dispute before the Court gives its final decision.

The Court notes that certain rights in question in these proceedings, in particular the political, civil, economic, social and cultural rights stipulated in Article 5, paragraphs *(c)*, *(d)* and *(e)* of CERD, are of such a nature that prejudice to them is capable of causing irreparable harm. Based on the information before it at this juncture, the Court is of the opinion that Crimean Tatars and ethnic Ukrainians in Crimea appear to remain vulnerable.

In this regard, the Court takes note of the report on the human rights situation in Ukraine (16 May to 15 August 2016), whereby the Office of the United Nations High Commissioner for Human Rights (OHCHR) acknowledged that "the ban on the *Mejlis*, which is a self-government body with quasi-executive functions, appears to deny the Crimean Tatars—an indigenous people of Crimea—the right to choose their representative institutions", as well as of the report on the human rights situation in Ukraine (16 August to 15 November 2016), in which the OHCHR explained that none of the Crimean Tatar NGOs currently registered in Crimea can be considered to have the same degree of representativeness and legitimacy as the *Mejlis*, elected by the Crimean Tatars' assembly, namely the *Kurultai*. The Court also takes note of the report of the OSCE Human Rights Assessment Mission on Crimea (6 to 18 July 2015), according to which "[e]ducation in and of the Ukrainian language is disappearing in Crimea through pressure on school administrations, teachers, parents and children to discontinue teaching in and of the Ukrainian language". The OHCHR has observed that "[t]he start of the 2016–2017 school year in Crimea and the city of Sevastopol confirmed the continuous decline of Ukrainian as a language of instruction" (report on the human rights situation in Ukraine (16 August to 15 November 2016)). These reports show, *prima facie*, that there have been restrictions in terms of the availability of Ukrainian-language education in Crimean schools.

The Court considers that there is an imminent risk that the acts, as set out above, could lead to irreparable prejudice to the rights invoked by Ukraine.

V. Conclusion and measures to be adopted (paras. 99–105)

The Court concludes that the conditions required by its Statute for it to indicate provisional measures in respect of CERD are met. Reminding the Russian Federation of its duty to comply with its obligations under CERD, the Court considers that, with regard to the situation in Crimea, the Russian Federation must refrain, pending the final decision in the case, from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the *Mejlis*. In addition, the Russian Federation must ensure the availability of education in the Ukrainian language. The Court also deems it necessary to indicate a measure aimed at ensuring the non-aggravation of the dispute between the Parties.

With regard to the situation in eastern Ukraine, the Court reminds the Parties that the Security Council, in its resolution 2202 (2015), endorsed the "Package of Measures for the Implementation of the Minsk Agreements", adopted and signed in Minsk on 12 February 2015. The Court expects the Parties, through individual and joint efforts, to work for the full implementation of this "Package of Measures" in order to achieve a peaceful settlement of the conflict in the eastern regions of Ukraine.

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Separate opinion of Judge Owada

In light of the rationale of the provisional measures and of the jurisprudence of the Court on this matter, the requirements for provisional measures consists of two categories, i.e., *prima facie* jurisdiction of the Court and the plausibility of rights asserted, which relate to the scope of the legal framework for the Court's exercise of its power under Article 41 of the Statute, while the other two requirements, i.e., the risk of irreparable prejudice and urgency, belong to the discretionary power of the Court to determine whether to indicate provisional measures or not.

Based on this understanding, the first two categories can only be a provisional determination, and the applicable standard, especially for the plausibility test must be fairly low. The relevant jurisprudence of the Court corroborates this, and the choice of the word "plausible" suggests that it is equivalent to "possible" or "arguable" that the rights asserted exists.

In the present case, the rights asserted by Ukraine under the ICSFT are plausible, the Court's proposition in its paragraph 74 that "a State party to the [ICSFT] may rely on Article 18 to require another State party to co-operate with it in the prevention of certain types of acts only if it is plausible that such acts constitute offences under Article 2 of the ICSFT" does not agree with the established jurisprudence. All that Ukraine should be required to show is that its asserted rights under the ICSFT are "plausible" or "arguable".

Nevertheless, Judge Owada considers that the requesting party has not met the test of the real and imminent risk of irreparable prejudice in the present case, since many uncertainties persist as to whether the flow of financing as well as military supplies from one place to another is taking place and if so by whom and for what purpose. Furthermore, the asserted rights under Article 18 of the ICSFT could not be said to be at imminent risk in the sense that irreparable prejudice cannot be said to exist at this stage as Ukraine may still meaningfully demand the Russian Federation to seek for co-operation in good faith to implement its obligation for the future. For these

different reasons, Judge Owada concurs with the Court's decision not to grant provisional measures concerning the ICSFT.

Declaration of Judge Tomka

Although Judge Tomka agrees that the Russian Federation has certain obligations under the International Convention on the Elimination of All Forms of Racial Discrimination, he considers that the order made by the Court under point 1 *(a)* of the operative clause goes too far. He observes that the activities of the *Mejlis* were banned by order of the Supreme Court of Crimea, affirmed on appeal, due to alleged "extremist activities". He notes that the Court has given no consideration to the reasons for that ban which are elucidated in those decisions. Moreover, he observes that this Court does not act as a court of appeal from national courts and should not overturn domestic court decisions, in particular not at the stage of proceedings relating to requests for the indication of provisional measures.

Judge Tomka notes that the International Convention on the Elimination of All Forms of Racial Discrimination guarantees freedom from racial discrimination in the enjoyment of particular rights, but that the underlying rights are subject to possible limitations. He notes that the Court must, in considering whether to order provisional measures, weigh the parties' respective rights. While the Parties are in dispute regarding sovereignty over Crimea, an issue which is not before the Court, there is no dispute between the Parties as far as the applicability of the International Convention on the Elimination of All Forms of Racial Discrimination in that territory is concerned. Irrespective of the legal basis for the exercise of its control and jurisdiction in Crimea, the Russian Federation should be able to take measures necessary for public safety and security.

Finally, Judge Tomka considers that Ukraine did not establish that there was urgency in this case. He notes that Ukraine's claims are likely to be adjudicated in the next four years and that the Russian Federation pointed to the existence of other organizations that appear to be in a position to advance the interests of the Crimean Tatar community, at least to some extent, during the intervening period.

Separate opinion of Judge Cançado Trindade

1. In his separate opinion, composed of 12 parts, Judge Cançado Trindade begins by explaining that, although he has concurred with his vote to the adoption of the present Order indicating Provisional Measures of Protection, there are related issues underlying the present decision of the ICJ but left out of its reasoning, which he feels obliged to dwell upon, and to leave on the records the foundations of his own personal position thereon. Those issues are: *(a)* conceptual development of provisional measures of protection; *(b)* the test of vulnerability of segments of the population (human vulnerability in international case-law, and in the *cas d'espèce*); *(c)* utmost vulnerability of victims, further irreparable harm, and urgency of the situation; *(d)* the decisive test: human vulnerability over "plausibility" of rights; *(e)* the necessity and importance of provisional measures of protection in the *cas d'espèce*; *(f)* the concern of the international community with the living conditions of the population everywhere; *(g)* provisional measures, and the protection of the human person, beyond the strict inter-State dimension; *(h)* chronic violence and the tragedy of human vulnerability; *(i)* provisional measures, and the protection of people in territory; and *(j)* the autonomous legal regime of provisional measures of protection: duty of compliance with them, non-compliance and State responsibility, prompt determination of their breaches, and duty of reparation.

2. He begins by recalling the conceptual development of provisional measures of protection, and their gradual transposition from domestic into international (procedural) law, in the first half of the XXth century, in international arbitral and judicial practice (part II). Their juridical preventive character has thereby been clarified, singling out their relevance to the progressive development of international law itself. Judge Cançado Trindade ponders that "[p]rovisional measures of protection have indeed evolved historically, in my perception, from *precautionary* legal measures in domestic procedural law into jurisdictional guarantees of a preventive character in international procedural law, endowed with a truly *tutelary* character" (para. 4).

3. Furthermore,—he proceeds,—provisional measures of protection have paved the way for *continuous monitoring*, in prolonged situations of extreme gravity and urgency, seeking to avoid irreparable damage to persons, in particular those in a situation of great vulnerability, if not defencelessness (para. 5). It is thus important to keep on devoting attention to the conceptual development of the *autonomous legal regime* (para. 8) of those measures. In this respect, Judge Cançado Trindade recalls that, along the years (from 1999 up to the present), he has identified—in two international jurisdictions wherein such measures are endowed with a *conventional* basis—obligations emanating from provisional measures of protection *per se*, distinct from obligations eventually ensuing from a Judgment as to the merits (and reparations); furthermore, non-compliance with the former—as well as the latter—generates the responsibility of the State, with legal consequences.

4. The rights in provisional measures are not necessarily identical to those vindicated in the merits stage. The injured party or victim may, in Judge Cançado Trindade's perception, appear promptly in the realm of provisional measures of protection, in case of non-compliance with them. Accordingly, non-compliance with, or breach of, such measures, engages autonomously the international responsibility of the State at issue, within the domain of provisional measures of protection, irrespective of the subsequent Judgments as to the merits of the concrete cases (para. 9). Hence the utmost importance of compliance with those measures for the realization of justice itself, and for the progressive development of international law, in face of the "increasing violence in the world today, everywhere"; there is thus need "to keep on enhancing the institute of provisional measures of protection" (para. 10).

5. The present case of the *Application of the ICSFT Convention and of the CERD Convention*,—he proceeds,

referring to the ICJ's relevant *jurisprudence constante*,—is not the first one wherein the alleged vulnerability of segments of the population concerned is brought to the Court's attention, in its consideration of provisional measures of protection. The greater the human vulnerability, the greater the needs of protection of those affected by it. It is thus

> "significant that, in our times, cases pertaining to situations of extreme adversity or vulnerability of human beings have been brought to the attention of the ICJ as well as other international tribunals. This is, in my perception, a sign of the new paradigm of the humanized international law, the new *jus gentium* of our times, sensitive and attentive to the needs of protection of the human person in any circumstances of vulnerability. The case-law of international human rights tribunals is particularly illustrative in this respect" (para. 17, and cf. para. 53).

6. After reviewing such international case-law, Judge Cançado Trindade focuses on human vulnerability in the present case, a point raised in the *Request* for provisional measures in the *cas d'espèce*, in respect of the fundamental right to life and other basic rights of the members of the affected segments of the population (paras. 21–22). He recalls that, in the oral phase of the present proceedings (public hearings before the ICJ of 6 to 9 March 2017), the contending parties addressed, each one in its own way, the test of vulnerability of segments of the population, in face of massive internal displacement and other fatalities in the areas affected (paras. 23–26).

7. In addition,—he continues,—also "in the documents submitted to the ICJ by both parties, shortly before the public hearings, evidence was produced of the utmost vulnerability of segments of the local population (e.g., in eastern Ukraine)", for example, "several reports on the human rights situation in Ukraine (mainly of the Office of the United Nations High Commissioner for Human Rights, OHCHR), containing accounts of *indiscriminate shelling* of the civilian population from all sides" (para. 27, and cf. paras. 28–29 and 31–33). And he adds that, according to those reports,

> "For instance, indiscriminate shelling has struck and damaged residential buildings, hospitals, ambulances, schools, kindergartens, and a school football pitch. In addition to the attacks on schools (encompassing the military use of them), the OHCHR also reports attacks on churches (including on priests and parishioners). In some towns, up to 80 per cent of residential buildings and public facilities have been destroyed. Those injured and killed as a result of indiscriminate shelling have included women, children, and elderly people, among others" (para. 30).

8. There are also reports from other entities, e.g., the Organization for Security and Cooperation in Europe (OSCE), which refer to "ongoing hostilities, shelling and general insecurity", and "serious human rights violations", as the main reason for the massive internal displacement of persons in the areas affected (paras. 34–35). In face of the aforementioned indiscriminate shelling of civilians, bringing to the fore the high probability of further irreparable damage, and the urgency of the situation, the test of *human vulnerability*, in Judge Cançado Trindade's perception, paves the way, "even more cogently than the one of 'plausibility' of rights, for the indication of provisional measures of protection, whose ultimate beneficiaries, in the present circumstances, are human beings" (para. 36).

9. In his understanding, the misgivings of the use of the so-called "plausibility" test by the Court (paras. 37–38) end up "creating a difficulty or obstacle for the consideration and adoption of provisional measures of protection in relation to the dispute as a whole before the Court, encompassing both the ICSFT and the CERD Conventions, and extending to both Crimea and eastern Ukraine" (para. 39). He points out that this is not the first time within the ICJ that he deems it fit to warn against the uncertainties surrounding the so-called "plausibility" test (cf. para. 40).

10. He finds it regrettable that, along the present Order in *the cas d'espèce*,

> "the ICJ distracts attention from the key test of the vulnerability of victims (which it just briefly refers to, as in paras. 92 and 96) to the inconsistencies of so-called 'plausibility', whatever that might concretely mean. The rights to be protected in the *cas d'espèce* are rights ultimately of human beings (individually or in groups), to a far greater extent than rights of States" (para. 41).

And he adds:

> "The Court is here faced with a situation where the fundamental rights to life (and of living) and to the security and integrity of the person are at stake, in the circumstances of the *cas d'espèce*. The individuals concerned live (or survive) in a situation of great vulnerability. (…)
>
> The requirements for the granting of provisional measures of protection are the gravity of the situation, the urgency of the need of such measures, and the probability of irreparable harm. They are met in a situation like that of the *cas d'espèce*, putting at stake, in eastern Ukraine, the fundamental rights to life and to the security and integrity of the person, among others. They are insufficiently dealt with, or even eluded, in the present Court's Order, which, on the other hand, abounds in the aforementioned inconsistencies of invocation of the 'plausibility' test.
>
> As I have been sustaining along the years, time and time again, provisional measures of protection have an *autonomous legal regime* of their own. This being so, it is clear to me that human vulnerability is a test even more compelling than 'plausibility' of rights for the indication or ordering of provisional measures of protection. In so acknowledging and sustaining, one is contributing to the ongoing historical process of *humanization* of contemporary international law" (paras. 42–44).

11. In the present case of the *Application of the ICSFT Convention and of the CERD Convention*, in his understanding the Court is entitled and obliged, in view of the evidence produced before it, to indicate provisional measures of protection, on the basis of *both* the ICSFT Convention and of the CERD Convention (para. 45). At the stage of provisional measures, the Court cannot make definitive findings of fact nor findings of attribution of responsibility,—issues to be determined later on, at the stage of the merits; at the present stage, "the ICJ—as the International Court *of Justice*,—is under the duty to focus, on the basis of the evidence produced, on the protection of the vulnerable civilian population living

(or surviving) in the areas concerned" (para. 46). This situation,—he proceeds, —

> "has been ongoing since 2014 and continues to result in fatalities, deaths and bodily injuries. There were and there continue to be armed incidents causing loss of life or bodily injuries, which by their nature and gravity are inherently irreparable. There is urgency in the situation, and the Court is to protect the vulnerable segments of the population. The fact that after the two Minsk Agreements (of 5 September 2014 and 12 February 2015) the situation remains unstable, and the tensions and indiscriminate shelling (from all sides) are still ongoing, stresses the ICJ's duty to order provisional measures of protection.
>
> For its part, the CERD Convention is a core United Nations human rights Convention intended to protect rights of the human person at intra-State level. Accordingly, concern for the protection of vulnerable segments of the population must inform the Court's finding that the test of human vulnerability here applies, requiring provisional measures of protection. To this end, there is *prima facie* jurisdiction under the CERD Convention (*inter alia* Articles 2 (1) and 5 (*b*)), as well as under the ICSFT Convention (Article 18, as related to Article 2), and undue and groundless obstacles to access to justice thereunder are to be discarded" (paras. 47–48, and cf. para. 49).

12. Judge Cançado Trindade adds that the application of International Humanitarian Law and that of the ICSFT and CERD Conventions "are not mutually-excluding, but rather, they reinforce each other in the factual context of the *cas d'espèce*, so as to secure the protection due to persons in situations of great vulnerability" (para. 50). In his perception, the circumstances of the *cas d'espèce* "call for a *vue d'ensemble* of the relevant provisions of the ICSFT and CERD Conventions, and ILHR and IHL in the exercise of hermeneutics. Other main organs of the United Nations (like the General Assembly and the Security Council) have likewise expressed their concerns with the circumstances of the *cas d'espèce*" (para. 51).

13. Judge Cançado Trindade then observes that, as on previous occasions, it so happens that, in face of the victimization of vulnerable segments of the population in an ongoing armed conflict or hostilities, one can behold the "approximations and convergences" between, and the concomitant application of, International Humanitarian Law and other international Conventions (of human rights and others), a situation,—he adds,—that

> "clearly requires the recognition of the effects of the Convention at issue *vis-à-vis* others, *simples particuliers* (*Drittwirkung*). In the *cas d'espèce*, such is the case of the ICSFT and CERD Conventions: *Drittwirkung* has as incidence here, as both Conventions cover inter-individual relations as well, without thereby excluding the determination of State responsibility (even if by omission, a question for consideration at the subsequent stage of the merits)" (para. 52).

14. He further recalls, in a wider framework, that the cycle of World Conferences of the United Nations (along the nineties and beginning of the last decade), came significantly to disclose a common denominator, underlying the final documents they adopted, namely, "the recognition of the legitimacy of the concern of the international community as a whole with the *conditions of living* of the population everywhere" (para. 53). The II United Nations World Conference of Human Rights (Vienna, 1993), in particular, added an important element to this common denominator, namely, the special attention devoted to the *vulnerable segments* of the population everywhere; the protection of the vulnerable, in Judge Cançado Trindade's view, constitutes its great legacy (para. 54). The Declaration and Programme of Action of Vienna, final document adopted by the 1993 Vienna Conference, sought to concentrate special attention on persons suffering from discrimination and vulnerable groups, in greater need of protection. It much contributed to "the recognition of the *centrality* of victims in the present domain of protection", with special attention to their living conditions amidst great vulnerability (para. 55).

15. Part VIII of the present Separate opinion is devoted to the protection, by means of provisional measures, of the fundamental rights of the human person, beyond the strict inter-State dimension (paras. 56–61). Judge Cançado Trindade ponders that the vulnerability of human life,—which has attracted attention of philosophers along the centuries,—assumes a dramatic dimension in face of persisting and chronic violence, and even of policies leading to it. Judge Cançado Trindade ponders that "[h]umanist thinking has always stood against that, and in defence of human life, and dignified conditions of living" (para. 62),—as exemplified by the reflections of the universal writer L. Tolstoi (paras. 62–67). In situations of generalized violence,—he proceeds,—attention is to be focused on the affected human beings, well beyond a strictly inter-State outlook (paras. 68 and 71), so as "to protect human life", pursuant to "a humanist outlook" (para. 69); provisional measures of protection are "truly *tutelary*" (para. 72), calling for "a more pro-active posture" on the part of the Court (para. 73).

16. Judge Cançado Trindade then stresses that the autonomous legal regime of provisional measures of protection

> "is configured by the *rights* to be protected (not necessarily identical to those vindicated later in the merits stage), by the *obligations* emanating from the provisional measures of protection, generating autonomously State *responsibility*, with its legal consequences, and by the presence of (potential) victims already at the stage of provisional measures of protection.
>
> As the *cas d'espèce* shows, the claimed rights to be protected encompass the fundamental rights of human beings, such as the right to life, the right to personal security and integrity, the right not to be forcefully displaced or evacuated from one's home. The duty of compliance with provisional measures of protection brings to the fore another element configuring their autonomous legal regime, (…) in its component elements, namely: non-compliance and the prompt engagement of State responsibility; prompt determination by the Court of breaches of provisional measures of protection; and the ensuing duty of reparation for damages resulting from those breaches" (paras. 74–75, and cf. paras. 77–81).

17. In this domain,—he continues,—"international case-law seems to be preceding legal doctrine", and this

development portrays the relevance of the preventive dimension in contemporary international law; contemporary international tribunals are to foster this progressive development, "to the benefit of all the *justiciables*" (para. 82). This is a matter which requires "much reflection, from a humanist outlook" (para. 84). In the circumstances of the *cas d'espèce*, the decisive test, in his understanding, "is that of human vulnerability, rather than so-called 'plausibility' of rights" (para. 85). And he adds that

> "In face of the gravity of the situation, of urgency and risks of (further) irreparable damage, provisional measures of protection are required. Their indication is oriented by the principle *pro persona humana*, *pro victima*. Those measures bear witness to the current historical process of *humanization* of international law, which is irreversible. The protection of human beings in situations of great vulnerability has thus found expression at international law level in our times, as a sign of such historical process; yet, there remains a long way to go" (para. 85).

18. In his understanding, attention is to be concentrated on *victims* (including the potential ones),—be they individuals[1], groups of individuals[2], peoples or humankind[3], as subjects of international law,—and not on inter-State susceptibilities; he stresses that "[h]uman beings in vulnerability are the ultimate beneficiaries of provisional measures of protection, endowed nowadays with a truly *tutelary* character, as true jurisdictional guarantees of preventive character" (para. 86).

19. In the course of the proceedings leading to the adoption of the present Order, the situation of utmost vulnerability of segments of the population—calling for provisional measures of protection—was brought to the attention of the Court (part III, *supra*, and para. 87) and Judge Cançado Trindade finds, in conclusion, that it is

> "regrettable that such human vulnerability is not duly dealt with in the reasoning of the Court, nor expressly reflected in the *dispositif* of the present Order, where,—despite the constatation in that documentation of the situation of human vulnerability of segments of the population (e.g., under indiscriminate shelling),—the protection of the fundamental rights to life and to the security and integrity of the person is not even mentioned.
>
> Even so, point (2) of the *dispositif*, addressed to both contending Parties, and the only one covering the dispute as a whole before the Court (encompassing both the ICSFT and the CERD Conventions), in both Crimea and eastern Ukraine, in my understanding implicitly extends protection also to those fundamental rights, in ordering that '[b]oth Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve'.
>
> The principle of humanity comes to the fore. There are no restrictions *ratione personae* (e.g., attempting to focus exclusively on relations between States and individuals). International Conventions, like the two invoked in the present case (the ICSFT and the CERD Conventions), as I have already pointed out, have a *Drittwirkung* effect, they cover likewise inter-individual relations, without thereby excluding the subsequent consideration of State responsibility (as to the merits), even if by omission.
>
> After all, the principle of humanity permeates the whole *corpus juris* of contemporary international law (encompassing the converging trends of the International Law of Human Rights, International Humanitarian Law, International Law of Refugees, International Criminal Law). The principle of humanity has a clear incidence on the protection of persons in great vulnerability. The *raison d'humanité* prevails here over the *raison d'État*. Human beings stand in need, ultimately, of protection against evil, which lies within themselves" (paras. 88–91).

Separate opinion of Judge Bhandari

Judge Bhandari is in agreement with the Court's Order to indicate provisional measures in respect of the International Convention on the Suppression of All Forms of Racial Discrimination (CERD). However, he feels compelled to write a separate opinion in order to clarify his views concerning the Court's decision not to indicate provisional measures in relation to the International Convention for the Suppression of the Financing of Terrorism (ICSFT). In the facts and circumstances of the case, on the preliminary examination of the evidence provided by both Parties, Judge Bhandari is of the view that the Court ought to have indicated provisional measures in relation to the ICSFT.

In his opinion, Judge Bhandari deals both with the breaches of the ICSFT as alleged by Ukraine, and with the response of the Russian Federation, in order to ascertain whether a case has been made out for the indication of provisional measures.

In his opinion, Judge Bhandari examines each requirement for the indication of provisional measures in turn. First, he discusses *prima facie* jurisdiction. Second, he examines plausibility, with specific reference to whether the acts alleged by Ukraine fall within the scope of Article 2 of the ICSFT. Third, he turns to the existence of a real and imminent risk of irreparable prejudice. Fourth, he examines the presence of a link between the rights invoked by Ukraine and the provisional measures it requested. Since both Parties adduced extensive evidence to the Court in order to show that the requirements for the indication of provisional measures were or were not met, Judge Bhandari preliminarily examines such evidence in order to subsequently appraise it in accordance with the test laid down in the Court's jurisprudence for indicating provisional measures.

Concerning *prima facie* jurisdiction, Judge Bhandari is of the view that Ukraine adduced sufficient evidence to show that the requirements contained in the compromissory clause under Article 24 of the ICSFT are met. First, Ukraine demonstrated that a dispute *prima facie* exists between the Parties in

[1] As he pointed out in his separate opinions of the *A.S. Diallo* case (Judgments of 30 November 2010, merits; and of 19 June 2012, reparations).

[2] As he sustained in his dissenting and separate opinions in the case of *Questions Relating to the Obligation to Prosecute or Extradite* (Order of 28 May 2009, and Judgment of 20 July 2012, respectively), as well as in his dissenting opinion in the case of the *Application of the Convention against Genocide* (Judgment of 3 February 2015).

[3] As he upheld in his three recent dissenting opinions in the three cases of the *Obligations of Nuclear Disarmament* (Judgments of 5 October 2016).

relation to the ICSFT, by submitting numerous Notes Verbales showing the opposing views of the Parties concerning the Russian Federation's obligations under the Convention. Second, Ukraine showed that four rounds of negotiation were held between the Parties with respect to the ICSFT prior to filing the case with the Court. Third, Ukraine also showed that it sent a request for arbitration to the Russian Federation prior to filing the case with the Court. Accordingly, Judge Bhandari concludes that *prima facie* jurisdiction exists in respect of the ICSFT.

Concerning plausibility, Judge Bhandari agrees with the Court that the obligation under Article 18 of the ICSFT to co-operate to prevent terrorism financing only arises if the acts alleged by Ukraine plausibly fall within the scope of Article 2 of the ICSFT. Therefore, Judge Bhandari analyses the evidence adduced by both Parties with respect to the elements of the definition of terrorism under Article 2 of the ICSFT. Judge Bhandari is of the opinion that the evidence adduced by Ukraine is not effectively countered by the evidence submitted by the Russian Federation. According to him, the evidence shows that it is plausible that there has been a transfer of "funds" to armed groups in eastern Ukraine, and that such "funds" have been plausibly transferred with "intent or knowledge" that they would be used or were to be used to commit one of the offences under Article 2, paragraph 1 *(b)*, of the ICSFT. Moreover, Judge Bhandari is of the opinion that the numerous events in eastern Ukraine resulting in the loss of human lives show that there plausibly exists a pattern of targeting civilians and persons not taking direct part in hostilities, which also shows that the acts alleged by Ukraine were plausibly committed with the purpose of intimidating the population. Judge Bhandari is of the view that Ukraine adduced sufficient evidence to show that the rights whose protection it invoked at this stage in the proceedings are plausible.

Concerning the real and imminent risk of irreparable prejudice, Judge Bhandari is of the view that the continuous loss of human life in eastern Ukraine would make it impossible to restore the *status quo ante* after the final disposal of the case by the Court. Judge Bhandari also believes that the recent escalation of violence in eastern Ukraine, especially in Avdiivka, justifies a finding that the situation is urgent. Judge Bhandari also maintains that the provisional measures requested by Ukraine are linked to the rights whose protection it sought, and could therefore have been indicated by the Court.

Judge Bhandari concludes that, based on a preliminary examination of the evidence submitted by both Parties, the Court ought to have indicated provisional measures in relation to the ICSFT.

Declaration of Judge Crawford

Judge Crawford explained why the rights that the Court sought to protect by making a provisional measures order in relation to representative institutions of the Crimean Tatars, including the *Mejlis*, are plausible. He briefly described the modern history of the Sürgün, the collective expulsion of the Tatars from Crimea which was in effect from 1944 to 1989. He set out the key constitutional features of the main representative bodies of the Crimean Tatars, the Qurultay and the *Mejlis*, noting that the *Mejlis* have a particular representative role. The definition of racial discrimination may be met by a restriction that directly implicates a racial or ethnic group, even if it is not expressly based on those grounds. He noted that the banning of the *Mejlis* needed to be carefully justified given the historical persecution of the Crimean Tatars and the role of the *Mejlis* in advancing and protecting the rights of the people it represents at a time of disruption and change. At this stage, there was sufficient evidence to conclude that the measure in question plausibly affects rights under CERD.

Separate opinion of Judge *ad hoc* Pocar

Judge *ad hoc* Pocar has voted with the majority in favour of the indication of all provisional measures concerning the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), as well as of the provisional measure asking both Parties to refrain from any action which might aggravate or extend the dispute.

However, he cannot share the view that the required threshold of plausibility is not met for the indication of at least some of the provisional measures requested by Ukraine with respect to the International Convention for the Suppression of the Financing of Terrorism (ICSFT). In his view, it is plausible that the indiscriminate attacks alleged by Ukraine are intended to spread terror, and that the persons providing funds to those who conducted these attacks had knowledge that such funds were to be used for that purpose. He would therefore have favoured the indication of a provisional measure requesting the Russian Federation to provide Ukraine with the full co-operation required by Article 18 of the ICSFT, including by exercising appropriate control over its borders, in order to prevent any offences within the meaning of that convention from being committed.

Moreover, Judge *ad hoc* Pocar has concerns regarding the implications of the present Order for the good administration of justice. He wonders how parties, in the future, will, in light of the Court's decision, reconcile the need to provide sufficient evidence to prove their case on plausibility and Practice Direction XI. In his view, the risk that parties over-address the merits could also overburden the Court and endanger its ability to promptly indicate provisional measures.

Finally, Judge *ad hoc* Pocar wishes to further clarify why the shooting-down of flight MH17 was not examined in detail by the Court. He recalls that the case under the ICSFT refers to both the shooting-down of flight MH17 and indiscriminate shelling on the ground, which may fall under Article 2, paragraph 1, letters *(a)* and *(b)* respectively. To avoid any misunderstanding, he considers that the Court could have made clear that it needs not, at this stage of the proceedings and due to lack of urgency—the airspace over eastern Ukraine being closed since July 2014—examine the applicability of letter *(a)*, and hence of the Montreal Convention, to the shooting-down of flight MH17.

Separate opinion of Judge *ad hoc* Skotnikov

1. Judge *ad hoc* Skotnikov concurs with the Court's conclusion that the conditions required by its Statute for the indication of provisional measures in respect of the rights alleged by Ukraine under the International Convention for the Suppression of the Financing of Terrorism are not met and supports the Court's decision not to indicate provisional measures on the basis of that Convention.

2. He explains that the right which Ukraine seeks to protect with respect to the *Mejlis* does not fall within the scope of the International Convention on the Elimination of all Forms of Racial Discrimination. In his view, the measure contained in paragraph 1 *(a)* of the operative clause may be seen as prejudging the merits. For these reasons, he voted against it.

3. As to the second provisional measure, which requests Russia to ensure the availability of education in the Ukrainian language, Judge *ad hoc* Skotnikov does not think that in this case the conditions of irreparable harm and urgency are met. However, he felt compelled to support this measure of general and non-controversial nature.

222. JADHAV CASE (INDIA *v.* PAKISTAN) [PROVISIONAL MEASURES]

Order of 18 May 2017

On 18 May 2017, the International Court of Justice delivered its Order on the request for the indication of provisional measures submitted by India in the *Jadhav Case (India* v. *Pakistan)*. In its order, the Court indicated various provisional measures.

The Court was composed as follows: President Abraham; Judges Owada, Cançado Trindade, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian; Registrar Couvreur.

*

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The operative paragraph (para. 61) of the Order reads as follows:

"…

The Court,

I. Unanimously,

Indicates the following provisional measures:

Pakistan shall take all measures at its disposal to ensure that Mr. Jadhav is not executed pending the final decision in these proceedings and shall inform the Court of all the measures taken in implementation of the present Order.

II. Unanimously,

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

*

* *

Judge Cançado Trindade appended a separate opinion to the Order of the Court; Judge Bhandari appended a declaration to the Order of the Court.

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* *

Application and Request for the indication of provisional measures (paras. 1–14)

The Court begins by recalling that, by an Application filed in the Registry on 8 May 2017, the Republic of India instituted proceedings against the Islamic Republic of Pakistan alleging violations of the Vienna Convention on Consular Relations of 24 April 1963 "in the matter of the detention and trial of an Indian National, Mr. Kulbhushan Sudhir Jadhav", sentenced to death in Pakistan. Accompanying its Application, India also submitted a Request for the indication of provisional measures, asking the Court to indicate:

"*(a)* that the Government of the Islamic Republic of Pakistan take all measures necessary to ensure that Mr. Kulbhushan Sudhir Jadhav is not executed;

(b) that the Government of the Islamic Republic of Pakistan report to the Court the action it has taken in pursuance of sub-paragraph *(a)*; and

(c) that the Government of the Islamic Republic of Pakistan ensure that no action is taken that might prejudice the rights of the Republic of India or Mr. Kulbhushan Sudhir Jadhav with respect to any decision th[e] Court may render on the merits of the case."

Further to a request by India, the President of the Court, in accordance with Article 74, paragraph 4, of the Rules of Court, called upon the Pakistani Government, pending the Court's decision on the Request for the indication of provisional measures, "to act in such a way as will enable any order the Court may make on this Request to have its appropriate effects".

I. Prima facie *jurisdiction* (paras. 15–34)

The Court observes at the outset that it may indicate provisional measures only if the provisions relied on by the Applicant appear, *prima facie*, to afford a basis on which its jurisdiction could be founded, but need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case.

It recalls that, in the present case, India seeks to found 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 (hereinafter the "Optional Protocol" and the "Vienna Convention", respectively). The Court must therefore first seek to determine whether Article I of the Optional Protocol *prima facie* confers upon it jurisdiction to rule on the merits, enabling it—if the other necessary conditions are fulfilled—to indicate provisional measures. It recalls that Article I provides 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."

The Court observes that India claims that a dispute exists between the Parties regarding the interpretation and application of Article 36, paragraph 1, of the Vienna Convention, which provides as follows:

"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 also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(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."

The Court points out that the Applicant seeks to ground its jurisdiction in Article 36, paragraph 1, of the Statute and Article I of the Optional Protocol; it does not seek to rely on the Parties' declarations under Article 36, paragraph 2, of the Statute. It recalls in this regard that, when the jurisdiction of the Court is founded on particular "treaties and conventions in force" pursuant to Article 36, paragraph 1, of its Statute, it becomes irrelevant to consider the objections to other possible bases of jurisdiction. Therefore, any reservations contained in the declarations made by the Parties under Article 36, paragraph 2, of the Statute cannot impede the Court's jurisdiction specially provided for in the Optional Protocol. Thus, the Court considers that it need not examine these reservations further.

Turning to the question of whether, on the date the Application was filed, a dispute over the interpretation or application of the Vienna Convention appeared to exist between the Parties, the Court notes that the Parties do indeed appear to have differed, and still differ today, on the question of India's consular assistance to Mr. Jadhav under the Vienna Convention. While India has maintained at various times that Mr. Jadhav should have been (and should still be) afforded consular assistance under the Vienna Convention, Pakistan has stated that such an assistance would be considered in the light of India's response to its request for assistance in the investigation process concerning him in Pakistan. The Court concludes that these elements are sufficient at this stage to establish *prima facie* that, on the date the Application was filed, a dispute existed between the Parties as to the question of consular assistance under the Vienna Convention with regard to the arrest, detention, trial and sentencing of Mr. Jadhav.

The Court then observes that, in order to determine whether it has jurisdiction—even *prima facie*—the Court must also ascertain whether such a dispute is one over which it might have jurisdiction *ratione materiae* on the basis of Article I of the Optional Protocol. In this regard, the Court notes that the acts alleged by India are capable of falling within the scope of Article 36, paragraph 1, of the Vienna Convention, which, *inter alia*, guarantees the right of the sending State to communicate with and have access to its nationals in the custody of the receiving State (sub-paragraphs *(a)* and *(c)*), as well as the right of its nationals to be informed of their rights (sub-paragraph *(b)*). The Court considers that the alleged failure by Pakistan to provide the requisite consular notifications with regard to the arrest and detention of Mr. Jadhav, as well as the alleged failure to allow communication and provide access to him, appear to be capable of falling within the scope of the Vienna Convention *ratione materiae*.

In the view of the Court, the aforementioned elements sufficiently establish, at this stage, the existence between the Parties of a dispute that is capable of falling within the provisions of the Vienna Convention and that concerns the interpretation or application of Article 36, paragraph 1, thereof.

The Court also notes that the Vienna Convention does not contain express provisions excluding from its scope persons suspected of espionage or terrorism. It concludes that, at this stage, it cannot be concluded that Article 36 of the Vienna Convention cannot apply in the case of Mr. Jadhav so as to exclude on a *prima facie* basis the Court's jurisdiction under the Optional Protocol.

Consequently, the Court considers that it has *prima facie* jurisdiction under Article I of the Optional Protocol to entertain the dispute between the Parties.

II. The rights whose protection is sought and the measures requested (paras. 35–48)

The Court recalls that its power to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible. Moreover, a link must exist between the rights which form the subject of the proceedings before the Court on the merits of the case and the provisional measures being sought.

The Court thus first considers whether the rights claimed by India on the merits, and for which it is seeking protection, are plausible. It observes that the rights to consular notification and access between a State and its nationals, as well as the obligations of the detaining State to inform without delay the person concerned of his rights with regard to consular assistance and to allow their exercise, are recognized in Article 36, paragraph 1, of the Vienna Convention.

The Court recalls that India submits that one of its nationals has been arrested, detained, tried and sentenced to death in Pakistan without having been notified by the same State or afforded access to him. The Applicant also asserts that Mr. Jadhav has not been informed without delay of his rights with regard to consular assistance or allowed to exercise them. Pakistan does not challenge these assertions.

In the view of the Court, taking into account the legal arguments and evidence presented, it appears that the rights invoked by India in the present case on the basis of Article 36, paragraph 1, of the Vienna Convention are plausible.

The Court then turns to the issue of the link between the rights claimed and the provisional measures requested. The Court notes that the provisional measures sought by

India consist in ensuring that the Government of Pakistan will take no action that might prejudice its alleged rights, in particular that it will take all measures necessary to prevent Mr. Jadhav from being executed before the Court renders its final decision. The Court considers that these measures are aimed at preserving the rights of India and of Mr. Jadhav under Article 36, paragraph 1, of the Vienna Convention. It concludes that a link exists between the right claimed by India and the provisional measures being sought.

III. Risk of irreparable prejudice and urgency (paras. 49–56)

The Court recalls that it has the power to indicate provisional measures when irreparable prejudice could be caused to rights in dispute, but that that power will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights concerned.

Without prejudging the result of any appeal or petition against the decision to sentence Mr. Jadhav to death, the Court considers that, as far as the risk of irreparable prejudice to the rights claimed by India is concerned, the mere fact that Mr. Jadhav is under such a sentence and might therefore be executed is sufficient to demonstrate the existence of such a risk.

The Court considers that there is considerable uncertainty as to when a decision on any appeal or petition could be rendered and, if the sentence is maintained, as to when Mr. Jadhav could be executed. Pakistan has indicated that any execution of Mr. Jadhav would probably not take place before the end of August 2017. For the Court, this suggests that an execution could take place at any moment thereafter, before it has given its final decision in the case. The Court also notes that Pakistan has given no assurance that Mr. Jadhav will not be executed before the Court has rendered its final decision. In those circumstances, the Court is satisfied that there is urgency in the present case.

The Court adds, with respect to the criteria of irreparable prejudice and urgency, that the fact that Mr. Jadhav could eventually petition Pakistani authorities for clemency, or that the date of his execution has not yet been fixed, are not *per se* circumstances that should preclude the Court from indicating provisional measures. The Court notes that the issues brought before it in this case do not concern the question whether a State is entitled to resort to the death penalty.

IV. Conclusion and measures to be adopted (paras. 57–60)

The Court concludes from all the above considerations that the conditions required by its Statute for it to indicate provisional measures are met and that certain measures must be indicated in order to protect the rights claimed by India pending its final decision. Under the present circumstances, the Court considers it appropriate for it to order that Pakistan shall take all measures at its disposal to ensure that Mr. Jadhav is not executed pending the final decision in these proceedings and shall inform the Court of all the measures taken in implementation of the present Order.

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Concurring Opinion of Judge Cançado Trindade

1. In his Concurring Opinion, composed of seven parts, Judge Cançado Trindade begins by pointing out that, having concurred with his vote to the adoption of the present Order indicating Provisional Measures of Protection, there are certain aspects pertaining to the matter dealt with therein to which he attaches great importance. He feels thus obliged to append his Concurring Opinion thereto, so as to leave on the records the foundations of his own personal position thereon. He purports to address the selected points bringing them into the realm of juridical epistemology.

2. The points he proceeds to examine (part I) are: *(a)* rights of States and of individuals as subjects of international law; *(b)* presence of rights of States and of individuals together; *(c)* the right to information on consular assistance in the framework of the guarantees of the due process of law; *(d)* the fundamental (rather than "plausible") human right to be protected: provisional measures as jurisdictional guarantees of a preventive character; *(e)* the autonomous legal regime of provisional measures of protection; and *(f)* the humanization of international law as manifested in the domain of consular law.

3. The present *Jadhav* case concerns alleged violations of the 1963 Vienna Convention on Consular Relations with regard to the detention and trial of an Indian national (Mr. K.S. Jadhav), sentenced to death (on 10 April 2017) by a Court Martial in Pakistan. Keeping in mind the distinct lines of arguments advanced by the two contending parties (India and Pakistan) before the ICJ, he observes at first that the present case "brings to the fore rights of States and of individuals emanating directly from international law" under Article 36(1) of the 1963 Vienna Convention, as related to the United Nations Covenant on Civil and Political Rights (paras. 5–6).

4. Judge Cançado Trindade stresses that, in "contemporary international law, rights of States and of individuals are indeed to be considered altogether, they cannot be dissociated from each other" (para. 7). He recalls that, before the turn of the century, the Inter-American Court of Human Rights [IACtHR] delivered its pioneering Advisory Opinion n° 16 on the *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (of 1 October 1999), advancing the proper hermeneutics of Article 36 (1) *(b)* of the 1963 Vienna Convention, reflecting the impact thereon of the *corpus juris* of the International Law of Human Rights (ILHR).

5. On that occasion,—he further recalls,—he appended a Concurring Opinion appended to that Advisory Opinion n° 16, wherein he examined that impact, putting an end to the "old monopoly of the State of the condition of being subject of rights", and demystifying the constraints of an outdated voluntarist positivism (para. 8). He then warned that those constraints "had wrongly been indifferent to other areas of human knowledge, as well as to the existential time of human beings", with its "obsession with the autonomy of the 'will' of the States", and he added:

> "It so happens that the very emergence and consolidation of the *corpus juris* of the ILHR are due to the reaction of the

universal juridical conscience to the recurrent abuses committed against human beings, often warranted by positive law: with that, the Law came to the encounter of human beings, the ultimate *titulaires* of their inherent rights protected by its norms (…).

In the framework of this new *corpus juris*, one cannot remain indifferent to the contribution of other areas of human knowledge, nor to the existential time of human beings. (…) [T]he right to information on consular assistance (…), "cannot nowadays be appreciated in the framework of exclusively inter-State relations, as contemporary legal science has come to admit that the contents and effectiveness of juridical norms accompany the evolution of time, not being independent of this latter" (…).

Thus, (…) Article 36 (1) *(b)* of the aforementioned 1963 Vienna Convention, in spite of having preceded in time the provisions of the two United Nations Covenants on Human Rights (of 1966), could no longer be dissociated from the international norms of protection of human rights concerning the guarantees of the due process of law and their evolutive interpretation" (paras. 9–11).

6. Judge Cançado Trindade holds (part III) that "States and individuals are subjects of contemporary international law; the crystallization of the subjective individual right to information on consular assistance bears witness of such evolution" (para. 12). The ICJ itself took into account the ILHR in the case of *Hostages in Tehran* (Provisional Measures, Order of 15 December 1979) (paras. 12–13), and, much later, the "presence of rights of States and of individuals together" was acknowledged in express terms by ICJ in the case of *Avena and Other Mexican Nationals* (Judgment of 31 March 2004, para. 40), where it stated that "violations of the rights of the individual under Article 36 [of the 1963 Vienna Convention] may entail a violation of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the rights of the individual" (para. 14).

7. The present *Jadhav* case affords, in his view, yet another occasion to keep in mind the formation of an *opinio juris communis* to this effect (para. 16), corresponding to a new *ethos* of our times (para. 18). It has thus become indispensable to link, for the purpose of protection,—he ponders,—"the right to information on consular assistance with the guarantees of the due process of law" set forth in the instruments of the ILHR, bearing witness of the process of *humanization* of international law, as manifested in particular also in the domain of consular law nowadays (part IV).

8. Provisional measures of protection—he proceeds—have become true *jurisdictional guarantees* of a preventive character (paras. 7 and 22), safeguarding, to begin with, the fundamental and non-derogable (rather than "plausible") right to life (in addition to the right to liberty and security of person, and the right to a fair trial) (part V). Judge Cançado Trindade draws attention to the importance of compliance with provisional measures of protection, as illustrated by the IACtHR's Orders in the case (of so-called "mandatory" death penalty) of *James and Others versus Trinidad and Tobago* (1998–2000), where the condemned individuals were not executed and the condemnatory sentences of the national tribunals were commuted (paras. 20–21).

9. Judge Cançado Trindade next considers the "autonomous legal regime of provisional measures of protection" (part VI), in its component elements, namely: "the rights to be protected, the obligations proper to provisional measures of protection; the prompt determination of responsibility (in case of non-compliance), with its legal consequences; the presence of the victim (or potential victim, already at this stage), and the duty of reparations for damages" (para. 24). He proceeds that, even though the proceedings in contentious case before the ICJ keep on being strictly inter-State ones (by "attachment to an outdated dogma of the past"), this in no way impedes that the beneficiaries of protection in given circumstances are the human beings themselves, individually or in groups,—as he pointed out also in his Dissenting Opinion in the case concerning *Questions Relating to the Obligation to Prosecute or to Extradite* (Order of 28 May 2009), and in his Separate opinion in the case of *Application of the International Convention for the Suppression of the Financing of Terrorism [ICSFT] and of the International Convention on the Elimination of All Forms of Racial Discrimination [CERD]* (Order of 19 April 2017) (para. 25).

10. Judge Cançado Trindade comes to the last part of his Concurring Opinion addressing the ongoing historical process of the humanization of international law (part VII), manifesting itself, as in the present *Jadhav* case, in particular also in the domain of consular law. He recalls that, already in his earlier Concurring Opinion in the IACtHR's Advisory Opinion n° 18 on the *Juridical Condition and Rights of Undocumented Migrants* (of 17 September 2003), he examined this process singling out the relevance, in its evolution, of *fundamental principles*, laying on the foundations themselves of the law of nations (*le droit des gens*, as foreseen by the "founding fathers" of the discipline), as well as of the emergence of *jus cogens* and the corresponding obligations *erga omnes* of protection, in their horizontal and vertical dimensions (para. 28). Those principles,—he added therein,

> "form the *substratum* of the legal order itself, revealing the *right to the Law (droit au Droit)*, of which are *titulaires* all human beings, irrespective of their statute of citizenship or any other circumstance (…). Without such principles,—which are truly *prima principia*,—wherefrom norms and rules emanate and wherein they find their meaning, the 'legal order' simply is not accomplished, and ceases to exist as such" (para. 29).

11. In his view, the "great legacy of the juridical thinking of the second half of the XXth century (…) has been, by means of the emergence and evolution of the ILHR, the rescue of the human being as subject" of the law of nations, endowed with international legal personality and capacity (para. 30). This was due—he proceeds—to "the awakening of the *universal juridical conscience*",—the "*recta ratio* inherent to humanity,—as the ultimate *material source* of the law of nations, standing well above the 'will' of individual States" (para. 30). And Judge Cançado Trindade concludes:

> "That outlook has decisively contributed to the formation, *inter alia* and in particular, of an *opinio juris communis* as to the right of individuals, under Article 36 (1) *(b)* of the 1963 Vienna Convention, reflecting the ongoing process of humanization of international law, encompassing

relevant aspects of consular relations. Always faithful to this humanist universal outlook, I deem it fit to advance it, once again, in the present Concurring Opinion in the Order that the ICJ has just adopted today, 15 May 2017, in the *Jadhav Case*.

The ICJ has, after all, shown awareness that the provisional measures of protection rightly indicated by it in the present Order (resolutory point I of the *dispositif*) are aimed at preserving the rights of *both* the State and the individual concerned (…) under Article 36 (1) the 1963 Vienna Convention. The jurisprudential construction to this effect, thus, to my satisfaction, keeps on moving forward. Contemporary international tribunals have a key role to play in their common mission of realization of justice" (paras. 32–33).

Declaration of Judge Bhandari

Judge Bhandari agrees with the decision of the Court to indicate provisional measures. However, he wishes to place on record his views concerning the requirements for indicating provisional measures in more detail. This case gives rise to questions pertaining to the basic violation of human rights through the denial of consular access during the pendency of court proceedings in Pakistan, which culminated with Mr. Kulbhushan Sudhir Jadhav's death sentence.

In his declaration, Judge Bhandari starts by outlining the facts pertaining to India's Application instituting proceedings as well as to India's Request for provisional measures. Subsequently, Judge Bhandari discusses the four requirements for the indication of provisional measures: (i) *prima facie* jurisdiction; (ii) plausibility; (iii) real and imminent risk of irreparable prejudice; and (iv) the link between the rights claimed on the merits and the provisional measures requested. Each requirement is examined in turn.

Concerning the facts of the case, Judge Bhandari underscores the uncertainty surrounding the circumstances in which Mr. Jadhav was arrested. He makes clear that the Parties do not agree as to where Mr. Jadhav was arrested, whether within or outside Pakistan. Judge Bhandari stresses the diplomatic intercourse between the Parties relating to India's consular rights with respect to Mr. Jadhav. Despite thirteen Notes Verbales sent by India to Pakistan, Pakistan has not communicated to India either the charges against Mr. Jadhav, or the documents of the proceedings against him. He also outlines the court proceedings in order for Mr. Jadhav to obtain a revision of his death sentence or to be granted clemency. It is currently not clear whether any of these domestic remedies have been triggered by Mr. Jadhav himself, while it is known that his mother has filed, in an act of desperation, both for appeal under Section 133 (B) of the Pakistan Army Act 1952, and for clemency under Section 131 of the 1952 Act. Moreover, Judge Bhandari emphasizes that Pakistan's denial of consular access has determined a situation in which India has no direct knowledge of the charges against Mr. Jadhav, as well as of the proceedings against him in the Pakistani military court.

Before addressing the requirements for indicating provisional measures, Judge Bhandari analyses the role of the 2008 India-Pakistan Agreement on Consular Access. He agrees with the Court that there is nothing which prima facie suggests that the Parties, by concluding the 2008 Agreement, have limited or set aside their reciprocal obligations under the Vienna Convention on Consular Relations. On the contrary, the 2008 Agreement amplifies, confirms and extends the Parties' reciprocal obligations relating to consular assistance, for which the Vienna Convention is a framework. Therefore, the 2008 Agreement does not exclude the Court's jurisdiction in the present case. Moreover, Judge Bhandari stresses that India did not rely on the 2008 Agreement, but only claimed the violation of the Vienna Convention. Specifically, India did not rely on the 2008 Agreement because: (i) Article 102, paragraph 2, of the United Nations Charter precludes the invocation before United Nations organs of treaties not registered with the United Nations, such as the 2008 Agreement: (ii) Article 73 of the Vienna Convention does not preclude the conclusion of treaties confirming, supplementing, amplifying or extending the provisions of the Vienna Convention itself; and (iii) Article 73 of the Vienna Convention does not allow the dilution of its provisions by means of the conclusion of subsequent consular treaties.

On *prima facie* jurisdiction, Judge Bhandari recalls that India based the Court's jurisdiction on Article 36, paragraph 1, of the Statute, read in conjunction with Article I of the Optional Protocol to the Vienna Convention. Neither India nor Pakistan made any reservation to that Optional Protocol. He draws a parallel with *LaGrand*, in which the Court found to have *prima facie* jurisdiction based on the same legal provisions, to which both Germany and the United States of America had not made any reservations. Judge Bhandari states that the Court was right in following the previous jurisprudence in *Equatorial Guinea* v. *France*, in which it was held that, in order to find it has *prima facie* jurisdiction, the Court must satisfy itself that there *prima facie* exists a dispute between the Parties and that such a dispute *prima facie* falls within the scope of the treaty invoked. According to Judge Bhandari, the *prima facie* existence of a dispute is confirmed by the exchange between the Parties of Notes Verbales on the subject of consular access to Mr. Jadhav. Moreover, such a dispute falls within the scope of the Vienna Convention *ratione materiae* since the facts alleged by India all pertain to its consular rights guaranteed under the Vienna Convention, yet allegedly denied by Pakistan.

With reference to plausibility, Judge Bhandari recalls the Court's test as recently restated in *Ukraine* v. *Russia*. According to Judge Bhandari, the rights claimed by India on the merits are plausible because they concern consular access to a person who is indisputably an Indian national, who has been arrested, tried and convicted in a foreign country. Therefore, it is plausible that India holds the rights it is claiming in the circumstances of the case, namely with respect to Mr. Jadhav. He recalls that the International Law Commission's commentary to the Draft Articles that became the Vienna Convention clearly stated that the right to consular assistance as provided for in Article 36, paragraph 1, of the Vienna Convention applies also in cases where a national court decision has become final. In the present case, it is possible that appeals against Mr. Jadhav's death sentence are still ongoing, and therefore rights to consular access plausibly apply.

Concerning real and imminent risk of irreparable prejudice, Judge Bhandari analysed the similarities between the present case and the previous death penalty cases: *Breard*, *LaGrand* and *Avena*. In all such cases, which involved facts comparable to the facts of Mr. Jadhav's case, the Court found that the execution of the foreign national would have irreparably prejudiced the rights of consular access claimed by the sending State on the merits. Moreover, Judge Bhandari clarified that it does not matter, for making a finding of urgency, how long a period of time is likely to elapse before Mr. Jadhav is executed. So long as there is a real risk that Mr. Jadhav would be executed before the final disposal of the case by the Court, there is urgency in the circumstances.

On the link between the provisional measures requested and the rights claimed on the merits, Judge Bhandari again highlighted the continuity between the previous death penalty cases and the present case. In all such cases, the Court always indicated that the respondent State should not execute the person whose consular rights were at stake in the proceedings before the Court, and that the respondent State should inform the Court as to the measures taken in the implementation of the order. Therefore, Judge Bhandari agreed that the same provisional measures should be indicated in the present case.

Judge Bhandari concludes that a clear case has been made out for the indication of provisional measures under Article 41 of the Statute. Consequently, during the pendency of the proceedings before the Court, Mr. Kulbhushan Sudhir Jadhav shall not be executed. In addition to issues of consular relations, this is a case in which it regrettably appears, on a preliminary examination of the facts, that the basic human rights of Mr. Jadhav have been violated by not allowing India to have consular access to him after his arrest and during the pendency of the criminal proceedings against him in Pakistan.

223. ALLEGED VIOLATIONS OF SOVEREIGN RIGHTS AND MARITIME SPACES IN THE CARIBBEAN SEA (NICARAGUA *v.* COLOMBIA) [COUNTER-CLAIMS]

Order of 15 November 2017

On 15 November 2017, the International Court of Justice delivered its Order on the admissibility of the counter-claims submitted by Colombia in the case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*. In its Order, the Court found that the third and fourth counter-claims submitted by Colombia were admissible and fixed time-limits for the filing of further written pleadings.

The Court was composed as follows: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian; Judges *ad hoc* Daudet, Caron; Registrar Couvreur.

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The operative paragraph (para. 82) of the Order reads as follows:

"…

The Court,

(A) (1) By fifteen votes to one,

Finds that the first counter-claim submitted by the Republic of Colombia is inadmissible as such and does not form part of the current proceedings;

In favour: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian; Judge *ad hoc* Daudet;

Against: Judge *ad hoc* Caron;

(*2*) By fifteen votes to one,

Finds that the second counter-claim submitted by the Republic of Colombia is inadmissible as such and does not form part of the current proceedings;

In favour: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian; Judge *ad hoc* Daudet;

Against: Judge *ad hoc* Caron;

(*3*) By eleven votes to five,

Finds that the third counter-claim submitted by the Republic of Colombia is admissible as such and forms part of the current proceedings;

In favour: President Abraham; Vice-President Yusuf; Judges Owada, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Bhandari, Robinson; Judge *ad hoc* Caron;

Against: Judges Tomka, Gaja, Sebutinde, Gevorgian; Judge *ad hoc* Daudet;

(*4*) By nine votes to seven,

Finds that the fourth counter-claim submitted by the Republic of Colombia is admissible as such and forms part of the current proceedings;

In favour: President Abraham; Vice-President Yusuf; Judges Owada, Bennouna, Cançado Trindade, Xue, Bhandari, Robinson; Judge *ad hoc* Caron;

Against: Judges Tomka, Greenwood, Donoghue, Gaja, Sebutinde, Gevorgian; Judge *ad hoc* Daudet;

(B) Unanimously,

Directs Nicaragua to submit a Reply and Colombia to submit a Rejoinder relating to the claims of both Parties in the current proceedings and *fixes* the following dates as time-limits for the filing of those pleadings:

For the Reply of the Republic of Nicaragua, 15 May 2018;

For the Rejoinder of the Republic of Colombia, 15 November 2018; and

Reserves the subsequent procedure for further decision."

*

* *

Vice-President Yusuf appended a declaration to the Order of the Court; Judges Tomka, Gaja, Sebutinde, Gevorgian and Judge *ad hoc* Daudet appended a joint opinion to the Order of the Court; Judge Can*çado Trindade* appended a declaration to the Order of the Court; Judges Greenwood and Donoghue appended separate opinions to the Order of the Court; Judge *ad hoc* Caron appended a dissenting opinion to the Order of the Court.

*

* *

The Court begins by recalling that, on 26 November 2013, Nicaragua instituted proceedings against Colombia on the basis of Article XXXI of the Pact of Bogotá with regard to a dispute concerning "violations of Nicaragua's sovereign rights and maritime zones declared by the Court's Judgment of 19 November 2012 [in the case concerning *Territorial and Maritime Dispute* (*Nicaragua* v. *Colombia*)] and the threat of the use of force by Colombia in order to implement these violations". It further recalls that, on 19 December 2014, Colombia raised preliminary objections to the jurisdiction of the Court. By a Judgment dated 17 March 2016, the Court found that it had jurisdiction, on the basis of Article XXXI of the Pact of Bogotá, to adjudicate upon the dispute between Nicaragua and Colombia regarding the alleged violations by Colombia of Nicaragua's rights in the maritime zones which, according to Nicaragua, the Court declared appertain to Nicaragua in its above-mentioned Judgment of 19 November 2012. In its Counter-Memorial filed on 17 November 2016, Colombia submitted four counter-claims. Having recalled that, under Article 80, paragraph 1, of the Rules of Court, two requirements must be met for the Court to be able to entertain a counter-claim, namely, that the counter-claim "comes within the jurisdiction of the Court" and that it "is directly connected with the subject-matter of the claim of the other party", the Court deems it appropriate in the present case to begin with the question whether Colombia's counter-claims

are directly connected with the subject-matter of Nicaragua's principal claims.

I. Direct connection (paras. 22–55)

A. First and second counter-claims (paras. 26–39)

The Court notes that Colombia's formulations of the first and second counter-claims differ in the submissions contained at the end of the Counter-Memorial, and in the body of the Counter-Memorial and in its Written Observations. While broadly similar in scope, these formulations are worded in a different way. In this respect, the Court notes that submissions formulated by the Parties at the end of their written pleadings must be read in light of the arguments developed in the body of those pleadings. In the present case, the Court further observes that the arguments of the Parties on direct connection are based on the wording used by Colombia in the body of its Counter-Memorial and Written Observations. Consequently, for the purposes of considering the admissibility of the first and second counter-claims as such, the Court will refer to the wording used by Colombia in the body of its Counter-Memorial and Written Observations.

The Court begins by observing that both the first and second counter-claims relate to Nicaragua's purported violations of its obligation to protect and preserve the marine environment. The first counter-claim is based on Nicaragua's alleged breach of a duty of due diligence to protect and preserve the marine environment of the south-western Caribbean Sea. The second counter-claim deals with Nicaragua's breach of its alleged duty of due diligence to protect the right of the inhabitants of the San Andrés Archipelago, in particular the Raizales, to benefit from a healthy, sound and sustainable environment. The Court notes that Colombia characterizes the second claim as a "logical consequence" of the first one and that Nicaragua does not challenge this assertion. Therefore, the Court will examine the first and second counter-claims jointly, keeping in mind, nevertheless, that they are separate.

The Court observes that a majority of the incidents referred to by Colombia in its first and second counter-claims allegedly occurred in Nicaragua's exclusive economic zone (EEZ), and more specifically in the maritime area around the Luna Verde Bank, which is located in the Seaflower Biosphere Reserve. Yet, in its counter-claims, Colombia also refers to certain incidents that have allegedly taken place within Colombia's territorial sea and the Joint Regime Area with Jamaica (around Serranilla and Bajo Alicia). However, since the number of these incidents is limited and most of the incidents referred to by Colombia have allegedly occurred in the maritime area around the Luna Verde Bank in Nicaragua's EEZ, the Court is of the view that Colombia's first and second counter-claims essentially relate to the same geographical area that is the focus of Nicaragua's principal claims.

With regard to the alleged facts underpinning Colombia's first and second counter-claims and Nicaragua's principal claims, respectively, the Court observes that Colombia relies on the alleged failure of Nicaragua to protect and preserve the marine environment in the south-western Caribbean Sea. In particular, Colombia contends that private Nicaraguan vessels have engaged in predatory fishing practices and have been destroying the marine environment of the south-western Caribbean Sea, thus preventing the inhabitants of the San Andrés Archipelago, including the Raizal community, from benefiting from a healthy, sound and sustainable environment and habitat. By contrast, the principal claims of Nicaragua are based upon Colombia's Navy's alleged interference with and violations of Nicaragua's exclusive sovereign rights and jurisdiction in Nicaragua's EEZ. Nicaragua states that Colombia has prevented Nicaraguan fishing vessels and its naval and coast guard vessels from navigating, fishing and exercising jurisdiction in Nicaragua's EEZ. Thus, the Court finds that the nature of the alleged facts underlying Colombia's first and second counter-claims and Nicaragua's principal claims is different, and that these facts do not relate to the same factual complex.

Furthermore, the Court is of the opinion that there is no direct legal connection between Colombia's first and second counter-claims, and Nicaragua's principal claims. First, the legal principles relied upon by the Parties are different. In its first two counter-claims, Colombia invokes rules of customary international law and international instruments relating essentially to the preservation and protection of the environment; by contrast, in its principal claims, Nicaragua refers to customary rules of the international law of the sea relating to the sovereign rights, jurisdiction and duties of a coastal State within its maritime areas, as reflected in Parts V and VI of UNCLOS. Secondly, the Parties are not pursuing the same legal aim by their respective claims. While Colombia seeks to establish that Nicaragua has failed to comply with its obligation to protect and preserve the marine environment in the south-western Caribbean Sea, Nicaragua seeks to demonstrate that Colombia has violated Nicaragua's sovereign rights and jurisdiction within its maritime areas.

The Court therefore concludes that there is no direct connection, either in fact or in law, between Colombia's first and second counter-claims and Nicaragua's principal claims.

B. Third counter-claim (paras. 40–46)

In its third counter-claim, Colombia requests the Court to declare that Nicaragua has infringed the customary artisanal fishing rights of the local inhabitants of the San Andrés Archipelago, including the indigenous Raizal people, to access and exploit their traditional fishing grounds. In particular, Colombia refers to various alleged acts of intimidation and harassment of the artisanal fishermen of the San Andrés Archipelago by Nicaragua's Navy—such as the seizure of the artisanal fishermen's products, fishing gear, food and other property.

The Court observes that the Parties agree that the facts relied upon by Colombia, in its third counter-claim, and by Nicaragua, in its principal claims, relate to the same time period (following the delivery of the 2012 Judgment) and the same geographical area (Nicaragua's EEZ). The Court further notes that the facts underpinning the third counter-claim of Colombia and the principal claims of Nicaragua are of the same nature in so far as they allege similar types of conduct of the naval forces of one Party *vis-à-vis* nationals of the other Party. In particular, Colombia complains about the treatment (alleged harassment, intimidation, coercive measures)

by Nicaragua's Navy of Colombian artisanal fishermen in the waters in the area of Luna Verde and in the area between Quitasueño and Serrana, while Nicaragua complains about the treatment (alleged harassment, intimidation, coercive measures) by Colombia's Navy of Nicaraguan licensed vessels fishing in the same waters. With regard to the legal principles relied upon by the Parties, the Court notes that Colombia's third counter-claim is based on the alleged right of a State and its nationals to access and exploit, under certain conditions, living resources in another State's EEZ. The Court further notes that Nicaragua's principal claims are based on customary rules relating to a coastal State's sovereign rights and jurisdiction in its EEZ, including the rights of a coastal State over marine resources located in this area. Thus, the respective claims of the Parties concern the scope of the rights and obligations of a coastal State in its EEZ. In addition, the Parties are pursuing the same legal aim by their respective claims since they are both seeking to establish the responsibility of the other by invoking violations of a right to access and exploit marine resources in the same maritime area.

The Court therefore concludes that there is a direct connection, as required by Article 80 of the Rules of Court, between Colombia's third counter-claim and Nicaragua's principal claims.

C. Fourth counter-claim (paras. 47–54)

In its fourth counter-claim, Colombia requests the Court to declare that Nicaragua, by adopting Decree No. 33–2013 of 19 August 2013, which established straight baselines and, according to Colombia, had the effect of extending its internal waters and maritime zones beyond what international law permits, has violated Colombia's sovereign rights and jurisdiction. Colombia considers that there is a direct connection between its fourth counter-claim and Nicaragua's principal claims regarding Colombia's Decree 1946 of 9 September 2013 establishing its "Integral Contiguous Zone", as subsequently amended by Decree 1119 of 17 June 2014. It recalls that Nicaragua contends that, by virtue of these decrees, Colombia has claimed for itself large parts of the maritime area that the Court had determined to belong to Nicaragua and has, therefore, allegedly "violated Nicaragua's maritime zones and sovereign rights".

The Court observes that the facts relied upon by Colombia in its fourth counter-claim and by Nicaragua in its principal claims—i.e. the adoption of domestic legal instruments fixing the limits or the extent of their respective maritime zones—relate to the same time period. It notes, above all, that both Parties complain about the provisions of domestic law adopted by each Party with regard to the delineation of their respective maritime spaces in the same geographical area, namely in the south-western part of the Caribbean Sea lying east of the Nicaraguan coast and around the Colombian Archipelago of San Andrés. The Court also notes that Nicaragua claims the respect of its rights in the EEZ and that the limits of Nicaragua's EEZ depend on its baselines, which are challenged in Colombia's fourth counter-claim. It further observes that, in their respective claims, Nicaragua and Colombia allege violations of the sovereign rights they each claim to possess on the basis of customary international rules relating to the limits, régime and spatial extent of the EEZ and contiguous zone, in particular in situations where these zones overlap between States with opposite coasts. In addition, it notes that the Parties are pursuing the same legal aim by their respective claims, since each is seeking a declaration that the other Party's decree is in violation of international law.

The Court therefore concludes that there is a direct connection, as required by Article 80 of the Rules of Court, between Colombia's fourth counter-claim and Nicaragua's principal claims.

II. Jurisdiction (paras. 56–77)

The Court then examines whether Colombia's third and fourth counter-claims meet the requirement of jurisdiction contained in Article 80, paragraph 1, of the Rules of Court.

The Court recalls that, in the present case, Nicaragua has invoked Article XXXI of the Pact of Bogotá as a basis of the Court's jurisdiction. According to this provision, the parties to the Pact recognize as compulsory the jurisdiction of the Court "so long as the present Treaty is in force". Under Article LVI, the Pact remains in force indefinitely, but "may be denounced upon one year's notice". Thus, after the denunciation of the Pact by a State party, the Pact shall remain in force between the denouncing State and the other parties for a period of one year following the notification of denunciation.

Colombia ratified the Pact of Bogotá on 14 October 1968, but subsequently gave notice of denunciation on 27 November 2012. The Application in the present case was submitted to the Court on 26 November 2013, i.e. after the transmission of Colombia's notification of denunciation, but before the one-year period referred to in Article LVI had elapsed. In its Judgment on preliminary objections of 17 March 2016, the Court noted that Article XXXI of the Pact was still in force between the Parties on the date that the Application in the present case was filed, and considered that the fact that the Pact subsequently ceased to be in force between the Parties did not affect the jurisdiction which existed on the date that the proceedings were instituted.

Colombia, relying on Article XXXI of the Pact of Bogotá, presented its counter-claims, which appeared as part of the submissions contained in its Counter-Memorial, on 17 November 2016, i.e. after the Pact of Bogotá had ceased to be in force between the Parties. Accordingly, the question that arises is whether, in a situation where a respondent has invoked in its counter-claims the same jurisdictional basis as that invoked by the applicant when instituting the proceedings, that respondent is prevented from relying on that basis of jurisdiction on the grounds that it has ceased to be in force in the period between the filing of the application and the filing of the counter-claims.

Once the Court has established jurisdiction to entertain a case, it has jurisdiction to deal with all its phases; the subsequent lapse of the title cannot deprive the Court of its jurisdiction. Although counter-claims are autonomous legal acts the object of which is to submit new claims to the Court, they are, at the same time, linked to the principal claims, and their purpose is to react to them in the same proceedings in respect

of which they are incidental. Consequently, the lapse of the jurisdictional title invoked by an applicant in support of its claims subsequent to the filing of the application does not deprive the Court of its jurisdiction to entertain counter-claims filed on the same jurisdictional basis.

The Court recalls that Colombia's third and fourth counter-claims were brought under the same title of jurisdiction as Nicaragua's principal claims. It further recalls that they have been found to be directly connected to these claims. It follows that the termination of the Pact of Bogotá as between the Parties did not, *per se*, deprive the Court of its jurisdiction to entertain those counter-claims.

The Court observes that, in order to establish if counter-claims come within its jurisdiction, it must also examine whether the conditions contained in the instrument providing for such jurisdiction are met. In this connection, it notes that it must first establish the existence of a dispute between the parties regarding the subject-matter of the counter-claims.

With regard to the third counter-claim, the Court considers that the Parties hold opposing views on the scope of their respective rights and duties in Nicaragua's EEZ. Nicaragua was aware that its views were positively opposed by Colombia, since, after the 2012 Judgment, the senior officials of the Parties exchanged public statements expressing their divergent views on the relationship between the alleged rights of the inhabitants of the San Andrés Archipelago to continue traditional fisheries, invoked by Colombia, and Nicaragua's assertion of its right to authorize fishing in its EEZ. According to Colombia, Nicaragua's naval forces have also intimidated Colombian artisanal fishermen who seek to fish in traditional fishing grounds. Therefore, it appears that a dispute has existed between the Parties regarding the alleged violation by Nicaragua of the rights at issue since November 2013, if not earlier.

With regard to the fourth counter-claim, the Court considers that the Parties hold opposing views on the question of the delineation of their respective maritime spaces in the south-western part of the Caribbean Sea, following the Court's 2012 Judgment. In this regard, the Court notes that, in a diplomatic Note of protest addressed to the Secretary-General of the United Nations on 1 November 2013, the Minister for Foreign Affairs of Colombia stated, *inter alia*, that "[t]he Republic of Colombia wishe[d] to inform the United Nations and its Member States that the straight baselines … claimed by Nicaragua [in Decree No. 33–2013 of 19 August 2013] [were] wholly contrary to international law". The Court further observes that, referring to this diplomatic Note, Nicaragua acknowledged that "[t]here [was] therefore a 'dispute' on this issue". Thus, it appears that a dispute has existed between the Parties on the matter since November 2013, if not earlier.

The Court then turns to the question whether, in accordance with the condition set out in Article II of the Pact of Bogotá, the matters presented by Colombia in its counter-claims could not "in the opinion of the Parties … be settled by direct negotiations".

With respect to the third counter-claim, the Court notes that, although following the 2012 Judgment the Parties have made general statements on issues relating to fishing activities of the inhabitants of the San Andrés Archipelago, they have never initiated direct negotiations in order to resolve these issues. This shows that the Parties did not consider that there was a possibility of finding a resolution of their dispute regarding the question of respect for traditional fishing rights through the usual diplomatic channels by direct negotiations. Therefore the Court considers that the condition set out in Article II of the Pact of Bogotá is met with respect to the third counter-claim.

With respect to the fourth counter-claim, the Court considers that Nicaragua's adoption of Decree No. 33–2013 of 19 August 2013 and Colombia's rejection of it by means of a diplomatic Note of protest from the Minister for Foreign Affairs of Colombia dated 1 November 2013, show that it would, in any event, no longer have been useful for the Parties to engage in direct negotiations on the matter through the usual diplomatic channels. The Court therefore finds that the condition set out in Article II of the Pact of Bogotá is met with respect to the fourth counter-claim.

The Court concludes that it has jurisdiction to entertain Colombia's third and fourth counter-claims.

III. Conclusion (paras. 78–81)

Given the above reasons, the Court concludes that the third and fourth counter-claims presented by Colombia are admissible as such. It considers it necessary for Nicaragua to file a Reply and Colombia a Rejoinder, addressing the claims of both Parties in the current proceedings, the subsequent procedure being reserved.

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* *

Declaration of Vice-President Yusuf

1. Judge Yusuf agrees in general with the Court's Order on the admissibility of Colombia's counter-claim. Nonetheless, he wishes to make some remarks expanding on certain aspects of the requirement on jurisdiction contained in Article 80 of the Rules of Court.

2. In Judge Yusuf's view, the Court has not previously elaborated in an adequate manner on what is meant by the jurisdictional limb of Article 80, which requires that a counter-claim "comes within the jurisdiction of the Court".

3. One aspect of counter-claims is their autonomous character. Another aspect of counter-claims is that they are intimately linked to and grafted onto the ongoing procedure that was initiated by the principal claim. Thus, while counter-claims are functionally autonomous in that they are addressed separately from the principal claim, they are also incidental in that they are affixed to the main proceedings.

4. The scope of jurisdiction of the Court is established according to the limits set forth in the instrument that founds the jurisdiction of the Court. It is imperative for the Court, when examining the admissibility of counter-claims that purport to be based on the same title of jurisdiction as the principal claim, to ensure that those counter-claims fall within

the scope of the jurisdiction thus prescribed. In this type of scenario, the Court need not establish its jurisdiction over the counter-claims *de novo*.

5. In the present case, the jurisdiction of the Court had already been established by the Court in its judgment on preliminary objections, which made it unnecessary for the Court to examine anew whether a "dispute" exists between the Parties. The Court should have simply ascertained whether the counter-claims fall within the bounds of the jurisdiction that the Court has already found to exist. This approach promotes procedural economy as it enables the Court to adjudicate in a holistic manner on the dispute brought before the Court.

6. It is moreover necessary to draw a distinction between counter-claims where the title of jurisdiction invoked differs from that of the principal claim and counter-claims that invoke the same title of jurisdiction as the principal claim. The Court has most commonly addressed counter-claims that purport to be based on the same title of jurisdiction as the principal claim; but Article 80 does not preclude the invocation of a title of jurisdiction different from that of the principal claim. It is only when the Court is faced with reliance on a different title of jurisdiction that it will have to address the question of jurisdiction over a counter-claim separately from the question of jurisdiction over the principal claim. Only in such a case must the validity of the jurisdictional basis of the counter-claims be assessed at the moment such counter-claims are brought to the Court.

Joint opinion of Judges Tomka, Gaja, Sebutinde, Gevorgian and Judge *ad hoc* Daudet

Judges Tomka, Gaja, Sebutinde, Gevorgian and Judge *ad hoc* Daudet take the view, in their joint opinion, that all four of Colombia's counter-claims are inadmissible as not falling within the jurisdiction of the Court, which is one of the requirements counter-claims must meet under Article 80, paragraph 1, of the Rules of Court.

The joint opinion outlines that a counter-claim, while a reaction to the claim of the applicant and thus "linked" to that claim, constitutes a separate and independent claim. Not only may such a claim survive withdrawal of the applicant's claim, but the Court also has discretion, under Article 80, paragraph 1, of the Rules of Court, to refuse to entertain a counter-claim if dealing with it would not serve the good and sound administration of justice. Indeed, the joint opinion notes that the Court has, in the past, made clear that a claim should normally be brought by way of application, and it is only to serve the administration of justice and procedural economy that claims are permitted to be brought as counter-claims.

The five judges observe that the Court in this case has reversed the order in which the two requirements under Article 80, paragraph 1, of the Rules of Court have been considered. While the Court is not bound to consider those requirements in a particular order, they note that it is more usual and logical to consider the requirements in the order in which they are set out in the latest version of Article 80, paragraph 1, of the Rules of Court, and it would have been more appropriate to do so in this case. In having found Colombia's first and second counter-claims inadmissible for lack of direct connection with Nicaragua's claims, the Court has left open whether those claims fall within the jurisdiction of the Court and could be brought by way of a new application. However, given that the Pact of Bogotá ceased to be in force with respect to Colombia with effect from 27 November 2013, and that Colombia does not have a declaration in force under Article 36, paragraph 2, of the Court's Statute, it cannot invoke any jurisdictional title as a basis for the Court's jurisdiction.

The joint opinion continues that, even if one takes the view that the Court's jurisdiction extends to the dispute between the Parties, the counter-claims of Colombia in this case do not concern the same dispute as that defined by the Court in its 2016 Judgment in this case. In respect of the first, second and third counter-claims, this is made clear by the 2016 Judgment itself, while the fourth counter-claim is also distinct from that dispute.

The joint opinion considers that there is no reason for asserting that the jurisdiction of the Court over identical claims should depend on whether they are presented as counter-claims or separately, by means of an application. It outlines that the majority's reliance on the *Nottebohm* case is inapposite to the issue of jurisdiction over counter-claims, that case being concerned, as it was, with the critical date for the establishment of the Court's jurisdiction over a claim instituted by way of a unilateral application. The fact that the two parties had Article 36, paragraph 2, declarations in force as at the date the application was filed sufficed to enable the Court to deal with all the aspects of the claim formulated therein. However, the Court in that case did not address, even implicitly, counter-claims.

The five judges query how it is possible for a counter-claim to be brought on the basis of a jurisdictional title that has lapsed, observing that the view of the Committee for the Revision of the Rules of Court appears to be contrary to the approach taken by the majority in this case. Moreover, the joint opinion raises concerns with the Court's speculation that an applicant might remove a basis of jurisdiction once an application has been filed. It observes, first, that such a situation has never occurred and, secondly, that such an action would raise concerns with respect to the pursuit by the applicant of litigation in good faith.

The joint opinion concludes that, the jurisdiction of the Court being based on consent and Colombia having withdrawn its consent prior to the filing of its counter-claims, Colombia could hardly have complained if the Court had dismissed all its counter-claims for lack of jurisdiction.

Declaration of Judge Cançado Trindade

1. In his Declaration, Judge Cançado Trindade observes at first that he has concurred with the adoption of the present Order (of 15 November 2017) of the International Court of Justice (ICJ) in the case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*

(Nicaragua v. *Colombia*), wherein the Court has taken the proper course in respect of the four counter-claims, namely, finding the first and second inadmissible, and the third and fourth admissible; yet he feels obliged, at the same time, to lay on the records his reflections on one particular point to which he attributes special relevance.

2. The point, as indicated in the Order, relates to the third counter-claim: it is that of the traditional fishing rights of the inhabitants of the Archipelago of San Andrés. Other related points—such as the *rationale* and admissibility of counter-claims, the cumulative requirements of Article 80(1) of the Rules of Court (jurisdiction and direct connection to the main claim), and the legal nature and effects of counter-claims,—have already been dealt with in detail by Judge Cançado Trindade in his extensive Dissenting Opinion in the case of *Jurisdictional Immunities of the State* (*Germany* v. *Italy*), *Counter-Claim*, *Order of* 6 *July 2010*, to which he deems it sufficient only to refer to in the present Declaration.

3. He adds that, even though counter-claims are interposed in the course of the process, being thus directly connected to the main claim and integrating the factual complex of the *cas d'espèce* (and so giving an impression of being "incidental"), this does not deprive them of their *autonomous* legal nature. Counter-claims "are to be treated on the same footing as the original claims, in faithful observance of the *principe du contradictoire*, thus ensuring the procedural equality of the parties. The original applicant assumes the role of counter-claim respondent (*reus in excipiendo fit actor*)" (para. 4).

4. Yet,—he proceeds,—the Court's practice in relation to counter-claims is still "in the making"; thus, "in the search for the realization of justice, there is still much to advance in this domain" (para. 5). In his perception, e.g. both claims and counter-claims "require, in my perception, prior public hearings, so as to obtain further clarifications from the contending parties" (para. 6). The Court, in any case, "is not bound by the submissions of the parties; it is perfectly entitled to go beyond them, so as *to say what the Law is (juris dictio)*. In enlarging the factual context to be examined in the adjudication of a dispute, main claims and counter-claims provide elements for a more consistent decision of the international tribunal seized of them" (para. 6).

5. Almost eight decades ago,—Judge Cançado Trindade recalls,—international legal doctrine was already apprehending the autonomous legal nature of counter-claims. Counter-claims are not simply a defence on the merits; in requiring the same degree of attention as the main claims, the counter-claims assist in achieving the sound administration of justice (*la bonne administration de la justice*). The same treatment is to be rigorously dispensed to the original claim and the counter-claim as a requirement of the sound administration of justice (*la bonne administration de la justice*). Judge Cançado Trindade adds that they are, both, autonomous, and should be treated on the same footing, with a strict observance of the *principe du contradictoire*; "only in this way *the procedural equality* of the parties (applicant and respondent, rendered respondent and applicant by the counter-claim) is secured" (paras. 7–8).

6. As to the key point he singles out, Judge Cançado Trindade observes that this is not the first time that, in a case of the kind, the ICJ takes into account, in an inter-State dispute, the basic needs and in particular the fishing rights of the affected segments of local populations, on both sides. It is significant—he recalls—that in three other ICJ decisions along the last eight years, concerning, like the present one, Latin American countries, attention has constantly been given to the point at issue, like in the *cas d'espèce*. Thus, in the Judgment of 13 July 2009 in the case of the *Dispute Regarding Navigational and Related Rights* (*Costa Rica* v. *Nicaragua*), the ICJ upheld the customary right of subsistence fishing of the inhabitants of *both* banks of the San Juan River (paras. 9–10).

7. Subsequently, in the Judgment of 20 April 2010 in the case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, the Court likewise took into account aspects pertaining to the affected segments of local populations on both sides, and consultation with them. In his Separate opinion appended to that Judgment, Judge Cançado Trindade ponders that the two aforementioned cases, concerning Latin American countries "attentive to the living conditions and public health of neighbouring communities", the ICJ has looked beyond the strictly inter-State dimension, into the segments of the populations concerned, and the Latin American States pleading before the ICJ have been faithful to the "deep-rooted tradition of Latin American international legal thinking, which has never lost sight of the relevance of doctrinal constructions and the general principles of law" (paras. 11–12).

8. More recently, in the Judgment of 27 January 2014 in the case concerning the *Maritime Dispute (Peru* v. *Chile)*, in the Pacific coast in South America, the ICJ expressed its awareness "of the importance that fishing has had for the coastal populations of both Parties"; it made clear once again—Judge Cançado Trindade proceeds—that, "despite the fact that the dispute was an inter-State one and the mechanism of peaceful judicial settlement is also an inter-State one, there is no reason to make abstraction of the needs of the affected persons in the reasoning of the Court, thus transcending the strict inter-State outlook" (para. 13)

9. Now, in the present case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*, opposing a Central American to a South American country, the point at issue again comes to the fore, and the ICJ, once again, takes due care to keep it in mind. Both contending parties have expressed concerns about the rights of their respective fishermen, seeming aware of the needs of each other's fishermen (para. 14). Special attention has been given to the fishermen from the local population of the Archipelago of San Andrés, Providencia and Santa Catalina ("*los pueblos raizales*", the *Raizal* people), in particular "their traditional and historic fishing rights from time immemorial, and the fact that they are vulnerable communities, highly dependent on traditional fishing for their own subsistence" (para. 14).

10. For its part, the ICJ, in the present Order, notes that the facts relied upon by both Parties relate to the same time period, the same geographical area, and are of the same nature

"in so far as they allege similar types of conduct of the naval forces of one Party *vis-à-vis* nationals of the other Party", engaged in "fishing in the same waters" (para. 16). In sequence, in its considerations on jurisdiction, the ICJ again dwells upon the traditional fishing rights of the inhabitants (artisanal fishermen) of the Archipelago of San Andrés (para. 18); it then finds that the third counter-claim "is admissible as such and forms part of the current proceedings" (resolutory point A(3) of the *dispositif*). In his appended Declaration, Judge Cançado Trindade ponders that the present case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*,

> "brings to the *floor rights of States together with rights of individuals*, artisanal fishermen seeking to fish, for their own subsistence, in traditional fishing grounds. This once again shows that in the inter-State *contentieux* before the ICJ, one cannot make abstraction of the rights of individuals (surrounded by vulnerability).
>
> The human factor has, in effect, marked presence in all four aforementioned cases concerning Latin American countries. In my perception, this is reassuring, bearing in mind that, after all, in historical perspective, it should not be forgotten that the State exists for human beings, and not *vice-versa*. Whenever the substance of a case pertains not only to States but to human beings as well, the human factor marks its presence, irrespective of the inter-State nature of the *contentieux* before the ICJ, and is to be taken duly into account by it, as it has done in the aforementioned Latin American cases. It is, furthermore, to be duly reflected in the Court's decision" (paras. 19–20).

11. Judge Cançado Trindade adds that Latin American international legal doctrine has "always been attentive also to the fulfilment of the needs and aspirations of peoples (keeping in mind those of the international community as a whole), in pursuance of superior common values and goals", as well as to "the importance of general principles of international law, reckoning that conscience (*recta ratio*) stands well above the 'will', faithfully in line with the longstanding jusnaturalist international legal thinking" (para. 21). And Judge Cançado Trindade concludes that

> "Latin American international legal doctrine has remained aware that, in doing so, it rightly relies on the perennial lessons and legacy of the 'founding fathers' of international law, going back to the flourishing of the *jus gentium (droit des gens*) in the XVIth and XVIIth centuries. The *jus gentium* they conceived was for everyone,—peoples, individuals and groups of individuals, and the emerging States. Solidarity marked its presence in the *jus gentium* of their times, as it does, in my view, also in the new *jus gentium* of the XXIst century.
>
> This is not the first time that I make this point within the ICJ[1]. After all, the exercise of State sovereignty cannot make abstraction of the needs of the populations concerned, from one country or the other. In the present case, the Court is faced, *inter alia*, with artisanal fishing for subsistence. States have human ends, they were conceived and gradually took shape in order to take care of human beings under their respective jurisdictions. Human solidarity goes *pari passu* with the needed juridical security of boundaries, land and maritime spaces. Sociability emanated from the *recta ratio* (in the foundation of *jus gentium*), which marked presence already in the thinking of the 'founding fathers' of the law of nations (*droit des gens*), and ever since and to date, keeps on echoing in human conscience" (paras. 22–23).

[1] He further refers, in this connection, to his Separate opinion appended to the Judgment of 16 April 2013 in the case of the *Frontier Dispute (Burkina Faso/Niger)*.

Separate opinion of Judge Greenwood

In his separate opinion, Judge Greenwood recalls that, while he has joined the majority with respect to the third counter-claim raised by Colombia, his reasoning differs in certain respects from that in the Order. Further, Judge Greenwood dissents in respect of the Court's finding on Colombia's fourth counter-claim.

In relation to the third counter-claim, Judge Greenwood considers that the test for a direct connection between the Nicaragua's claim and the third counter-claim has in this case revealed that the subject-matter of the dispute raised by the claim and the counter-claim are one and the same. He recalls that the Court has already, at the preliminary objections phase, considered whether the dispute raised by the principal claim falls within the terms of the jurisdictional limits of the Pact of Bogotá. As such, Judge Greenwood considers that it was unnecessary and somewhat artificial for the Court in its Order to engage in a separate analysis of the third counter-claim's ability to meet the Pact of Bogotá's jurisdictional requirements.

In relation to the fourth counter-claim, Judge Greenwood finds that the status of the area in which the incidents that lie at the heart of Nicaragua's claim are said to have taken place would not be affected by any decision regarding Nicaragua's baselines. On this basis, he disagrees with the Court in its finding of a direct connection between the counter-claim and the subject-matter of the principal claim.

Separate opinion of Judge Donoghue

1. The Pact of Bogotá was in force between the Parties when Nicaragua filed its Application, but that was no longer the case when Colombia submitted its counter-claims. In these circumstances, Judge Donoghue considers that the Court has jurisdiction over Colombia's counter-claims only to the extent that each counter-claim falls within the dispute that was the subject-matter of Nicaragua's Application.

2. After identifying the subject-matter of the dispute presented in Nicaragua's Application, Judge Donoghue concludes that the first, second and fourth counter-claims of Colombia do not fit within that subject-matter. These counter-claims fall outside the scope of the jurisdiction of the Court and are therefore inadmissible under Article 80, paragraph 1, of the Rules of Court. However, Judge Donoghue considers that the third counter-claim (concerning the alleged rights of inhabitants of Colombian islands to "artisanal" fishing without Nicaraguan authorization in maritime areas attributed to Nicaragua by the 2012 Judgment of the Court) falls within the jurisdiction of the Court, as it fits within the subject-matter

of the dispute presented in Nicaragua's Application and the other conditions of jurisdiction (existence of a dispute and negotiation precondition) are met. The third counter-claim is also "directly connected with the subject-matter of the claim" of Nicaragua, so it is admissible under the Rules of Court.

Dissenting opinion of Judge *ad hoc* Caron

Judge Caron dissents in respect of the Court's finding on Colombia's first and second counter-claims inasmuch as the Court finds that there is not a direct connection either in fact or in law, between Colombia's first and second counter-claims and the subject-matter of Nicaragua's principal claims. Judge Caron also dissents regarding the principles that animate the direct connection requirement. In particular, Article 80 of the Rules of Court does not require that the direct connection must exist both in fact and in law. Judge Caron dissents because in his view, the connection need only exist in fact or in law.

Judge Caron dissents from the Court's Order in respect of the direct connection because the Presidential Decree 1946 is a core part of the factual complex underlying Nicaragua's claim and the Court's direct connection analysis does not recognize that the factual complex underlying Colombia's first and second counter-claims consists of the very same facts that led in significant part to the issuance of the decree.

Judge Caron recalls that the Court's Order, in respect of the first and second counter-claims concludes in paragraph 37 that "the nature of the alleged facts underlying Colombia's first and second counter-claims and Nicaragua's principal claims is different". However, a central aspect of the subject-matter of Nicaragua's claim and the factual complex underlying it is Colombia's Integral Contiguous Zone established by its Presidential Decree 1946 of 9 September 2013. The Court's Order notes in paragraph 12 that Nicaragua in this proceeding seeks the revocation of "laws and regulations enacted by Colombia, which are incompatible with the Court's Judgment of 19 November 2012 including the provisions in the Decrees 1946 of 9 September 2013 …" And, in paragraph 70 of its Judgment of 17 March 2016 referring to "Colombia's proclamation of an 'Integral Contiguous Zone'", the Court observed that "the Parties took different positions on the legal implications of such action in international law". Given that the existence of Presidential Decree 1946 is an explicit target of Nicaragua's Application and a core part of the factual complex underlying its claim, it is critical for a direct connection analysis to recognize that the factual complex underlying the first and second Colombian counter-claims consists of the very same facts that led in significant part to the issuance of the decree. Presidential Decree 1946 is a part of the factual complex underlying both the subject-matter of Nicaragua's claim, and Colombia's first and second counter-claims. Therefore the first and second counter-claims are directly connected to the subject-matter of the claim of Nicaragua.

Turning to the direct connection requirement in law on Colombia's first and second counter-claims, Judge Caron points out that Article 80 of the Rules of Court does not require that the direct connection must exist both in fact and in law.

Judge Caron dissents because in his view, the connection need only exist in fact or law. Further, the legal aim of the Parties as regards the Presidential Decree 1946 is connected as Nicaragua requests the revocation of the Presidential Decree 1946 while Colombia's first and second counter-claims aim to validate the motivations which underlay the issue of the said decree.

Finally, Judge Caron emphasizes that the Court's unique role in the peaceful settlement of disputes means that the Court must recognize that a State in construing its application before the Court will frame its case from its perspective of the dispute. Therefore, it should not be significant whether the counter-claim and claim rely on the same legal instruments or principles.

Judge Caron concludes that the admission of the first and second counter-claims would have allowed for a fuller consideration of the international dispute presented in the proceedings and to the possibility of a longer-term peaceful resolution to that dispute.

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