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CONTENTS

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 2008 to 31 December 2012. It is the continuation of four earlier volumes on the same subject (ST/LEG/SER.F/1 and Addenda 1, 2 and 3), which covered the periods 1948-1991, 1992-1996, 1997-2002 and 2003-2007, respectively.[1]

During the period covered by this publication, the Court issued 28 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.

168. CASE CONCERNING SOVEREIGNTY OVER PEDRA BRANCA/PULAU BATU PUTEH, MIDDLE ROCKS AND SOUTH LEDGE (MALAYSIA/SINGAPORE)

Judgment of 23 May 2008

On 23 May 2008, the International Court of Justice rendered its Judgment in the case concerning *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*.

The Court was composed as follows: Vice-President Al-Khasawneh, Acting President; Judges Ranjeva, Shi, Koroma, Parra-Aranguren, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judges *ad hoc* Dugard, Sreenivasa Rao; Registrar Couvreur.

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The operative paragraph (para. 300) of the Judgment reads as follows:

" . . .

The Court,

(1) By twelve votes to four,

Finds that sovereignty over Pedra Branca/Pulau Batu Puteh belongs to the Republic of Singapore;

In favour: Vice-President, Acting President, Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Buergenthal, Owada, Tomka, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge *ad hoc* Sreenivasa Rao;

Against: Judges Parra-Aranguren, Simma, Abraham; Judge *ad hoc* Dugard;

(2) By fifteen votes to one,

Finds that sovereignty over Middle Rocks belongs to Malaysia;

In favour: Vice-President, Acting President, Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Parra-Aranguren, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge *ad hoc* Dugard;

Against: Judge *ad hoc* Sreenivasa Rao;

(3) By fifteen votes to one,

Finds that sovereignty over South Ledge belongs to the State in the territorial waters of which it is located.

In favour: Vice-President, Acting President, Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judges *ad hoc* Dugard, Sreenivasa Rao;

Against: Judge Parra-Aranguren."

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Judge Ranjeva appended a declaration to the Judgment of the Court; Judge Parra-Aranguren appended a separate opinion to the Judgment of the Court; Judges Simma and Abraham appended a joint dissenting opinion to the Judgment of the Court; Judge Bennouna appended a declaration to the Judgment of the Court; Judge *ad hoc* Dugard appended a dissenting opinion to the Judgment of the Court; Judge *ad hoc* Sreenivasa Rao appended a separate opinion to the Judgment of the Court.

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Chronology of the procedure and submissions of the Parties
(paras. 1–15)

By joint letter dated 24 July 2003, Malaysia and Singapore notified to the Registrar a Special Agreement between the two States, signed at Putrajaya on 6 February 2003 and having entered into force on 9 May 2003. In that Special Agreement they requested the Court to determine whether sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge belongs to Malaysia or Singapore.

Each of the Parties duly filed a Memorial, Counter-Memorial and Reply within the time-limits fixed by the Court, having regard to the provisions of the Special Agreement concerning written pleadings. The Special Agreement provided for the possible filing of a fourth pleading by each of the Parties. However, by a joint letter dated 23 January 2006, the Parties informed the Court that they had agreed that it was not necessary to exchange Rejoinders.

Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise the right conferred by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case: Malaysia chose Mr. Christopher John Robert Dugard and Singapore Mr. Sreenivasa Rao Pemmaraju.

Prior to her election as President of the Court, Judge Higgins, referring to Article 17, paragraph 2, of the Statute, recused herself from participating in the case. It therefore fell upon the Vice-President, Judge Al-Khasawneh, to exercise the functions of the presidency for the purposes of the case, in accordance with Article 13, paragraphs 1 and 2, of the Rules of Court.

Public hearings were held from 6 to 23 November 2007.

Geography, general historical background and history of the dispute
(paras. 16–36)

Geography
(paras. 16–19)

The Court first describes the geographical context of the dispute.

Pedra Branca/Pulau Batu Puteh is a granite island, measuring 137 m long, with an average width of 60 m and covering an area of about 8,560 sq m at low tide. It is situated at the

eastern entrance of the Straits of Singapore, at the point where the latter open up into the South China Sea. Pedra Branca/Pulau Batu Puteh is located at 1° 19' 48" N and 104° 24' 27" E. It lies approximately 24 nautical miles to the east of Singapore, 7.7 nautical miles to the south of the Malaysian state of Johor and 7.6 nautical miles to the north of the Indonesian island of Bintan. The names Pedra Branca and Batu Puteh mean "white rock" in Portuguese and Malay respectively. On the island stands Horsburgh lighthouse, which was erected in the middle of the nineteenth century.

Middle Rocks and South Ledge are the two maritime features closest to Pedra Branca/Pulau Batu Puteh. Middle Rocks is located 0.6 nautical miles to the south and consists of two clusters of small rocks about 250 m apart that are permanently above water and stand 0.6 to 1.2 m high. South Ledge, at 2.2 nautical miles to the south-south-west of Pedra Branca/Pulau Batu Puteh, is a rock formation only visible at low tide. [See sketch-map No. 2]

General historical background
(paras. 20–29)

The Court then gives an overview of the complex historical background of the dispute between the Parties (only parts of which are referred to below).

The Sultanate of Johor was established following the capture of Malacca by the Portuguese in 1511. By the mid-1600s the Netherlands had wrested control over various regions in the area from Portugal. In 1795, the British established rule over several Dutch possessions in the Malay archipelago, but in 1814 returned the former Dutch possessions in the Malay archipelago to the Netherlands.

In 1819 a British "factory" (trading station) was established on Singapore island (which belonged to Johor) by the East India Company, acting as an agent of the British Government in various British possessions. This exacerbated the tension between the United Kingdom and the Netherlands arising out of their competing colonial ambitions in the region. On 17 March 1824 a treaty was signed between the two colonial Powers. As a consequence of this Treaty, one part of the Sultanate of Johor fell within the British sphere of influence while the other fell within the Dutch sphere of influence.

On 2 August 1824 a Treaty of Friendship and Alliance (hereinafter "the Crawfurd Treaty") was signed between the East India Company and the Sultan of Johor and the Temenggong (a Malay high-ranking official) of Johor, providing for the full cession of Singapore to the East India Company, along with all islands within 10 geographical miles of Singapore.

Since the death of Sultan Mahmud III of Johor in 1812, his two sons had claimed the succession to the Johor Sultanate. The United Kingdom had recognized as the heir the elder son Hussein (who was based in Singapore), whereas the Netherlands had recognized as the heir the younger son Abdul Rahman (who was based in Riau, present day Pulau Bintan in Indonesia). On 25 June 1825 Sultan Abdul Rahman sent a letter to his elder brother in which he "donated" to him the part of the lands assigned to Sultan Hussein in accordance with the 1824 Anglo-Dutch Treaty.

Between March 1850 and October 1851 a lighthouse was constructed on Pedra Branca/Pulau Batu Puteh.

In 1867 the Straits Settlements, a grouping of East India Company territories established in 1826 consisting, *inter alia*, of Penang, Singapore and Malacca, became a British crown colony. In 1885 the British Government and the State of Johor concluded the Johor Treaty, which gave the United Kingdom overland trade and transit rights through the State of Johor and responsibility for its foreign relations, as well as providing for British protection of its territorial integrity.

The Straits Settlements were dissolved in 1946; that same year the Malayan Union was created, comprising part of the former Straits Settlements (excluding Singapore), the Federated Malay States and five Unfederated Malay States (including Johor). From 1946, Singapore was administered as a British Crown Colony in its own right. In 1948 the Malayan Union became the Federation of Malaya, a grouping of British colonies and Malay States under the protection of the British. The Federation of Malaya gained independence from Britain in 1957, with Johor as a constituent state of the Federation. In 1958 Singapore became a self-governing colony. In 1963 the Federation of Malaysia was established, formed by the merger of the Federation of Malaya with the former British colonies of Singapore, Sabah and Sarawak. In 1965 Singapore left the Federation and became a sovereign and independent State.

History of the dispute
(paras. 30–36)

The Court notes that, on 21 December 1979 Malaysia published a map entitled "Territorial Waters and Continental Shelf Boundaries of Malaysia" (hereinafter "the 1979 map"). The map depicted the island of Pedra Branca/Pulau Batu Puteh as lying within Malaysia's territorial waters. By a diplomatic Note dated 14 February 1980 Singapore rejected Malaysia's "claim" to Pedra Branca/Pulau Batu Puteh and requested that the 1979 map be corrected. This led to an exchange of correspondence and subsequently to a series of intergovernmental talks in 1993–1994, which did not bring a resolution of the matter. During the first round of talks in February 1993 the question of the appurtenance of Middle Rocks and South Ledge was also raised. In view of the lack of progress in the bilateral negotiations, the Parties agreed to submit the dispute for resolution by the International Court of Justice.

The Court recalls that in the context of a dispute related to sovereignty over land, the date upon which the dispute crystallized is of significance. In the view of the Court, it was on 14 February 1980, the time of Singapore's protest in response to Malaysia's publication of the 1979 map, that the dispute as to sovereignty over Pedra Branca/Pulau Batu Puteh crystallized. With regard to sovereignty over Middle Rocks and South Ledge, the Court finds that the dispute crystallized on 6 February 1993, when Singapore referred to these maritime features in the context of its claim to Pedra Branca/Pulau Batu Puteh during bilateral discussions between the Parties.

Sovereignty over Pedra Branca/Pulau Batu Puteh
(paras. 37–277)

Positions of the Parties
(paras. 37–42)

Malaysia states in its written pleadings that it "has an original title to Pulau Batu Puteh of long standing. Pulau Batu Puteh is, and has always been, part of the Malaysian State of Johor. Nothing has happened to displace Malaysia's sovereignty over it. Singapore's presence on the island for the sole purpose of constructing and maintaining a lighthouse there—with the permission of the territorial sovereign—is insufficient to vest sovereignty in it." Malaysia further says that the island "could not at any relevant time be considered as *terra nullius* and hence susceptible to acquisition through occupation".

Singapore claims that "the selection of Pedra Branca as the site for building of the lighthouse with the authorization of the British Crown", a process which started in 1847, "constituted a classic taking of possession *à titre de souverain*". According to Singapore, title to the island was acquired by the British Crown in accordance with the legal principles of that time and has since "been maintained by the British Crown and its lawful successor, the Republic of Singapore". While in Singapore's Memorial and Counter-Memorial, no reference is made expressly to the status of Pedra Branca/Pulau Batu Puteh as *terra nullius*, the Court observes that in its Reply Singapore expressly indicated that "[i]t is obvious that the status of Pedra Branca in 1847 was that of *terra nullius*".

In light of the foregoing, the Court notes that the issue is reduced to whether Malaysia can establish its original title dating back to the period before Singapore's activities of 1847 to 1851, and conversely whether Singapore can establish its claim that it took "lawful possession of Pedra Branca/Pulau Batu Puteh" at some stage from the middle of the nineteenth century when the construction of the lighthouse by agents of the British Crown started.

The question of the burden of proof
(paras. 43–45)

On this question, the Court reaffirms that it is a general principle of law, confirmed by its jurisprudence, that a party which advances a point of fact in support of its claim must establish that fact.

Legal status of Pedra Branca/Pulau Batu Puteh before the 1840s
(paras. 46–117)

Original title to Pedra Branca/Pulau Batu Puteh
(paras. 46–80)

The Court starts by observing that it is not disputed that the Sultanate of Johor, since it came into existence in 1512, established itself as a sovereign State with a certain territorial domain under its sovereignty in part of south-east Asia. Having examined the arguments of the Parties, the Court notes that, from at least the seventeenth century until early in the nineteenth, it was acknowledged that the territorial and maritime domain of the Kingdom of Johor comprised a considerable portion of the Malaya Peninsula, straddled the Straits of Singapore and included islands and islets in the area of the Straits—where Pedra Branca/Pulau Batu Puteh is located.

The Court then moves to ascertain whether the original title to Pedra Branca/Pulau Batu Puteh claimed by Malaysia is founded in law.

Of significance is the fact that Pedra Branca/Pulau Batu Puteh had always been known as a navigational hazard in the Straits of Singapore. Therefore the island evidently was not *terra incognita*. The fact that there is no evidence throughout the entire history of the old Sultanate of Johor that any competing claim had ever been advanced over the islands in the area of the Straits of Singapore is another significant factor.

The Court recalls the pronouncement made by the Permanent Court of International Justice (PCIJ) in the case concerning the *Legal Status of Eastern Greenland*, on the significance of the absence of rival claims. The PCIJ then noted that, while "[i]n most of the cases involving claims to territorial sovereignty . . . there have been two competing claims to the sovereignty", in the case before it "up to 1931 there was no claim by any Power other than Denmark to the sovereignty over Greenland". The PCIJ therefore concluded that, considering the "inaccessible character of the uncolonized parts of the country, the King of Denmark and Norway displayed . . . in 1721 to 1814 his authority to an extent sufficient to give his country a valid claim to sovereignty, and that his rights over Greenland were not limited to the colonized area".

The Court observes that this conclusion also applies to the present case involving a tiny uninhabited and uninhabitable island, to which no claim of sovereignty had been made by any other Power throughout the years from the early sixteenth century until the middle of the nineteenth century. In that context the Court also notes that State authority should not necessarily be displayed "in fact at every moment on every point of a territory", as shown in the *Island of Palmas Case (Netherlands/United States of America)*.

The Court concludes from the foregoing that the territorial domain of the Sultanate of Johor covered in principle all the islands and islets within the Straits of Singapore, including the island of Pedra Branca/Pulau Batu Puteh. It finds that this possession of the islands by the Sultanate was never challenged by any other Power in the region and can in all the circumstances be seen as satisfying the condition of "continuous and peaceful display of territorial sovereignty". The Court thus concludes that the Sultanate of Johor had original title to Pedra Branca/Pulau Batu Puteh.

Examining the ties of loyalty that existed between the Sultanate of Johor and the Orang Laut ("the people of the sea"), who were engaged in fishing and piratical activities in the Straits of Singapore, the Court finds that the descriptions, in contemporary official reports by British officials, of the nature and the level of relationship between the Sultan of Johor and the Orang Laut confirm the ancient original title of the Sultanate of Johor to those islands, including Pedra Branca/Pulau Batu Puteh.

The Court then turns to the question whether this title was affected by the developments in the period 1824 to 1840.

The legal significance of the 1824 Anglo-Dutch Treaty
(paras. 81–101)

First the Court notes that documentary evidence conclusively shows that the Sultanate of Johor continued to exist as the same sovereign entity throughout the period 1512 to 1824, in spite of changes in the precise geographical scope of its territorial domain and vicissitudes of fortune in the Sultanate through the ages, and that these changes and vicissitudes did not affect the legal situation in relation to the area of the Singapore Straits, which always remained within the territorial domain of the Sultanate of Johor.

Second, the Court observes that it is common ground between the Parties that the 1824 Anglo-Dutch Treaty divided the region into two parts—one belonging to the Dutch sphere of influence (the Riau-Lingga Sultanate under Abdul Rahman) and the other falling under the British sphere of influence (the Sultanate of Johor under Hussein). However, Singapore appears to claim that the Treaty left the entire Straits aside, and that Pedra Branca/Pulau Batu Puteh had remained *terra nullius* or had become *terra nullius* as a result of the division of the "old Sultanate of Johor", thus leaving room for the "lawful possession" of Pedra Branca/Pulau Batu Puteh by the British during the period 1847–1851.

After careful analysis of the text of the 1824 Anglo-Dutch Treaty, the Court concludes that the Treaty was the legal reflection of a political settlement reached between the two colonial Powers to divide the territorial domain of the old Sultanate of Johor into two sultanates to be placed under their respective spheres of influence. Thus in this scheme there was no possibility for any legal vacuum left for freedom of action to take lawful possession of an island in between these two spheres of influence.

The general reference in Article 12 of the Treaty to "the other Islands south of the Straights of Singapore" would suggest that all the islands and islets within the Straits fell within the British sphere of influence. This naturally covered the island of Pedra Branca/Pulau Batu Puteh, which thus remained part of what continued to be called the "Sultanate of Johor" after the division of the old Sultanate.

The relevance of the 1824 Crawfurd Treaty
(paras. 102–107)

The Court considers the relevance to the dispute of the "Crawfurd Treaty", by which the Sultan and Temenggong of Johor ceded the island of Singapore to the East India Company. The Court states that the Treaty cannot be relied on as establishing "British recognition of prior and continuing sovereignty of the Sultanate of Johor over all other islands in and around the Strait of Singapore", including Pedra Branca/Pulau Batu Puteh, as Malaysia claimed. The Court however notes that this finding does not signify *a contrario* that the islands in the Straits of Singapore falling outside the scope of Article II of this Treaty were *terrae nullius* and could be subject to appropriation through "lawful occupation" either. This latter point can only be judged in the context of what legal effect the division of the old Sultanate of Johor had upon the islands in the area of the Straits of Singapore, in particular in light of the 1824 Anglo-Dutch Treaty and in light of the legal relevance, *vel non*, of the so-called letter "of donation" of 1825 sent from Sultan Abdul Rahman of Riau-Lingga to his brother Sultan Hussein of Johor.

The legal significance of the letter "of donation" of 1825
(paras. 108–116)

The Court examines whether the letter "of donation" from Sultan Abdul Rahman to his brother Hussein had the legal effect of transferring the title to the territory included in that letter "of donation". The Court notes that the so-called letter "of donation" from Sultan Abdul Rahman to his brother Hussein merely confirmed the division agreed upon by the 1824 Anglo-Dutch Treaty and therefore was without legal effect.

Conclusion
(para. 117)

The Court concludes that Malaysia has established to its satisfaction that as of the time when the British started their preparations for the construction of the lighthouse on Pedra Branca/Pulau Batu Puteh in 1844, this island was under the sovereignty of the Sultan of Johor.

Legal status of Pedra Branca/Pulau Batu Puteh after the 1840s
(paras. 118–272)

The Court observes that in order to determine whether Malaysia has retained sovereignty over Pedra Branca/Pulau Batu Puteh following 1844 or whether sovereignty has since passed to Singapore, it needs to assess the relevant facts—consisting mainly of the conduct of the Parties during that period—by reference to the governing principles and rules of international law.

Applicable law
(paras. 118–125)

It notes that any passing of sovereignty might be by way of agreement between the two States in question. Such an agreement might take the form of a treaty, as with the 1824 Crawfurd Treaty and the 1927 Agreement referred to earlier. The agreement might instead be tacit and arise from the conduct of the Parties. In this matter international law does not impose any particular form but places its emphasis on the parties' intentions. Sovereignty over territory might under certain circumstances pass as a result of the failure of the State which has sovereignty to respond to conduct *à titre de souverain* of the other State or to concrete manifestations of the display of territorial sovereignty by the other State. Such manifestations of the display of sovereignty may call for a response if they are not to be opposable to the State in question. The absence of reaction may well amount to acquiescence. That is to say, silence may also speak, but only if the conduct of the other State calls for a response. Critical for the Court's assessment of the conduct of the Parties is the central importance in international law and relations of State sovereignty over territory and of the stability and certainty of that sovereignty. Because of that, any passing of sovereignty over territory on the basis of the conduct of the Parties must be manifested clearly and without any doubt by that conduct and the relevant facts.

The process for the selection of the site for Horsburgh lighthouse
(paras. 126–148)

In 1836 merchants and mariners expressed the wish to build one or more lighthouses in memory of James Horsburgh, a hydrographer to the East Indies Company. In November 1836 "Pedra Branca" was identified as a preferred location. In a letter sent to the Governor of Singapore on 1 March 1842 "Pedra Branca" was the only locality specifically mentioned. The Court notes that, in this first formal communication, the private commercial interests recognized that the British Government would have to carry the proposal into effect and provide the further funds.

In the ensuing correspondence between the subscribers and the British authorities several alternative locations were envisaged. By October 1844, the island of Peak Rock was identified as the most eligible site. In late November W. J. Butterworth, who had become Governor of the Straits Settlements in 1843, received replies to letters which he had written to the Sultan and Temenggong of Johor. Notwithstanding the Parties' extensive research, the Governor's letters have not been found, but the Parties did provide to the Court copies of the translations of the replies, both dated 25 November 1844, in which the Sultan and the Temenggong consented to the construction of a lighthouse in the Straits of Singapore, without mentioning the exact location.

Examining whether Johor ceded sovereignty over the particular piece of territory which the United Kingdom would select for the construction and operation of the lighthouse for the stated purpose or granted permission only to that construction and operation, the Court finds that the correspondence is not conclusive.

Given the lack of any written agreement relating to the modalities of the maintenance of the lighthouse and the island on which it was to be constructed, the Court considers that it is not in a position to resolve the issue about the content of any possible agreement reached in November 1844.

The construction and commissioning of Horsburgh lighthouse, 1850–1851
(paras. 149–163)

The Court notes that the planning for the construction and the construction itself were in the hands of the Government Surveyor of Singapore, John Thomson, who was appointed as Architect of the project by Governor Butterworth. In December 1849 the Government Surveyor began organizing the construction. On 24 May 1850 the foundation stone was laid. The Court takes note of the fact that no Johor authorities were present at the ceremony. There is no indication that they were even invited by the Governor to attend. That might suggest that the British and Singapore authorities did not consider it necessary to apprise Johor of their activities on Pedra Branca/Pulau Batu Puteh. The Temenggong of Johor visited the rock only once, nine days after the laying of the foundation stone, accompanied by 30 of his followers.

After describing the modalities of the construction and commissioning of the lighthouse, the Court notes that it cannot draw any conclusions with regard to sovereignty. Rather it sees those events as bearing on the issue of the evolving views of the authorities in Johor and in Singapore about sovereignty over Pedra Branca/Pulau Batu Puteh.

The conduct of the Parties, 1852–1952
(paras. 164–191)

The Court first considers the Straits lights system and related British and Singapore legislation. It notes that as a matter of law, a lighthouse may be built on the territory of one State and administered by another State—with the consent of the first State. A central element in Malaysia's argument is that because Horsburgh lighthouse was built on an island over which Johor was sovereign all the actions of the British authorities and, following them, the Singaporean authorities, are simply actions pursued in the normal course of the operation of the lighthouse. Singapore, by contrast, says that some of the actions are not matters simply of the operation of the lighthouse but are, in whole or part, acts *à titre de souverain*. Singapore refers to legislation enacted by itself and its predecessors in title, which regulated the defraying of costs of establishing and operating the lighthouse, vesting control of it under various governmental bodies, and regulating the activities of persons residing, visiting and working on Pedra Branca/Pulau Batu Puteh. In the Court's view however the provisions invoked by Singapore do not as such demonstrate British sovereignty over the areas to which they apply, because they applied equally to lighthouses which are undoubtedly on Johor territory as well as to that on Pedra Branca/Pulau Batu Puteh and, moreover, say nothing expressly about sovereignty.

Turning to the various constitutional developments invoked by Malaysia, including the 1927 Straits Settlement and Johor Territorial Waters Agreement, the Court considers that they do not help resolve the question of sovereignty over Pedra Branca/Pulau Batu Puteh. It observes that the purpose of the Agreement was to "retrocede" to Johor certain areas that had been ceded by Johor to the East India Company in 1824 and were all within 10 miles of the main island of Singapore. They could not have included Pedra Branca/Pulau Batu Puteh, as the island was not within the scope of the Agreement.

With respect to Malaysia's contention that the Temenggong continued to control fishing in the neighbourhood of Pedra Branca/Pulau Batu Puteh after the construction of the lighthouse, as shown by an exchange of correspondence between Johor and the British authorities in Singapore in 1861, the Court observes that the letters relate to events occurring within 10 miles of the island of Singapore. Therefore nothing can be made of the fact that the Singapore authorities did not in that context refer to jurisdiction over the waters of Pedra Branca/Pulau Batu Puteh.

The 1953 correspondence
(paras. 192–230)

The Court notes that on 12 June 1953 the Colonial Secretary of Singapore wrote to the British Adviser to the Sultan of Johor, that he was "directed to ask for information about the rock some 40 miles from Singapore known as Pedra Branca" in the context of "the determination of the boundaries of the Colony's territorial waters". Acknowledging that in the case of Pulau Pisang, an island "which is also outside the Treaty

limits of the colony" it was "clear that there was no abrogation of the sovereignty of Johore", the Secretary asked to be informed of "any document showing a lease or grant of the rock or whether it ha[d] been ceded by the Government of the State of Johore or in any other way disposed of". Later in that month the Secretary to the British Adviser to the Sultan of Johor advised the Colonial Secretary that he had passed the letter to the State Secretary of Johor, who would "doubtless wish to consult with the Commissioner for Lands and Mines and Chief Surveyor and any existing archives before forwarding the views of the State Government to the Chief Secretary". In a letter dated 21 September 1953, the Acting State Secretary of Johor replied that "the Johore Government [did] not claim ownership of Pedra Branca".

The Court considers that this correspondence and its interpretation are of central importance for determining the developing understanding of the two Parties about sovereignty over Pedra Branca/Pulau Batu Puteh.

The Court notes that the Singapore letter of 12 June 1953 seeks information about "the rock" as a whole and not simply about the lighthouse in light of the determination of the Colony's territorial waters, a matter which is dependent on sovereignty over the island. The Court notes that the letter had the effect of putting the Johor authorities on notice that in 1953 the Singapore authorities understood that their predecessors thought that Pedra Branca/Pulau Batu Puteh had been ceded "gratuitously" by the Sultan and the Temenggong to the East India Company. The Court reads the letter as showing that the Singapore authorities were not clear about events occurring over a century earlier and that they were not sure that their records were complete.

Turning to the reply from the Acting State Secretary of Johor, the Court dismisses the Malaysian contention that, under the provisions of the Johor Agreement between the British Crown and the Sultan of Johor and the Federation of Malaya Agreement between the British Crown and nine Malay states (including Johor), the Acting State Secretary "was definitely not authorized" and did not have "the legal capacity to write the 1953 letter, or to renounce, disclaim, or confirm title of any part of the territories of Johore".

The Court considers that the Johor Agreement is not relevant since the correspondence was initiated by a representative of Her Britannic Majesty's Government which at that time was not to be seen as a foreign State; further, it was the British Adviser to the Sultan of Johor who passed the initial letter on to the Secretary of State of the Sultanate. The Court is also of the view that the Federation of Malaya Agreement does not assist the Malaysian argument because the action of responding to a request for information is not an "exercise" of "executive authority". Moreover, the failure of Malaysia to invoke this argument, both throughout the whole period of bilateral negotiations with Singapore and in the proceedings until late in the oral phase, lends support to the presumption of regularity invoked by Singapore.

Examining the 1953 letter's content, the Court expresses the view that the Johor reply is clear in its meaning: Johor does not claim ownership over Pedra Branca/Pulau Batu Puteh. That response relates to the island as a whole and not simply to the lighthouse. When the Johor letter is read in the context of the request by Singapore for elements of information bearing on the status of Pedra Branca/Pulau Batu Puteh, as discussed above, it becomes evident that the letter addresses the issue of sovereignty over the island. The Court accordingly concludes that Johor's reply shows that as of 1953 Johor understood that it did not have sovereignty over Pedra Branca/Pulau Batu Puteh. In light of Johor's reply, the authorities in Singapore had no reason to doubt that the United Kingdom had sovereignty over the island.

The steps taken by the Singapore authorities in reaction to the final response were not known to the Johor authorities and have limited significance for the Court's assessment of any evolving understanding shared by the Parties. The case file shows that, on receipt of the Johor reply, the Colonial Secretary of Singapore sent an internal memorandum to the Attorney-General saying that he thought that "[o]n the strength of [the reply], we can claim Pedra Branca . . ." The Attorney-General stated that he agreed. The Singapore authorities, so far as the case file shows, took no further action. They had already received related communications from London, to which the Court now turns.

The conduct of the Parties after 1953
(paras. 231–272)

The Court first takes into consideration Singapore's contention that it and its predecessors have exercised sovereign authority over Pedra Branca/Pulau Batu Puteh by investigating shipwrecks within the island's territorial waters. Concluding that this conduct gives significant support to the Singapore case, the Court also recalls that it was only in June 2003, after the Special Agreement submitting the dispute to the Court had come into force, that Malaysia protested against this category of Singapore conduct.

After examining the argument of Singapore's exercise of exclusive control over visits to Pedra Branca/Pulau Batu Puteh and the use of the island by officials from Singapore as well as from other States, including Malaysia, the Court states that many of the visits by Singaporean personnel related to the maintenance and operation of the lighthouse and are not significant in the case. However it finds that the conduct of Singapore with respect to permissions granted or not granted to Malaysian officials in the context of a survey of the waters surrounding the island in 1978 is to be seen as conduct *à titre de souverain* and does give significant support to Singapore's claim to sovereignty over Pedra Branca/Pulau Batu Puteh.

Both Parties contend that their naval patrols and exercises around Pedra Branca/Pulau Batu Puteh since the formation of their respective navies constitute displays of their sovereign rights over the island. The Court does not see this activity as significant on one side or the other. It observes that naval vessels operating from Singapore harbour would as a matter of geographical necessity often have to pass near Pedra Branca/Pulau Batu Puteh.

As for Singapore's claim that the flying of the British and Singapore ensigns from Horsburgh lighthouse from the time of its commissioning to this day is also a clear display of sovereignty, the Court states that the flying of an ensign is not

in the usual case a manifestation of sovereignty. It considers that some weight may nevertheless be given to the fact that Malaysia did not protest against the ensign flying at Horsburgh lighthouse.

The Court then looks into the installation of a relay station by the Singapore Navy, in May 1977, for a military rebroadcast station on Pedra Branca/Pulau Batu Puteh. Singapore contends that the installation was carried out openly. Malaysia asserts that the installation was undertaken secretly and that it became aware of it only on receipt of Singapore's Memorial. The Court is not able to assess the strength of the assertions made on the two sides about Malaysia's knowledge of the installation. The conduct is inconsistent with Singapore recognizing any limit on its freedom of action.

As for the plans to reclaim areas around Pedra Branca/Pulau Batu Puteh, which had been considered on various occasions in the 1970s by the Port of Singapore Authority, the Court observes that while the reclamation was not proceeded with and some of the documents were not public, the tender advertisement was public and attracted replies. Further the proposed action, as advertised, did go beyond the maintenance and operation of the lighthouse. It is conduct which supports Singapore's case.

In 1968 the Government of Malaysia and the Continental Oil Company of Malaysia concluded an agreement authorizing petroleum exploration in the whole of the area of the continental shelf off the east coast of West Malaysia. Given the territorial limits and qualifications in the concession and the lack of publicity of the co-ordinates, the Court does not consider that weight can be given to the concession.

By legislation of 1969 Malaysia extended its territorial waters from 3 to 12 nautical miles. Malaysia contends that the legislation "extended Malaysian territorial waters to and beyond Pulau Batu Puteh". The Court notes however that the said legislation does not identify the areas to which it is to apply except in the most general sense: it says only that it applies "throughout Malaysia".

Malaysia invokes several territorial agreements to support its claim to sovereignty over Pedra Branca/Pulau Batu Puteh: the Indonesia Malaysia Continental Shelf Agreement of 1969, the Territorial Sea Agreement of 1970 and the Indonesia Singapore Territorial Sea Agreement of 1973. The Court does not consider that those agreements can be given any weight in respect of sovereignty over Pedra Branca/Pulau Batu Puteh, since they did not cover this issue. The Court similarly does not see as significant for the purposes of the proceedings the co-operation in the Straits of Malacca and Singapore adopted in 1971 by Indonesia, Malaysia and Singapore, which was invoked by Singapore.

The Court also dismisses as non-authoritative and essentially descriptive certain official publications of the Government of Singapore describing its territory, which in the view of Malaysia are notable for their absence of any reference to Pedra Branca/Pulau Batu Puteh among the approximately 60 islands that are included in those descriptions.

Finally, the Court turns to nearly a hundred official maps submitted by the Parties. Malaysia emphasizes that of all the maps before the Court only one published by the Singapore Government included Pedra Branca/Pulau Batu Puteh as within its territory and that map was not published until 1995. The Court recalls that Singapore did not, until 1995, publish any map including Pedra Branca/Pulau Batu Puteh within its territory. But that failure to act is in the view of the Court of much less weight than the weight to be accorded to the maps published by Malaya and Malaysia between 1962 and 1975. The Court concludes that those maps tend to confirm that Malaysia considered that Pedra Branca/Pulau Batu Puteh fell under the sovereignty of Singapore.

Conclusion
(paras. 273–277)

The Court is of the opinion that the relevant facts, including the conduct of the Parties, reflect a convergent evolution of the positions of the Parties regarding title to Pedra Branca/Pulau Batu Puteh. The Court concludes, especially by reference to the conduct of Singapore and its predecessors *à titre de souverain*, taken together with the conduct of Malaysia and its predecessors including their failure to respond to the conduct of Singapore and its predecessors, that by 1980 sovereignty over Pedra Branca/Pulau Batu Puteh had passed to Singapore.

For the foregoing reasons, the Court concludes that sovereignty over Pedra Branca/Pulau Batu Puteh belongs to Singapore.

Sovereignty over Middle Rocks and South Ledge
(paras. 278–299)

Arguments of the Parties
(paras. 278–287)

The Court notes that Singapore's position is that sovereignty in respect of Middle Rocks and South Ledge goes together with sovereignty over Pedra Branca/Pulau Batu Puteh. Thus, according to Singapore, whoever owns Pedra Branca/Pulau Batu Puteh owns Middle Rocks and South Ledge, which, it claims, are dependencies of the island of Pedra Branca/Pulau Batu Puteh and form with the latter a single group of maritime features. Malaysia on the other hand argues that these three features do not constitute one identifiable group of islands in historical or geomorphological terms, and adds that they have always been considered as features falling within Johor/Malaysian jurisdiction.

Legal status of Middle Rocks
(paras. 288–290)

The Court first observes that the issue of the legal status of Middle Rocks is to be assessed in the context of its reasoning on the principal issue in the case. It recalls that it has reached the conclusion that sovereignty over Pedra Branca/Pulau Batu Puteh rests with Singapore under the particular circumstances surrounding the case. However these circumstances clearly do not apply to other maritime features in the vicinity of Pedra Branca/Pulau Batu Puteh, i.e., Middle Rocks and South Ledge. None of the conduct of the Parties reviewed in the previous part of the Judgment has any application to the case of Middle Rocks.

The Court therefore finds that original title to Middle Rocks should remain with Malaysia as the successor to the Sultan of Johor.

Legal status of South Ledge
(paras. 291–299)

With regard to South Ledge, the Court however notes that there are special problems to be considered, inasmuch as South Ledge presents a special geographical feature as a low-tide elevation.

The Court recalls Article 13 of the United Nations Convention on the Law of the Sea and considers its previous jurisprudence, the arguments of the Parties, as well as the evidence presented before it.

The Court notes that South Ledge falls within the apparently overlapping territorial waters generated by the mainland of Malaysia, by Pedra Branca/Pulau Batu Puteh and by Middle Rocks. It recalls that in the Special Agreement and in the final submissions it has been specifically asked by the Parties to decide the matter of sovereignty separately for each of the three maritime features. At the same time the Court observes that it has not been mandated by the Parties to draw the line of delimitation with respect to the territorial waters of Malaysia and Singapore in the area in question.

In these circumstances, the Court concludes that sovereignty over South Ledge, as a low-tide elevation, belongs to the State in the territorial waters of which it is located.

*

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Declaration of Judge Ranjeva

Judge Ranjeva considers that no substantive objection can be raised to the present Judgment, in so far as Malaysia's immemorial historical title to Pedra Branca/Pulau Batu Puteh is established, even though Singapore's sovereignty over this feature at the date of the Court's decision cannot reasonably be contested. That however is not the case for the Court's reasoning in respect of the transfer of Johor's sovereignty to Singapore. Judge Ranjeva thus points out that the purpose of his declaration is to suggest an alternative basis on which the Court could have relied.

In the present Judgment, the Court infers acquiescence on the part of Johor to the transfer of its title of sovereignty over Pedra Branca/Pulau Batu Puteh. In Judge Ranjeva's view, there are only two events from which a transfer of sovereignty can result: either an equivalent act occurs (the possibility referred to in paragraph #120 of the Judgment), or a superior legal title intervenes. In the absence of the latter situation, Judge Ranjeva wonders how Johor's title could have been extinguished without Johor's consent. For lack of evidence, the Judgment relies on presumptive consent to reach the conclusion that sovereignty was transferred; this is open to criticism as being out of keeping with the facts.

Judge Ranjeva believes that the Judgment came to this conclusion through a failure to take account of the historical criticism approach in interpreting the facts in their contemporary political and legal context. While relations between sovereign colonial Powers fell within the ambit of international law, it is difficult to argue that dealings between the United Kingdom and the Sultanate of Johor were based on relations between sovereign, equal subjects of international law. Thus, the sovereignty acknowledged to indigenous authorities was inoperative vis-à-vis colonial Powers, the authorities' sole obligation being to submit to the will of the Powers. Under these circumstances, the Sultan of Johor could not broach the slightest opposition to a decision by the British. Judge Ranjeva thus considers that the present case cannot be seen as involving an international transfer of title by the operation of acquiescence, when, under the rules and practice of the colonial Powers, what was involved was the exercise of a colonial territorial title. Johor's silence through the colonial period cannot therefore be held against it. The situation changed however with the Parties' accession to independence: Malaysia may no longer rely on its silence in response to conduct pointing towards Singapore's sovereignty over Pedra Branca/Pulau Batu Puteh. In conclusion, Singapore has sovereignty over the island.

Separate opinion of Judge Parra-Aranguren

I

1. Judge Parra-Aranguren considers that the findings made by the Court in its Judgment demonstrate that juridical reasons can always be found to support any conclusion.

II

2. Judge Parra-Aranguren voted against paragraph 300 (1) of the Judgment because it is based mainly on the interpretation of the 1953 correspondence made in section 5.4.5, which he cannot accept.

3. On 12 June 1953 Singapore asked Johor for information in an attempt to clarify the status of Pedra Branca/Pulau Batu Puteh owing to the island's relevance to the determination of Singapore's territorial waters; it asked in particular whether there was any document showing a lease or grant, or whether the island had been ceded by Johor or in any other way disposed of. The Acting State Secretary of Johor replied on 21 September 1953, informing Singapore that "the Johore Government does not claim ownership of Pedra Branca" (paras. 192 and 196 of the Judgment).

4. Singapore maintained that, "'by declaring that Johor did not claim Pedra Branca, the [Johor State Secretary's] letter had the effect of confirming Singapore's title to Pedra Branca and of confirming that Johor had no title, historic or otherwise, to the island'". Moreover, Singapore stressed that its argument was not "that Johor abandoned or relinquished title to Pedra Branca in 1953" and that the effect of Johor's 1953 letter was "to pronounce explicitly that Johor did not have a claim to ownership of Pedra Branca".

5. In this respect Judge Parra-Aranguren recalls that in earlier sections of the Judgment the Court concluded that prior to 1953 Pedra Branca/Pulau Batu Puteh belonged to Malaysia and for this reason, in his opinion, the Johor's 1953 letter could not have had the effect of confirming either that Singapore held title to Pedra Branca/Pulau Batu Puteh or that Johor

had no title to Pedra Branca/Pulau Batu Puteh, as maintained by Singapore.

6. Singapore did not maintain that the 1953 letter should be understood as Johor's renunciation, abandonment or relinquishment of its title to Pedra Branca/Pulau Batu Puteh and, accordingly, Judge Parra-Aranguren believes that this argument should not have been analysed and relied upon to conclude that Singapore holds title to Pedra Branca/Pulau Batu Puteh.

7. As paragraph 196 of the Judgment states: "No further correspondence followed and the Singapore authorities took no public action."

8. In the opinion of Judge Parra-Aranguren, it is surprising that "[n]o further correspondence followed", because Johor had not furnished the information requested by Singapore and the basic practice in international relations whenever a question remains unanswered is to repeat the request in writing and to insist that the information be provided. Singapore chose not to proceed in this way and did not explain to the Court why it abstained from acting.

9. Furthermore, the 1953 letter from Johor answered a completely different question from the one asked by Singapore, merely stating that "the Johor Government does not claim ownership of Pedra Branca". Paragraph 222 of the Judgment acknowledges that "ownership" is in principle distinct from "sovereignty", but that "[i]n international litigation 'ownership' over territory has sometimes been used as equivalent to 'sovereignty'". It is a fact that Johor used the term "ownership", not "sovereignty". Therefore, in Judge Parra-Aranguren's view, if Singapore understood the 1953 letter to mean in reality that Johor did "not claim sovereignty over Pedra Branca", it should at the very least, have requested the explanation from Malaysia necessary to "clarify the status of Pedra Branca", which was Singapore's main objective in sending the letter of 12 June 1953.

10. The lack of "public action" by Singapore's authorities is more difficult to understand than the "lack of further correspondence".

11. In the opinion of Judge Parra-Aranguren, if Singapore did in fact consider that its sovereignty over Pedra Branca/Pulau Batu Puteh had been acknowledged, notwithstanding the ambiguous terms of Johor's 1953 letter, elementary principles of good faith required Singapore to assert a formal claim of sovereignty over Pedra Branca/Pulau Batu Puteh, especially in the light of the facts mentioned in paragraphs 196 and 224 of the Judgment. However, Singapore failed to do so and, as a result of its inaction, the status of Pedra Branca/Pulau Batu Puteh, far from being "clarified", remained obscure.

12. Additionally, it may be observed that, while information about Pedra Branca/Pulau Batu Puteh was sought because it was "relevant to the determination of the boundaries of the Colony's territorial waters", no action was taken, as acknowledged in paragraph 225 of the Judgment.

III

13. Judge Parra-Aranguren also voted against paragraph 300 (1) of the Judgment because he does not agree with the examination of "[t]he conduct of the Parties after 1953" made in section 5.4.6.

14. In this section the Court states that the United Kingdom and Singapore acted as operator of Horsburgh Lighthouse, but "that was not the case in all respects"; also, "[w]ithout being exhaustive", the Court recalls actions to have been performed by Singapore *à titre de souverain*. However "the bulk of them" took place after 1953, as stated in paragraph 274 of the Judgment, and the Court has already determined in its Judgment dated 10 October 2002, that a period of some 20 years is "far too short" (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 352, para. 65). In the present case the Court finds in paragraph 34 of the Judgment that 14 February 1980 is the critical date for the purposes of the dispute as to sovereignty over Pedra Branca/Pulau Batu Puteh. Therefore, even assuming that the actions mentioned in section 5.4.6 of the Judgment were performed by Singapore *à titre de souverain*, the period concerned is "far too short" and for this reason, in Judge Parra-Aranguren's opinion, they are not sufficient to undermine Johor's historical title to Pedra Branca/Pulau Batu Puteh. Singapore's *effectivités* do not correspond to the law, and, as the Court has reiterated more than once, "[w]here the act does not correspond to the law, where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing the legal title, preference should be given to the holder of the title" (*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 587, para. 63).

15. Paragraph 275 of the Judgment states that "the Johor authorities and their successors took no action at all on Pedra Branca/Pulau Batu Puteh from June 1850 for the whole of the following century or more". Similar statements are also found in a number of other paragraphs of the Judgment and were made repeatedly by Singapore in the present proceedings. However, in the opinion of Judge Parra-Aranguren, the Johor authorities and their successors were under no international obligation to undertake any action at all, because Johor had historical title to Pedra Branca/Pulau Batu Puteh, as recognized in the Judgment. On the contrary, clarification of the status of the island was a matter of prime importance to Great Britain, because Great Britain had made a substantial investment in the construction and maintenance of Horsburgh lighthouse. However, Great Britain remained silent over the years and the status of Pedra Branca/Pulau Batu Puteh was still unclear in 1953, as evidenced in Mr. J. D. Higham's letter.

IV

16. Paragraph 297 of the Judgment states that the Court "will proceed on the basis of whether South Ledge lies within the territorial waters generated by Pedra Branca/Pulau Batu Puteh, which belongs to Singapore, or within those generated by Middle Rocks, which belongs to Malaysia"; and "that South Ledge falls within the apparently overlapping territorial waters generated by the mainland of Malaysia, Pedra Branca/Pulau Batu Puteh and Middle Rocks". The Court adds in paragraph 298 that "in the Special Agreement and in the final submissions it has been specifically asked to decide the matter of

sovereignty separately for each of the three maritime features", but at the same time observes that it "has not been mandated by the Parties to draw the line of delimitation with respect to the territorial waters of Malaysia and Singapore in the area in question". Consequently in paragraph 300 (3) of the Judgment the Court "[f]inds that sovereignty over South Ledge belongs to the State in the territorial waters of which it is located."

17. As explained above, Judge Parra-Aranguren considers that Pedra Branca/Pulau Batu Puteh belongs to Malaysia and he agrees that Middle Rocks is under the sovereignty of Malaysia, as found in paragraph 300 (2) of the Judgment. Therefore, in his opinion South Ledge is located within the territorial waters of Malaysia and for this reason it belongs to Malaysia. Consequently, he voted against paragraph 300 (3) of the Judgment.

V

18. On 23 November 2007 the Court informed Malaysia and Singapore that it was retiring for deliberation. Public hearings on the merits in the case brought by Djibouti against France commenced on 21 January 2008 and the Court retired eight days later for deliberation, which is ongoing. Public hearings on the Preliminary Objections in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia and Montenegro)*, to be held from 26 to 30 May 2008, require careful examination beforehand of the written arguments and of some requests made by the Parties.

19. Judge Parra-Aranguren therefore wishes to emphasize that constraints arising from the time-limits fixed by the Court for the preparation of this separate opinion have prevented him from setting out a thorough explanation of his disagreement with subparagraphs (1) and (3) of paragraph 300 and that he has for this reason only described some of the main reasons why he has voted against them.

Joint dissenting opinion of Judges Simma and Abraham

Judges Simma and Abraham express their disagreement with the first point of the operative clause of the Judgment which attributes the island of Pedra Branca/Pulau Batu Puteh to Singapore.

They endorse the conclusion reached by the Court at the end of the first part of its reasoning, whereby in 1844, on the eve of the construction of the Horsburgh lighthouse, the island was under the sovereignty of the Sultanate of Johor.

However, they dissociate themselves from the Judgment when it indicates that, between 1844 and 1980, sovereignty passed to Singapore, as a result of conduct of the Parties reflecting a convergent evolution of their positions as regards the status of the island.

Firstly, Judges Simma and Abraham note that the Court refrains from indicating clearly on which legal basis it relies to justify such a change in the holder of sovereignty, in the absence of any express agreement between the States concerned. In the abstract presentation that it gives of the applicable law, the Judgment refers to the possibility of a "tacit agreement" or of "acquiescence" by the original sovereign, but it makes no choice between these in the concrete conclusion that it draws from an examination of the conduct of the Parties, nor does it indicate if and how it might be possible for them to be combined. Further, the Judgment makes no mention of the notion of "acquisitive prescription", which appears capable of accounting for the process whereby a State acquires sovereignty over a territory that did not originally belong to it and without the express consent of the original sovereign.

Judges Simma and Abraham nonetheless take the view that, in substance, the Judgment draws on the criteria which they hold to be legally correct in order to assess the conduct of the Parties, even if it does not refer clearly enough to the relevant legal categories, which is not the most important point.

However, Judges Simma and Abraham disagree with the way in which the Judgment applies those criteria to the present case, and, consequently, with the conclusions that it draws from them.

Indeed, the facts do not demonstrate a sufficiently clear, consistent and public exercise of State sovereignty over the island by Singapore and its predecessor Great Britain, so that no acquiescence of any kind to the transfer of sovereignty can be deduced from the lack of reaction by Malaysia and its predecessor Johor.

According to Judges Simma and Abraham, there are thus at least two conditions lacking for the application of acquisitive prescription—or of tacit agreement, or acquiescence, since those legal categories are not hermetically separated from one another—namely, on the one hand, the effective exercise of the attributes of sovereignty by the State relying on them (Singapore in this case) combined with the intention to act as sovereign and, on the other hand, the visibility of this exercise of sovereignty, making it possible to establish the acceptance, through its lack of reaction, of the original sovereign (Malaysia in this case).

The acts taken into consideration by the Court as manifestations of sovereignty by Singapore are minor and sporadic, and their meaning was far from clear from the perspective of Johor and Malaysia. The Court should therefore not have concluded that sovereignty over the island had passed to Singapore. It should have attributed it to Malaysia, as the undisputed successor of the Sultanate of Johor.

Declaration of Judge Bennouna

Judge Bennouna, who voted in favour of the operative clause in the Judgment, is nevertheless not convinced by all of the reasoning adopted by the Court in justifying it. After reviewing the doubts entertained by the Court whenever it has looked to colonial law in its past decisions, Judge Bennouna expresses his view that the Court should have relied in the present case essentially on the practice of the two States after Singapore gained independence in 1965 further to its withdrawal from the Federation of Malaysia, which had been established in 1963. In Judge Bennouna's opinion, the Court would thus have avoided deciding on the basis of colonial practices resulting by and large from the rivalry between two European Powers seeking to secure their hegemony in the region.

Dissenting opinion of Judge *ad hoc* Dugard

Judge *ad hoc* Dugard dissents on the question of sovereignty over Pedra Branca/Pulau Batu Puteh, but concurs with the Court in respect of its finding that Malaysia has territorial title to Middle Rocks and that South Ledge is to be disposed of in accordance with the law governing maritime territorial delimitation.

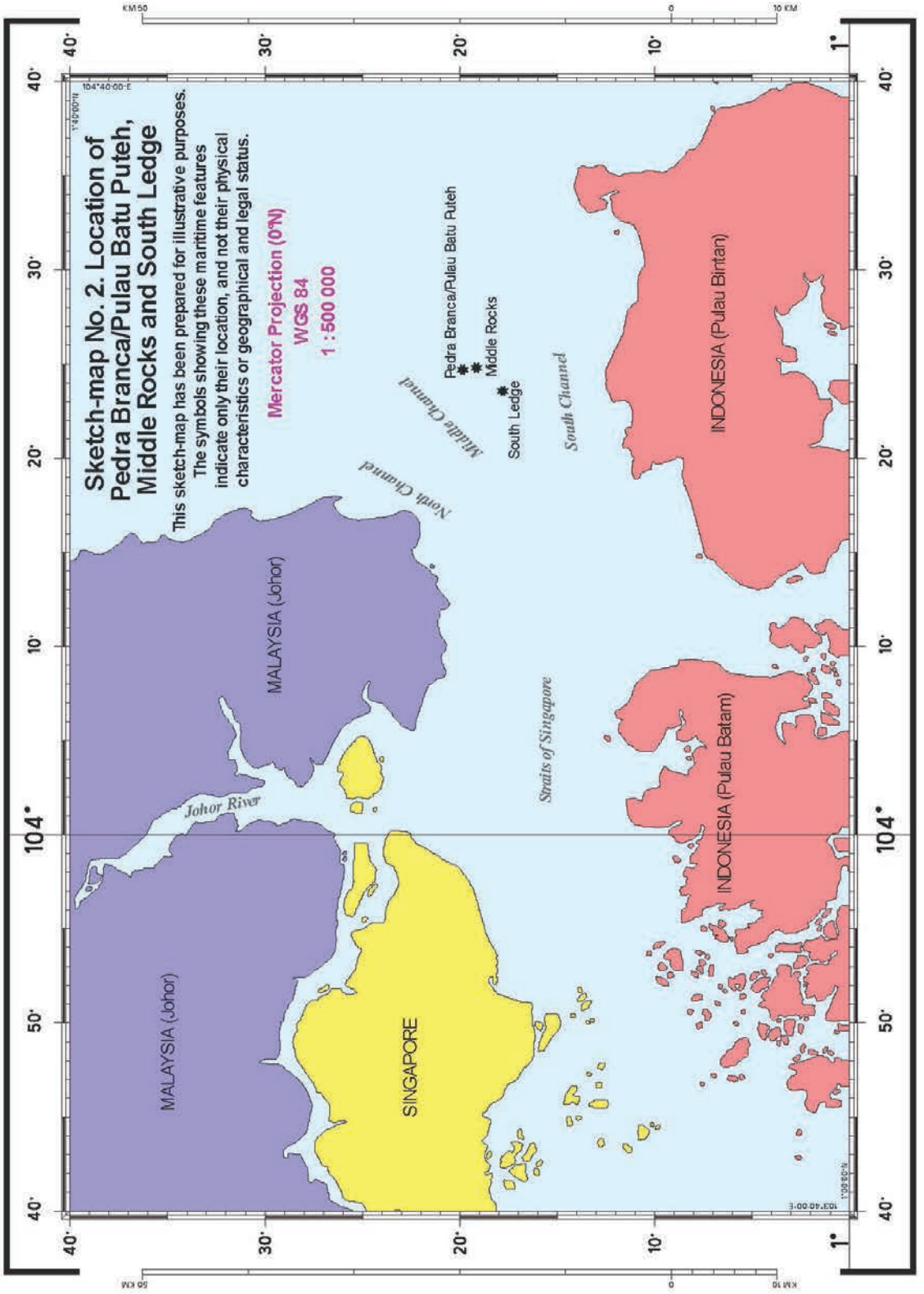
Judge *ad hoc* Dugard agrees with the Court that Malaysia had original title to Pedra Branca/Pulau Batu Puteh and finds that neither the conduct of Malaysia nor that of Singapore between 1850 and 1980 has disturbed this title. In particular, he finds that the 1953 correspondence between Johor and Singapore did not result in, or contribute to, the passing of sovereignty from Johor to Singapore. Judge *ad hoc* Dugard argues that the conduct of both Parties between 1953 and 1980 is equivocal and cannot be interpreted to indicate that Malaysia had abandoned title to Pedra Branca/Pulau Batu Puteh or acquiesced in Singapore's assertion of title over the island.

Judge *ad hoc* Dugard is critical of the legal reasons advanced by the Court to support its finding that sovereignty passed from Johor/Malaysia to Singapore. He finds that notions of tacit agreement, arising from the conduct of the Parties, developing understanding between the Parties and acquiescence are not supported by the facts and do not provide an acceptable legal foundation upon which to base the passing of sovereignty over Pedra Branca/Pulau Batu Puteh from Johor/Malaysia to Singapore.

Separate opinion of Judge *ad hoc* Sreenivasa Rao

Judge *ad hoc* Sreenivasa Rao, partially dissenting, explained his reasons for finding that sovereignty over Middle Rocks should also have been attributed to Singapore. In his view, Malaysia failed to meet the burden of proof incumbent upon it to establish that Johor had original title over Pedra Branca/Pulau Batu Puteh and the other two maritime features, Middle Rocks and South Ledge. In his view, the general historical description of the Malay Kingdom cannot be taken as certain and convincing evidence that Johor ever considered these maritime features as its possessions. Any claim of immemorial possession, to succeed, must first establish effective uninterrupted and uncontested possession. In the absence of evidence in favour of such possession, Johor at best could be held to have had an inchoate title based on discovery which it did not, however, perfect. For this, it required to display peaceful and continuous State authority commensurate with the nature of the territory involved. Activities of the Orang Laut, in so far as they are accepted as subjects of Johor, are private and do not account for display of Johor's State authority. The Orang Laut's piratical activities are even more inadmissible as evidence for the purpose of establishing the original title of Johor.

He further noted that Singapore, in contrast, exercised various State functions with respect to Pedra Branca/Pulau Batu Puteh and exercised control over waters around it for over 130 years, after it took over possession of the same in 1847. Accordingly, even though at the time Britain took possession of Pedra Branca/Pulau Batu Puteh it was not *terra nullius*, by virtue of the exhibition of superior *effectivités* for over a period of 130 years Britain/Singapore could be held to have manifested sovereignty over it and the waters around it. Accordingly, Singapore acquired title which it maintained without interruption and contest. Johor's reply to Singapore in 1953 stating that it did not claim any ownership over the rock confirms this. By virtue of such sovereignty over Pedra Branca/Pulau Batu Puteh and the waters around it, Singapore also has sovereignty over Middle Rocks and South Ledge as these maritime features fall within the limits of the territorial waters of Singapore.


Sketch-map No. 2. Location of Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge
This sketch-map has been prepared for illustrative purposes. The symbols showing these maritime features indicate only their location, and not their physical characteristics or geographical and legal status.
Mercator Projection (0°N)
WGS 84
1 : 500 000
Pedra Branca/Pulau Batu Puteh
Middle Rocks
South Ledge
Middle Channel
North Channel
South Channel
Straits of Singapore
Johor River
MALAYSIA (Johor)
SINGAPORE
INDONESIA (Pulau Bintan)
INDONESIA (Pulau Batam)
104°
40'
30'
20'
10'
50'
1°
KM 50
0
10 KM

169. CASE CONCERNING CERTAIN QUESTIONS OF MUTUAL ASSISTANCE IN CRIMINAL MATTERS (DJIBOUTI *v.* FRANCE)

Judgment of 4 June 2008

On 4 June 2008, the International Court of Justice rendered its Judgment in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France).*

The Court was composed as follows: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Parra-Aranguren, Buergenthal, Owada, Simma, Tomka, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judges *ad hoc* Guillaume, Yusuf; Registrar Couvreur.

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The operative paragraph (para. 205) of the Judgment reads as follows:

" . . .

The Court,

(1) As regards the jurisdiction of the Court,

(*a*) Unanimously,

Finds that it has jurisdiction to adjudicate upon the dispute concerning the execution of the letter rogatory addressed by the Republic of Djibouti to the French Republic on 3 November 2004;

(*b*) By fifteen votes to one,

Finds that it has jurisdiction to adjudicate upon the dispute concerning the summons as witness addressed to the President of the Republic of Djibouti on 17 May 2005, and the summonses as "*témoins assistés*" (legally assisted witnesses) addressed to two senior Djiboutian officials on 3 and 4 November 2004 and 17 June 2005;

In favour: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Buergenthal, Owada, Simma, Tomka, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judges *ad hoc* Guillaume, Yusuf;

Against: Judge Parra-Aranguren;

(*c*) By twelve votes to four,

Finds that it has jurisdiction to adjudicate upon the dispute concerning the summons as witness addressed to the President of the Republic of Djibouti on 14 February 2007;

In favour: President Higgins; Vice-President Al-Khasawneh; Judges Shi, Koroma, Buergenthal, Owada, Simma, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge *ad hoc* Yusuf;

Against: Judges Ranjeva, Parra-Aranguren, Tomka; Judge *ad hoc* Guillaume;

(*d*) By thirteen votes to three,

Finds that it has no jurisdiction to adjudicate upon the dispute concerning the arrest warrants issued against two senior Djiboutian officials on 27 September 2006;

In favour: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Parra-Aranguren, Buergenthal, Simma, Tomka, Keith, Sepúlveda-Amor, Bennouna; Judge *ad hoc* Guillaume;

Against: Judges Owada, Skotnikov; Judge *ad hoc* Yusuf;

(2) As regards the final submissions of the Republic of Djibouti on the merits,

(*a*) Unanimously,

Finds that the French Republic, by not giving the Republic of Djibouti the reasons for its refusal to execute the letter rogatory presented by the latter on 3 November 2004, failed to comply with its international obligation under Article 17 of the Convention on Mutual Assistance in Criminal Matters between the two Parties, signed in Djibouti on 27 September 1986, and that its finding of this violation constitutes appropriate satisfaction;

(*b*) By fifteen votes to one,

Rejects all other final submissions presented by the Republic of Djibouti.

In favour: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Parra-Aranguren, Buergenthal, Owada, Simma, Tomka, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge *ad hoc* Guillaume;

Against: Judge *ad hoc* Yusuf."

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Judges Ranjeva, Koroma, Parra-Aranguren appended separate opinions to the Judgment of the Court; Judge Owada appended a declaration to the Judgment of the Court; Judge Tomka appended a separate opinion to the Judgment of the Court; Judges Keith and Skotnikov appended declarations to the Judgment of the Court; Judge *ad hoc* Guillaume appended a declaration to the Judgment of the Court; Judge *ad hoc* Yusuf appended a separate opinion to the Judgment of the Court.

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Chronology of the procedure and submissions of the Parties (paras. 1–18)

On 9 January 2006, the Republic of Djibouti (hereinafter "Djibouti") filed in the Registry of the Court an Application, dated 4 January 2006, against the French Republic (hereinafter "France") in respect of a dispute:

> "concern[ing] the refusal by the French governmental and judicial authorities to execute an international letter rogatory regarding the transmission to the judicial authorities in Djibouti of the record relating to the investigation in the Case against X for the murder of Bernard Borrel, in violation of the Convention on Mutual Assistance in Criminal Matters between the [Djiboutian] Government and the [French] Government, of 27 September 1986, and in breach

of other international obligations borne by [France] to . . . Djibouti".

In respect of the above-mentioned refusal to execute an international letter rogatory, the Application also alleged the violation of the Treaty of Friendship and Co-operation concluded between France and Djibouti on 27 June 1977.

The Application further referred to the issuing, by the French judicial authorities, of witness summonses to the Djiboutian Head of State and senior Djiboutian officials, allegedly in breach of the provisions of the said Treaty of Friendship and Co-operation, the principles and rules governing the diplomatic privileges and immunities laid down by the Vienna Convention on Diplomatic Relations of 18 April 1961 and the principles established under customary international law relating to international immunities, as reflected in particular by the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 14 December 1973.

In its Application, Djibouti indicated that it sought to found the jurisdiction of the Court on Article 38, paragraph 5, of the Rules of Court and was "confident that the French Republic will agree to submit to the jurisdiction of the Court to settle the present dispute".

The Registrar, in accordance with Article 38, paragraph 5, of the Rules of Court, immediately transmitted a copy of the Application to the Government of France and informed both States that, in accordance with that provision, the Application would not be entered in the General List of the Court, nor would any action be taken in the proceedings, unless and until the State against which the Application was made consented to the Court's jurisdiction for the purposes of the case.

By a letter dated 25 July 2006 and received in the Registry on 9 August 2006, the French Minister for Foreign Affairs informed the Court that France "consents to the Court's jurisdiction to entertain the Application pursuant to, and solely on the basis of . . . Article 38, paragraph 5", of the Rules of Court, while specifying that this consent was "valid only for the purposes of the case, within the meaning of Article 38, paragraph 5, i.e. in respect of the dispute forming the subject of the Application and strictly within the limits of the claims formulated therein" by Djibouti. The case was entered in the General List of the Court under the date of 9 August 2006.

By letters dated 17 October 2006, the Registrar informed both Parties that the Member of the Court of French nationality had notified the Court of his intention not to take part in the decision of the case, taking into account the provisions of Article 17, paragraph 2, of the Statute. Pursuant to Article 31 of the Statute and Article 37, paragraph 1, of the Rules of Court, France chose Mr. Gilbert Guillaume to sit as judge *ad hoc* in the case. Since the Court included upon the Bench no judge of Djiboutian nationality, Djibouti proceeded to exercise its right conferred by Article 31 of the Statute to choose a judge *ad hoc* to sit in the case: it chose Mr. Abdulqawi Ahmed Yusuf.

By an Order dated 15 November 2006, the Court fixed 15 March 2007 and 13 July 2007, respectively, as the time-limits for the filing of the Memorial of Djibouti and the Counter-Memorial of France; those pleadings were duly filed within the time-limits so prescribed. The Parties not having deemed it necessary to file a Reply and a Rejoinder, and the Court likewise having seen no need for these, the case was therefore ready for hearing.

Public hearings were held between 21 and 29 January 2008. At the conclusion of the oral proceedings, the Parties presented the following final submissions to the Court:

On behalf of the Government of Djibouti,

"The Republic of Djibouti requests the Court to adjudge and declare:

1. that the French Republic has violated its obligations under the 1986 Convention:

(i) by not acting upon its undertaking of 27 January 2005 to execute the letter rogatory addressed to it by the Republic of Djibouti dated 3 November 2004;

(ii) in the alternative, by not performing its obligation pursuant to Article 1 of the aforementioned Convention following its wrongful refusal given in the letter of 6 June 2005;

(iii) in the further alternative, by not performing its obligation pursuant to Article 1 of the aforementioned Convention following its wrongful refusal given in the letter of 31 May 2005;

2. that the French Republic shall immediately after the delivery of the Judgment by the Court:

(i) transmit the "Borrel file" in its entirety to the Republic of Djibouti;

(ii) in the alternative, transmit the "Borrel file" to the Republic of Djibouti within the terms and conditions determined by the Court;

3. that the French Republic has violated its obligation pursuant to the principles of customary and general international law not to attack the immunity, honour and dignity of the President of the Republic of Djibouti:

(i) by issuing a witness summons to the President of the Republic of Djibouti on 17 May 2005;

(ii) by repeating such attack or by attempting to repeat such attack on 14 February 2007;

(iii) by making both summonses public by immediately circulating the information to the French media;

(iv) by not responding appropriately to the two letters of protest from the Ambassador of the Republic of Djibouti in Paris dated 18 May 2005 and 14 February 2007 respectively;

4. that the French Republic has violated its obligation pursuant to the principles of customary and general international law to prevent attacks on the immunity, honour and dignity of the President of the Republic of Djibouti;

5. that the French Republic shall immediately after the delivery of the Judgment by the Court withdraw the witness summons dated 17 May 2005 and declare it null and void;

6. that the French Republic has violated its obligation pursuant to the principles of customary and general international law not to attack the person, freedom and honour of

the *procureur général* of the Republic of Djibouti and the Head of National Security of Djibouti;

7. that the French Republic has violated its obligation pursuant to the principles of customary and general international law to prevent attacks on the person, freedom and honour of the *procureur général* of the Republic of Djibouti and the Head of National Security of the Republic of Djibouti;

8. that the French Republic shall immediately after the delivery of the Judgment by the Court withdraw the summonses to attend as *témoins assistés* and the arrest warrants issued against the *procureur général* of the Republic of Djibouti and the Head of National Security of the Republic of Djibouti and declare them null and void;

9. that the French Republic by acting contrary to or by failing to act in accordance with Articles 1, 3, 4, 6 and 7 of the Treaty of Friendship and Co-operation of 1977 individually or collectively has violated the spirit and purpose of that Treaty, as well as the obligations deriving therefrom;

10. that the French Republic shall cease its wrongful conduct and abide strictly by the obligations incumbent on it in the future;

11. that the French Republic shall provide the Republic of Djibouti with specific assurances and guarantees of non-repetition of the wrongful acts complained of."

On behalf of the Government of France,

"For all the reasons set out in its Counter-Memorial and during its oral argument, the French Republic requests the Court:

(1) (*a*) to declare that it lacks jurisdiction to rule on those claims presented by the Republic of Djibouti upon completion of its oral argument which go beyond the subject of the dispute as set out in its Application, or to declare them inadmissible;

(*b*) in the alternative, to declare those claims to be unfounded;

(2) to reject all the other claims made by the Republic of Djibouti."

The facts of the case
(paras. 19–38)

The Court notes initially that the Parties concur that it is not for it to determine the facts and establish responsibilities in the Borrel case, and in particular, the circumstances in which Mr. Borrel met his death. It adds that they agree that the dispute before the Court does however originate in that case, as a result of the opening of a number of judicial proceedings, in France and in Djibouti, and the resort to bilateral treaty mechanisms for mutual assistance between the Parties. The Court describes at length the facts, some admitted and others disputed by the Parties, and the judicial proceedings brought in connection with the Borrel case.

Jurisdiction of the Court
(paras. 39–95)

The Court recalls that Djibouti sought to found the Court's jurisdiction on Article 38, paragraph 5, of the Rules of Court. It notes that while France acknowledges that the Court's jurisdiction to settle the dispute is "beyond question" by virtue of that provision, it contests the scope of that jurisdiction *ratione materiae* and *ratione temporis* to deal with certain violations alleged by Djibouti

Preliminary question regarding jurisdiction and admissibility
(paras. 45–50)

The Court notes that in determining the scope of the consent expressed by one of the parties, it pronounces on its jurisdiction and not on the admissibility of the application. It then proceeds to examine the objections raised by France relating to the scope of its jurisdiction.

Jurisdiction ratione materiae
(paras. 51–64)

After stating the positions of the Parties, the Court notes that its jurisdiction is based on the consent of States, under the conditions expressed therein, and that neither the Statute of the Court nor its Rules require that the consent of the parties which thus confers jurisdiction on the Court be expressed in any particular form. The Court recalls that it has also interpreted Article 36, paragraph 1, of the Statute as enabling consent to be deduced from certain acts, thus accepting the possibility of *forum prorogatum*. Thus for it to exercise jurisdiction on the basis of *forum prorogatum*, the Court is of the opinion that the element of consent must be either explicit or clearly to be deduced from the relevant conduct of a State.

The Court observes that this is the first time it falls to the Court to decide on the merits of a dispute brought before it by an application based on Article 38, paragraph 5, of the Rules of Court. It indicates that this provision, introduced by the Court into its Rules in 1978, allows a State which proposes to found the jurisdiction of the Court to entertain a case upon a consent thereto yet to be given or manifested by another State to file an application setting out its claims and inviting the latter to consent to the Court dealing with them, without prejudice to the rules governing the sound administration of justice. It notes that the State which is asked to consent to the Court's jurisdiction to settle a dispute is completely free to respond as it sees fit; if it consents to the Court's jurisdiction, it is for it to specify, if necessary, the aspects of the dispute which it agrees to submit to the judgment of the Court. It explains that the deferred and *ad hoc* nature of the Respondent's consent, as contemplated by Article 38, paragraph 5, of the Rules of Court, makes the procedure set out there a means of establishing *forum prorogatum*. The Court adds that its jurisdiction can be founded on *forum prorogatum* in a variety of ways, by no means all of which fall under Article 38, paragraph 5. It stipulates, however, that no applicant may come to the Court without being able to indicate, in its Application, the State against which the claim is brought and the subject of the dispute, as well as the precise nature of that claim and the facts and grounds on which it is based.

Extent of the mutual consent of the Parties
(paras. 65–95)

The Court then turns to discerning the extent of the mutual consent of the Parties. To this end, it examines the terms of France's acceptance of the jurisdiction of the Court and the terms of Djibouti's Application to which that acceptance responds.

The Court notes that France has taken the view that it has only accepted the Court's jurisdiction over the stated subject-matter of the case which is to be found, and only to be found, in paragraph 2 of the Application, under the heading "Subject of the dispute".

That paragraph reads as follows:

> "The subject of the dispute concerns the refusal by the French governmental and judicial authorities to execute an international letter rogatory regarding the transmission to the judicial authorities in Djibouti of the record relating to the investigation in the Case against X for the murder of Bernard Borrel, in violation of the Convention on Mutual Assistance in Criminal Matters between the Government of the Republic of Djibouti and the Government of the French Republic, of 27 September 1986, and in breach of other international obligations borne by the French Republic to the Republic of Djibouti."

Basing itself upon its jurisprudence, the Court indicates that the subject of the dispute was not to be determined exclusively by reference to matters set out under the relevant section heading of the Application. The Court thus notes that the Application, taken as a whole, has a wider scope than that described in the aforementioned paragraph and that it includes the summonses sent to the Djiboutian President on 17 May 2005 and those sent to other Djiboutian officials on 3 and 4 November 2004.

The Court indicates that the Parties do not contest that the claims relating to the Djiboutian letter rogatory of 3 November 2004 and thus the question of compliance, in particular, with the 1986 Convention on Mutual Assistance in Criminal Matters are subject to its jurisdiction. It notes, however, that they disagree on the issue of whether the claims relating to the summonses sent by France to the Djiboutian President, the *procureur de la République* of Djibouti and the Djiboutian Head of National Security, as well as the arrest warrants issued against the latter two officials, fall within its jurisdiction.

The operative phrases in France's response to Djibouti's Application read as follows:

> "I have the honour to inform you that the French Republic consents to the Court's jurisdiction to entertain the Application pursuant to and solely on the basis of said Article 38, paragraph 5 [of the Rules of Court].
>
> The present consent to the Court's jurisdiction is valid only for the purposes of the case within the meaning of Article 38, paragraph 5, i.e. in respect of the dispute forming the subject of the Application and strictly within the limits of the claims formulated therein by the Republic of Djibouti."

After examining France's letter of acceptance, the Court declares that on the basis of a plain reading of the text of that letter, by its choice of words, the consent of the Respondent is not limited to the "subject of the dispute" as described in paragraph 2 of Djibouti's Application. It finds that when France, which had full knowledge of the claims formulated by Djibouti in its Application, sent its letter to the Court, it did not seek to exclude certain aspects of the dispute forming the subject of the Application from its jurisdiction. The Court consequently holds that, with regard to jurisdiction *ratione materiae*, the claims concerning both subject-matters referred to in Djibouti's Application, namely, France's refusal to comply with Djibouti's letter rogatory and the summonses to appear sent by the French judiciary, on the one hand to the President of Djibouti dated 17 May 2005, and on the other hand to two senior Djiboutian officials dated 3 and 4 November 2004 and 17 June 2005, are within the Court's jurisdiction.

The Court then turns to the question of its jurisdiction over the witness summons of 2007 served on the President of Djibouti and the arrest warrants of 2006 issued against the senior Djiboutian officials [actions which took place after the filing of the Application]. It recalls that, in its Memorial, Djibouti argued that it had reserved the right, in the Application, "to amend and supplement [it]" and that it noted that the claims based on violations of the international law on immunities which took place after 9 January 2006 were not "new or extraneous to the initial claims" and that they "all relate[d] to the claims set out in the Application and [were] based on the same legal grounds". The Court notes that France, for its part, has submitted that any possible jurisdiction of the Court to address such violations could not be exercised in respect of facts occurring after the filing of the Application

With respect to the arrest warrants issued for senior Djiboutian officials, the Court indicates that it is clear from France's letter that its consent does not go beyond what is in that Application. It emphasizes that where jurisdiction is based on *forum prorogatum*, great care must be taken regarding the scope of the consent as it has been circumscribed by the respondent State. The Court recalls that France's consent is valid "only for the purposes of the case", that is, regarding "the dispute forming the subject of the Application and strictly within the limits of the claims formulated therein by the Republic of Djibouti"; that in Djibouti's Application there are no claims relating to arrest warrants; and that, although the arrest warrants could be perceived as a method of enforcing the summonses, they represent new legal acts in respect of which France cannot be considered as having implicitly accepted the Court's jurisdiction. Therefore the Court is of the opinion that the claims relating to the arrest warrants arise in respect of issues which are outside the scope of the Court's jurisdiction *ratione materiae*.

With respect to the summons addressed to the President of Djibouti on 14 February 2007, the Court indicates that it was in relation to the same case as the initial summons sent to the President of Djibouti on 17 May 2005, was issued by the same judge, and it was in relation to the same legal question, but that this time it followed the proper form under French law. The Court finds that, even though it had been corrected as to form, it was a repetition of the witness summons of 17 May 2005. It emphasizes that in the list of the legal grounds on which Djibouti bases its Application (see paragraph 3 of that

document), it referred expressly to the attacks on the person of a Head of State. Noting that France has accepted the jurisdiction of the Court in relation to the "claims formulated" in Djibouti's Application, the Court reaches the conclusion that it has jurisdiction to examine both of the aforementioned summonses.

The alleged violation of the Treaty of Friendship and Co-operation between France and Djibouti of 27 June 1977
(paras. 96–114)

Djibouti argues that France violated a general obligation of co-operation provided for by the Treaty of Friendship and Co-operation (signed by the two States on 27 June 1977) by not co-operating with it in the context of the judicial investigation into the Borrel case, by attacking the dignity and honour of the Djiboutian Head of State and other Djiboutian authorities and by acting in disregard of the principles of equality, mutual respect and peace set out in Article 1 of the Treaty. France, for its part, contends that any interpretation of the Treaty resulting in the acknowledgment of the existence of a general obligation to co-operate which is legally binding on it in respect of the execution of the international letter rogatory is inconsistent not only with the wording of the Treaty, but also with its object, its purpose, its context, and the will of the parties.

The Court engages in a meticulous examination of the provisions of the Treaty. While it notes that the respective obligations of the Treaty are obligations of law, articulated as obligations of conduct, committing the Parties to work towards the attainment of certain objectives, it finds that mutual assistance in criminal matters, the subject regulated by the 1986 Convention, is not a matter mentioned among the fields of co-operation enumerated in the Treaty of 1977.

If, moreover, the Court concludes that the Treaty of Friendship and Co-operation of 1977 does have a certain bearing on the interpretation and application of the Convention on Mutual Assistance in Criminal Matters (of 27 September 1986 between Djibouti and France), inasmuch as it must be interpreted and applied in such a way as to take into consideration the friendship and co-operation established by France and Djibouti as the basis for their mutual relations in the 1977 Treaty, it notes nevertheless that that is as far as the relationship between the two instruments can be explained in legal terms. The Court is thus of the opinion that, in the light of its jurisprudence and of the customary rule laid down in Article 31, paragraph 3, of the Vienna Convention on the Law of Treaties of 23 May 1969, an interpretation of the 1986 Convention duly taking into account the spirit of friendship and co-operation stipulated in the 1977 Treaty cannot possibly stand in the way of a party to that Convention relying on a clause contained in it which allows for non-performance of a conventional obligation under certain circumstances.

The alleged violation of the Convention on Mutual Assistance in Criminal Matters between France and Djibouti of 27 September 1986
(paras. 115–156)

Djibouti claims that France violated the aforementioned Convention by refusing to execute the letter rogatory issued on 3 November 2004 by the Djiboutian judicial authorities. The Court examines in turn the three arguments presented by Djibouti to support this claim.

The obligation to execute the international letter rogatory
(paras. 116–124)

According to Djibouti, the obligation to execute the international letter rogatory laid down in Article 1 of the 1986 Convention allegedly imposes on the two Parties an obligation of reciprocity in implementing the Convention. The Court notes in this respect that in the relations between Djibouti and France, Article 1 of the Convention of 1986 refers to mutuality in the performance of the obligations laid down therein. It considers in this regard that each request for legal assistance is to be assessed on its own terms by each Party. It notes, moreover, that the Convention nowhere provides that the granting of assistance by one State in respect of one matter imposes on the other State the obligation to do likewise when assistance is requested of it in turn. The Court accordingly considers that Djibouti cannot rely on the principle of reciprocity in seeking execution of the international letter rogatory it submitted to the French judicial authorities.

As for the obligation to execute international letters rogatory laid down in Article 3 of the 1986 Convention, the Court observes that it is to be realized in accordance with the procedural law of the requested State. It indicates that the ultimate treatment of a request for mutual assistance in criminal matters clearly depends on the decision by the competent national authorities, following the procedure established in the law of the requested State. While it must of course ensure that the procedure is put in motion, the State does not thereby guarantee the outcome, in the sense of the transmission of the file requested in the letter rogatory. The Court notes that Article 3 must be read in conjunction with Articles 1 and 2 of the Convention.

The alleged undertaking by France to execute the international letter rogatory requested by Djibouti
(paras. 125–130)

The Court then comes to the assessment of a letter dated 27 January 2005 addressed to the Ambassador of Djibouti in Paris by the Principal Private Secretary to the French Minister of Justice written as follows:

> "I have asked for all steps to be taken to ensure that a copy of the record of the investigation into the death of Mr. Bernard Borrel is transmitted to the Minister of Justice and Penal and Muslim Affairs of the Republic of Djibouti before the end of February 2005 (such time being required because of the volume of material to be copied).
>
> I have also asked the *procureur* in Paris to ensure that there is no undue delay in dealing with this matter."

Djibouti argues that this amounted to an undertaking by the Principal Private Secretary (which was binding on the French Ministry of Justice and the French State as a whole) and that that undertaking gave rise to a legitimate expectation on its part that the file would be transmitted.

The Court notes that the terms of the letter of 27 January 2005, when given their ordinary meaning, entail no formal undertaking by the Principal Private Secretary to the Min-

ister of Justice to transmit the Borrel file; the letter rather informed the Ambassador of Djibouti to France of the steps that had been undertaken to set in motion the legal process to make possible the transmission of the file. It adds that in any event the Principal Private Secretary could not have given a definitive commitment, because French law (Art. 694–2 of the French Code of Criminal Procedure) grants the authority to execute letters rogatory exclusively to investigating judges. Accordingly, the Court considers that, by virtue of its content and the factual and legal circumstances surrounding it, the letter of 27 January 2005 does not, by itself, entail a legal undertaking by France to execute the international letter rogatory transmitted to it by Djibouti on 3 November 2004.

France's refusal to execute the international letter rogatory (paras. 131–156)

Djibouti argues that France cannot rely on the provisions of Article 2 (c) of the Convention of 1986, by virtue of which a State may refuse mutual assistance, if it considers that execution of the request is likely to prejudice its essential interests. It further indicates that French law cannot be interpreted as giving the investigating judge sole authority to determine the essential interests of the State. Djibouti asserts that France, in the letter from its Ambassador in Djibouti to the Djiboutian Minister for Foreign Affairs of 6 June 2005, omitted to provide any reason for its "unilateral" refusal of mutual assistance, in violation of Article 17 of the Convention of 1986, which lays down that "[r]easons shall be given for any refusal of mutual assistance". According to Djibouti, the obligation to give reasons is in fact a condition of the validity of the refusal. It points out in this respect that the mere mention of Article 2 (c) is at best to be considered as a very general sort of "notification", which is in its opinion certainly not the same as providing "reasons".

France, for its part, points out that it is not for another State to determine how France should organize its own procedures. It notes that penal matters, more than others, affect the national sovereignty of States and their security, *ordre public* and other essential interests, as mentioned in Article 2 (c) of the Convention of 1986. It adds that not only did it inform Djibouti on 31 May 2005, in a letter from the Director of Criminal Affairs and Pardons at the Ministry of Justice to the Ambassador of Djibouti to France, of the investigating judge's refusal of the request for mutual assistance concerned, but that it also gave explicit reasons for its refusal by referring to Article 2 (c) of the Convention of 1986. France considers in that respect that the citation of that article suffices as the statement of reasons required by Article 17 of the Convention.

As Djibouti denies that its Ambassador in Paris ever received the letter dated 31 May 2005 and as France was unable to demonstrate that it had indeed been sent to the Djiboutian authorities, the Court concludes that it cannot take this document into consideration in its examination of the present case

After recalling the circumstances in which the French judicial authorities took the decision to refuse to execute the international letter rogatory and how Djibouti was informed of that decision, the Court indicates that it is unable to accept the contention of Djibouti that, under French law, matters relating to security and *ordre public* could not fall for determination by the judiciary alone. It declares that it is aware that the Ministry of Justice had at a certain time been very active in dealing with such issues. However, the Court adds, where ultimate authority lay in respect of the response to a letter rogatory was settled by the *Chambre de l'instruction* of the Paris Court of Appeal in its judgment of 19 October 2006. The *Chambre de l'instruction* held that the application, in one way or another, of Article 2 of the 1986 Convention to a request made by a State is a matter solely for the investigating judge (who will have available information from relevant government departments). The Court of Appeal further determined that such a decision by an investigating judge is a decision in law, and not an advice to the executive. It is not for this Court to do other than accept the findings of the Paris Court of Appeal on this point.

As to whether the decision of the competent authority was made in good faith, and falls within the scope of Article 2 of the 1986 Convention, the Court recalls that Judge Clément's *soit-transmis* of 8 February 2005 states the grounds for her decision to refuse the request for mutual assistance. The judge explained in it that transmission of the file was considered to be "contrary to the essential interests of France", in that the file contained declassified "defence secret" documents, as well as information and witness statements in respect of another case in progress, the transmission of which to a foreign political authority would have amounted "to an abuse of French law", as they were "documents that are accessible only to the French judge". The Court indicates moreover that it was not evident from this *soit-transmis* why Judge Clément found that it was not possible to transmit part of the file, even with some documents removed or blackened out. It explains, however, that it was able to deduce from the written and oral pleadings of France that the intelligence service documents and information permeated the entire file. Consequently, the Court finds that those reasons that were given by Judge Clément do fall within the scope of Article 2 (c) of the 1986 Convention.

The Court is unable to accept, as France contends, that there has been no violation of Article 17 on the ground that Djibouti was allegedly informed that Article 2 (c) had been invoked. Equally, the Court is unable to accept the contention of France that the fact that the reasons have come within the knowledge of Djibouti during these proceedings means that there has been no violation of Article 17. A legal obligation to notify reasons for refusing to execute a letter rogatory is not fulfilled through the requesting State learning of the relevant documents only in the course of litigation, some long months later. As no reasons were given in the letter of 6 June 2005, the Court concludes that France failed to comply with its obligation under Article 17 of the 1986 Convention.

The Court observes in this respect that even if it had been persuaded of the transmission of the letter of 31 May 2005, the bare reference it was said to contain to Article 2 (c) would not have sufficed to meet the obligation of France under Article 17. It considers that some brief further explanation was called for and that this is not only a matter of courtesy. It also allows the requested State to substantiate its good faith in refusing the request.

The Court observes finally that there is a certain relationship between Articles 2 and 17 of the Convention in the sense that the reasons that may justify refusals of mutual assistance which are to be given under Article 17 include the grounds specified in Article 2. At the same time, Articles 2 and 17 provide for distinct obligations, and the terms of the Convention do not suggest that recourse to Article 2 is dependent upon compliance with Article 17. The Court thus finds that, in spite of the non-respect by France of Article 17, the latter was entitled to rely upon Article 2 (c) and that, consequently, Article 1 of the Convention has not been breached.

The alleged violations of the obligation to prevent attacks on the person, freedom or dignity of an internationally protected person
(paras. 157–200)

Djibouti considers that France, by sending witness summonses to the Head of State of Djibouti and to senior Djiboutian officials, has violated "the obligation deriving from established principles of customary and general international law to prevent attacks on the person, freedom or dignity of an internationally protected person".

The alleged attacks on the immunity from jurisdiction or the inviolability of the Djiboutian Head of State
(paras. 161–180)

Djibouti calls into question two witness summonses in the Borrel case, issued by the French investigating judge, Judge Clément, to the President of the Republic of Djibouti on 17 May 2005 and 14 February 2007 respectively.

— The witness summons addressed to the Djiboutian Head of State on 17 May 2005

The Court recalls that the investigating judge responsible for the Borrel case sent a witness summons to the President of Djibouti, on an official visit to France at the time, on 17 May 2005, simply by facsimile to the Djiboutian Embassy in France, inviting him to attend in person at the judge's office the following day. For Djibouti, this summons was not only inappropriate as to its form, but was, in the light of Articles 101 and 109 of the French Code of Criminal Procedure, an element of constraint. Djibouti has, moreover, inferred from the absence of an apology and from the fact that that summons was not declared void that the attack on the immunity, honour and dignity of the Head of State has continued.

France, for its part, submits that the summoning of a foreign Head of State as an ordinary witness in no sense constitutes an infringement of "the absolute nature of the immunity from jurisdiction and, even more so, from enforcement that is enjoyed by foreign Heads of State". In its view, the witness summons addressed to the Djiboutian Head of State was purely an invitation which imposed no obligation on him.

The Court indicates that it has already recalled in the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)* case "that in international law it is firmly established that . . . certain holders of high-ranking office in a State, such as the Head of State . . . enjoy immunities from jurisdiction in other States, both civil and criminal" (*Judgment, I.C.J. Reports 2002*, pp. 20–21, para. 51). In its opinion, a Head of State enjoys in particular "full immunity from criminal jurisdiction and inviolability" which protects him or her "against any act of authority of another State which would hinder him or her in the performance of his or her duties" (*ibid*., p. 22, para. 54). Thus the determining factor in assessing whether or not there has been an attack on the immunity of the Head of State lies in the subjection of the latter to a constraining act of authority.

In the present case, the Court finds that the summons was not associated with the measures of constraint provided for by Article 109 of the French Code of Criminal Procedure; it was in fact merely an invitation to testify which the Head of State could freely accept or decline. Consequently, the Court holds that there was no attack by France on the immunities from criminal jurisdiction enjoyed by the Head of State.

However, the Court notes that the investigating judge, Judge Clément, addressed the summons to Djibouti's President notwithstanding the formal procedures laid down by Article 656 of the French Code of Criminal Procedure, which deals with the "written statement of the representative of a foreign Power". The Court considers that by inviting a Head of State to give evidence simply through sending him a facsimile and by setting him an extremely short deadline without consultation to appear at her office, the investigating judge failed to act in accordance with the courtesies due to a foreign Head of State.

Having taken note of all the formal defects surrounding the summons under French law, the Court considers that these do not in themselves constitute a violation by France of its international obligations regarding the immunity from criminal jurisdiction and the inviolability of foreign Heads of State. Nevertheless, the Court observes that an apology would have been due from France.

The Court recalls, moreover, that the rule of customary international law reflected in Article 29 of the Vienna Convention on Diplomatic Relations, whereby receiving States are under the obligation to protect the honour and dignity of diplomatic agents, necessarily applies to Heads of State. The Court observes, in this respect, that if it had been shown by Djibouti that confidential information relating to the witness summons addressed to its President had been passed from the offices of the French judiciary to the media, such an act could have constituted, in the context concerned, not only a violation of French law, but also a violation by France of its international obligations. However, the Court recognizes that it does not possess any probative evidence that would establish that the French judicial authorities are the source behind the dissemination of the confidential information in question.

— The witness summons addressed to the Djiboutian Head of State on 14 February 2007

With respect to the second summons, the Court finds that it was issued following the procedure laid down by Article 656 of the French Code of Criminal Procedure, and therefore in accordance with French law. It notes that the consent of the Head of State is expressly sought in this request for testimony, which was transmitted through the intermediary of the authorities and in the form prescribed by law. The Court consequently considers that this measure cannot have infringed

the immunities from jurisdiction enjoyed by the Djiboutian Head of State.

As for Djibouti's argument, that the disclosure to the media of confidential information regarding the second witness summons, in breach of the confidentiality of the investigation, must be regarded as an attack on the honour or the dignity of its Head of State, the Court indicates once again that it has not been provided with probative evidence which would establish that the French judicial authorities were the source behind the dissemination of the confidential information at issue here.

The alleged attacks on the immunities said to be enjoyed by the procureur de la République *and the Head of National Security of Djibouti*
(paras. 181–200)

The Court examines the four summonses as *témoins assistés* addressed in 2004 and 2005 by French judges to senior Djiboutian officials, Mr. Djama Souleiman Ali and Mr. Hassan Said Khaireh, respectively *procureur de la République* and Head of National Security of Djibouti. According to Djibouti, these witness summonses violate international obligations on immunities, both conventional and deriving from general international law.

The Court recalls that in the event of summonses as *témoins assistés*, the situation envisaged by French law is one where suspicions exist regarding the person in question, without these being considered sufficient grounds to proceed with a "*mise en examen*". The person concerned is thus obliged to appear before the judge, on pain of being compelled to do so by the law enforcement agencies (Art. 109 of the French Code of Criminal Procedure).

Djibouti initially contended that the *procureur de la République* and the Head of National Security benefited from personal immunities from criminal jurisdiction and inviolability, before rejecting this argument during the oral proceedings. It then argued in terms of "functional immunity, or *ratione materiae*". For Djibouti, it is a principle of international law that a person cannot be held as individually criminally liable for acts performed as an organ of State, and while there may be certain exceptions to that rule, there is no doubt as to its applicability in the present case. The Court observes that such a claim is, in essence, a claim of immunity for the Djiboutian State, from which the *procureur de la République* and the Head of National Security would be said to benefit.

France, in replying to this new formulation of Djibouti's argument, indicated that as functional immunities are not absolute, it is for the justice system of each country to assess, when criminal proceedings are instituted against an individual, whether, in view of the acts of public authority performed in the context of his duties, that individual should enjoy, as an agent of the State, the immunity from criminal jurisdiction that is granted to foreign States. According to France, the two senior officials concerned have never availed themselves before the French criminal courts of the immunities which Djibouti claims on their behalf.

The Court observes, initially, that it has not been "concretely verified" before it that the acts which were the subject of the summonses as *témoins assistés* issued by France were indeed acts within the scope of their duties as organs of State. It then points out that it is not apparent from the terms of the final submissions of Djibouti that the claim that Mr. Djama Souleiman Ali and Mr. Hassan Said Khaireh benefited from functional immunities as organs of State still constitutes the only or the principal argument being made by Djibouti.

The Court notes that there are no grounds in international law upon which it could be said that the officials concerned were entitled to personal immunities, not being diplomats within the meaning of the Vienna Convention on Diplomatic Relations of 1961, and the Convention on Special Missions of 1969 not being applicable.

The Court must also observe that at no stage have the French courts (before which the challenge to jurisdiction would normally be expected to be made), nor indeed this Court, been informed by the Government of Djibouti that the acts complained of by France were its own acts of the State of Djibouti and that the *procureur de la République* and the Head of National Security were its organs, agencies or instrumentalities in carrying them out.

The Court emphasizes that the State which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other State concerned, thereby enabling the court of the forum State to ensure that it does not fail to respect any entitlement to immunity and might thereby engage the responsibility of that State. Further, the State notifying a foreign court that judicial process should not proceed, for reasons of immunity, against its State organs, is assuming responsibility for any internationally wrongful act in issue committed by such organs.

Given all these elements, the Court does not uphold the sixth and seventh final submissions of Djibouti.

Remedies
(paras. 201–204)

Having found that the reasons invoked by France, in good faith, under Article 2 (c) fall within the provisions of the 1986 Convention, the Court will not order the Borrel file to be transmitted with certain pages removed, as Djibouti has requested in the alternative. Having itself no knowledge of the contents of the file, the Court considers that it would not have been in a position so to do.

With respect to remedies for the violation by France of its obligation to Djibouti under Article 17 of the 1986 Convention, the Court declares that it will not order the publication of the reasons underlying the decision, as specified in the *soit-transmis* of Judge Clément, underlying the refusal of the request for mutual assistance, these having in the meantime passed into the public domain. The Court determines that its finding that France has violated that obligation constitutes appropriate satisfaction.

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Separate opinion of Judge Ranjeva

In the opinion of Judge Raymond Ranjeva, the Judgment failed to meet the requirements of *forum prorogatum* when,

by finding that the second witness summons, dated 14 February 2007, fell within the Court's jurisdiction, it extended that jurisdiction *ratione materiae*. While the errors which marred the first witness summons explain why the second was issued, the fact remains that, in law, the latter is an independent judicial act.

Indeed, for the second witness summons to exist in legal form, it was necessary for the investigating judge to use discretion and deliberately opt to take a new judicial decision. Judge Ranjeva considers that the Judgment arrived at the above finding by abandoning the definition of the subject of the dispute as set out in the Application and adopting instead the definition contained in the Memorial: "in breach of . . . obligations . . ." (see the Application) under the Convention on Mutual Assistance in Criminal Matters cannot mean, in French, the official language of both Parties, "as well as the . . . breaching of . . . international obligations" (see the Memorial). In this case, the Respondent's consent was founded on the definition of the subject of the dispute according to the terms used in the Application. In the event of doubt, a critical analysis of the terms of the Application should have been made, but the Judgment did not undertake this. Consequently, and contrary to the rules of *forum prorogatum*, by extending the Court's jurisdiction *ratione materiae*, the Judgment has considered not the justiciable dispute itself, but the dispute in its entirety.

Separate opinion of Judge Koroma

In his separate opinion, Judge Koroma states that he voted in favour of the operative paragraphs, for various reasons, including the decision by France to give its consent under Article 38, paragraph 5, of the Rules of Court, which allowed the Court to exercise its jurisdiction in this case.

In Judge Koroma's view, the issue before the Court is not whether the 1986 Convention on Mutual Assistance in Criminal Matters allows for the non-performance of a conventional obligation under certain circumstances but rather whether, in applying that Convention in the context of an investigation into the murder of a citizen of one of the parties to the Convention, due regard ought not to be paid to the 1977 Treaty of Friendship and Co-operation between the two parties, especially when the Treaty is being invoked not with the intention of impeding or subverting the investigation but to further it. Allowing the Parties to avail themselves of the Treaty in this way not only serves their interests but also accords with its object, purpose and spirit, as both Parties have an interest in uncovering the facts and circumstances surrounding the death of Judge Borrel.

Judge Koroma also points out in his separate opinion that, apart from the obligation of the two parties to the 1977 Treaty to co-operate, the Treaty also recognizes equality and mutual respect to be the basis of relations between the two countries. In applying the 1986 Convention due account ought to have been taken of those principles, especially when Djibouti, in a spirit of co-operation, equality and mutual respect, had complied with France's request to execute the international letters rogatory relating to the investigation of Mr. Borrel's death, providing access to necessary documents, witnesses and sites, including the presidential palace in Djibouti. On the other hand, had Djibouti declined such co-operation by not executing France's letters rogatory, not only could it have been regarded to be in breach of its obligation to co-operate in the investigation of the death but a negative inference would have arisen as to its culpability.

The Judge further recalls that a party to a treaty may not invoke its domestic law as justification for the non-fulfilment of its obligation, responding to the contention of the Respondent that it had to comply with the domestic law in discharging its obligation under the 1986 Convention on Mutual Assistance in Criminal Matters between the two countries.

In Judge Koroma's view, the Court should have taken into account the principle of reciprocity—a principle which is inherent and comprehended within a bilateral treaty, such as the 1986 Convention. He emphasizes that a State enters into a treaty relationship expecting that the other party will perform its own treaty or conventional obligations. Accordingly, Djibouti was entitled to expect that France would comply, on the basis of reciprocity, with Djibouti's request for the execution of its letter rogatory, since it had earlier complied with France's requests dealing with the same subject-matter, namely, the investigation into the death of Mr. Borrel.

Judge Koroma takes the view that the obligation to respect the dignity and honour of the Djiboutian Head of State was violated by the French magistrate not only when the witness summonses were sent to him by facsimile and setting him a short deadline to appear at her office, but also when these were leaked to the press. The Judge points out that international law imposes on receiving States the obligation to respect the inviolability, honour and dignity of Heads of State—meaning immunity from all interference whether under colour of law or right or otherwise, and connotes a special duty of protection from such interference or from mere insult, on the part of the receiving State. In his view, the matters complained of involved not merely matters of courtesy but the obligation to respect the immunity of the Head of State from legal process. In Judge Koroma's view, when the Court came to the conclusion that there was a violation and an apology due in the form of a remedy, this should have been reflected in the operative paragraph as a finding of the Court, as such paragraph has a legal significance of its own and for a party in whose favour a determination has been made and who is entitled to have it enforced.

Separate opinion of Judge Parra-Aranguren

1. Judge Parra-Aranguren's vote in favour of paragraph 205, subparagraphs (1) (a) and (d), and of subparagraph (2) of the Judgment does not mean that he agrees with each and every part of the Court's reasoning in reaching its conclusions. The limited time available to present the separate opinion within the period fixed by the Court did not permit him to set out a complete explanation of his disagreement with paragraph 205, subparagraphs (1) (b) and (c). He has however advanced some of his main reasons for voting against them.

2. Djibouti sought in its Application to found the jurisdiction of the Court on Article 38, paragraph 5, of the Rules of Court. France informed the Court, by a letter from its Minister for Foreign Affairs dated 25 July 2006, of its consent "to the

Court's jurisdiction to entertain the Application pursuant to and solely on the basis of said Article 38, paragraph 5", of the Rules of Court specifying that its consent was valid only "in respect of the dispute forming the subject of the Application and strictly within the limits of the claims formulated therein by the Republic of Djibouti".

3. In the opinion of France, the jurisdiction of the Court is restricted to deciding only "the dispute forming the subject of the Application" as determined in its paragraph 2, i.e., "the refusal by the French governmental and judicial authorities to execute an international letter rogatory regarding the transmission to the judicial authorities in Djibouti of the record relating to the investigation in the 'Case against X for the murder of Bernard Borrel', in violation of the Convention on Mutual Assistance in Criminal Matters between the Government of the Republic of Djibouti and the Government of the French Republic, of 27 September 1986, and in breach of other international obligations borne by the French Republic to the Republic of Djibouti".

4. Djibouti maintains to the contrary that "the dispute forming the subject of the Application" in respect of which France gave its consent involves not only the French authorities' refusal to execute the letter rogatory issued on 3 November 2004, but also all violations by France of its obligation to prevent attacks on the person, the freedom and the dignity of Djibouti's Head of State, Djibouti's *procureur général* and Djibouti's Head of National Security.

5. In determining its jurisdiction *ratione materiae* in the Judgment, the Court accepts Djibouti's contention.

6. The Court maintains that the subject-matter of the dispute may be discerned from a reading of the whole Application and observes: that paragraph 2 of Djibouti's Application, entitled "Subject of the dispute", does not mention any other matters which Djibouti also seeks to bring before the Court, namely, the various summonses sent to the President of Djibouti and two senior Djiboutian officials; that said summonses are mentioned in Djibouti's Application under the heading "Legal Grounds" and "Nature of the Claim"; that the Application, "despite a confined description of the subject of the dispute in its second paragraph, taken as a whole, has a wider scope which includes the summonses sent to the Djiboutian President on 17 May 2005 and those sent to other Djiboutian officials on 3 and 4 November 2004"; and that France had full knowledge of the claims formulated by Djibouti in its Application when sending its letter of 25 July 2006 to the Court but did not seek to exclude certain aspects of the dispute forming the subject of the Application from its jurisdiction.

7. Judge Parra-Aranguren considers that France did not consent to the jurisdiction of the Court in the present case in respect of all claims mentioned in Djibouti's Application, because, had that been the case, its letter of 25 July 2006 would have simply stated that France consented to have the Court decide on Djibouti's Application, with no further elaboration. In his opinion, the reference to Djibouti's Application in general terms is found in the first paragraph of the French letter, not in the second, where France expresses its limited consent to the jurisdiction of the Court. Consequently, France did not agree to have the Court decide all claims mentioned by Djibouti in its Application but only some of them, i.e., those "in respect of the dispute forming the subject of the Application" and "strictly within the limits of the claims formulated" by Djibouti. Therefore, contrary to the finding in the final sentence of paragraph 83 of the Judgment, the French declaration "read as a whole", interpreted "in harmony with a natural and reasonable way of reading the text", leads to the conclusion that France's true intention was to consent to the jurisdiction of the Court only over "the dispute forming the subject of the Application", as it was unilaterally defined by Djibouti in paragraph 2 of its Application.

8. Moreover Judge Parra-Aranguren observes that in the second paragraph of its letter dated 25 July 2006 France consented to the Court deciding "the dispute forming the subject of the Application", not to its deciding the Application as a whole. Therefore, France's consent was given in respect of the dispute described by Djibouti not in the whole Application but only in paragraph 2, under the heading "Subject of the Dispute", which does not mention any alleged violations by France of its obligation to prevent attacks on the person, the freedom or the dignity of Djibouti's Head of State, Djibouti's *procureur général* or Djibouti's Head of National Security. Consequently, in his opinion, these are not part of "the dispute forming the subject of the Application", which is the only matter in respect of which France consented to a decision by the Court, and for this reason the Court does not have jurisdiction to rule upon them.

9. Additionally, Judge Parra-Aranguren notes that, in paragraphs 1 and 22 of its Application, Djibouti describes the "Subject of the Dispute" in similar terms to those used in paragraph 2. As noted in the Judgment, Djibouti mentions the summonses issued by France in violation of its international obligations under the headings "Legal Grounds" and "Nature of the Claim". However, Judge Parra-Aranguren observes that they are also mentioned in the Application under the headings "Statement of Facts" and "Statement of the Grounds on Which the Claim is Based"' and that, notwithstanding these references to them, the last section of the Application, under the heading "Jurisdiction of the Court and Admissibility of the Present Application", describes the "Subject of the Dispute" in the same manner as in paragraph 2.

10. Given the above, in Judge Parra-Aranguren's opinion, "the dispute forming the subject of the Application" referred to by France in the second paragraph of its letter dated 25 July 2006 is to be understood to be that described in paragraph 2 of Djibouti's Application under the heading "Subject of the Dispute", as well as in paragraphs 1 and 22.

11. Finally, Judge Parra-Aranguren observes that no mention of any alleged violations by France of its obligation to prevent attacks on the person, the freedom or the dignity of Djibouti's Head of State, Djibouti's *procureur général* or Djibouti's Head of National Security is found in Documents I, III or IV attached to Djibouti's Application: i.e., the letter of 4 January 2006 from Mr. Djama Souleiman Ali, State Prosecutor of the Republic of Djibouti, to the President of the International Court of Justice; the "Delegation of Powers" signed by the President of the Republic of Djibouti on 28 December 2005; and an undated letter from the Minister for Foreign Affairs

and International Co-operation of the Republic of Djibouti to the President of the International Court of Justice. Therefore, in Judge Parra-Aranguren's opinion it may be concluded from the silence of Djibouti's State Prosecutor, its President and its Minister for Foreign Affairs and International Co-operation, that none of them considered "the dispute forming the subject of the Application" to include any alleged violations by France of its obligation to prevent attacks on the person, the freedom or the dignity of Djibouti's Head of State, Djibouti's *procureur général* or Djibouti's Head of National Security.

12. The above-indicated reasons led Judge Parra-Aranguren to conclude that the Court does not have jurisdiction *ratione materiae* to decide any claims mentioned by Djibouti but not included in paragraph 2 of its Application. Therefore, it is mainly because of the Court's lack of jurisdiction, not for the reasons set out in the Judgment, that he voted in favour of subparagraphs (1) (d) and (2) (b).

Declaration of Judge Owada

Judge Owada appends a short declaration to the Judgment. In this declaration Judge Owada explains the reason why he has voted against subparagraph 1 (d) of the operative clause of the Judgment, relating to jurisdiction to adjudicate over the dispute concerning the arrest warrants issued against the two senior Djiboutian officials on 27 September 2006.

In the view of Judge Owada, while it is true that "[f]or the Court to exercise jurisdiction on the basis of *forum prorogatum*, the element of consent must be either explicit or clearly to be deduced from the relevant conduct of a State" (Judgment, para. 62), the task of the Court in the present case should not be any different from a case based on two declarations under the optional clause, given the fact that the Respondent in the present case has given its express consent *ad hoc* to the jurisdiction of the Court in a written form by the letter of the Respondent of 25 July 2006 in relation to the Application of the Applicant. All that is required is to interpret and apply the two relevant documents, so that the precise scope of the common consent of the parties may be defined through identifying the overlapping elements common to the two relevant documents.

However, in determining whether the Court has jurisdiction over events that took place after the filing of the Application, i.e., the witness summons of 2007 served on the President of Djibouti and the arrest warrants of 2006 issued against the Djiboutian senior officials, the Judgment departs from the criteria established in its jurisprudence as to whether those facts or events which are subsequent to the filing of the Application are inseparably connected to the facts or events expressly falling within the purview of the Court's jurisdiction, so that they may be covered by the scope of the subject of the dispute (e.g., *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland*); *LaGrand (Germany* v. *United States of America)*; and *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*). The Judgment makes a distinction in the present case by stating that "[i]n none of these cases was the Court's jurisdiction founded on *forum prorogratum*" and declares that "[a]lthough the arrest warrants could be perceived [to be] a method of enforcing the summonses, they represent new legal acts in respect of which France cannot be considered as having implicitly accepted the Court's jurisdiction". On this basis, the Court concludes that "[t]herefore, the claims relating to the arrest warrants arise in respect of issues which are outside the scope of the Court's jurisdiction *ratione materiae*" (Judgment, para. 88), whereas the issuance of the new summons to the President was "a repetition of the preceding one", and thus "in its substance, it is the same summons" (Judgment, para. 91), thus bringing this latter act within the purview of the jurisdiction of the Court.

In Judge Owada's view, the issue in both instances is the same. It is the issue of whether the acts subsequent to the filing of the Application fall within the scope of the acceptance by France of the Court's jurisdiction *ratione materiae* as deduced from the language used in France's letter of 25 July 2006, in particular the expression "in respect of the dispute forming the subject of the Application and strictly within the limits of the claims formulated therein by the Republic of Djibouti" (Judgment, para. 77). In this context, the jurisprudence of the Court as established in the above cases is of relevance to the present case in determining the scope of jurisdiction accepted by France in its letter of 25 July 2006.

For these reasons Judge Owada cannot agree with the Judgment, in that the Judgment departs from the established jurisprudence on the issue of the scope of the "subject-matter of the dispute" in introducing a new criterion of whether the subsequent events after the submission of the Application were "new legal acts" or not (Judgment, para. 88).

Separate opinion of Judge Tomka

In his separate opinion, Judge Tomka deals with the question of *forum prorogatum*, explaining that, in this case, to determine the scope of the Court's jurisdiction, the agreement of the Parties concluded by unilateral acts must be interpreted: the Application and the Respondent's reply. He states that it was the Applicant which, in its Application, introduced a contradiction between the subject of the dispute specified *expressis verbis* and the claims which did not wholly correspond with the subject of the dispute as circumscribed by the Applicant. He presents the arguments that it was possible for the Court to conclude that its jurisdiction was limited to France's refusal to execute an international letter rogatory from Djibouti. In the light of France's somewhat elliptical reply to Djibouti's Application, it was also possible for the Court to conclude that its jurisdiction *ratione materiae* was broader and included the invitations to appear as witnesses sent to the Head of State and certain Djiboutian senior officials. The majority decided in favour of this extended jurisdiction and Judge Tomka concurred with the majority. But he could not subscribe to the conclusion on one aspect of the jurisdiction *ratione temporis*. For him, that jurisdiction was limited to the claims formulated in the Application relating to the facts which occurred before the Application was filed on 9 January 2006, but not to the claims relating to the facts which occurred after the filing of the Application. France consented to the jurisdiction "in respect of the dispute forming the subject of the Application and strictly within the limits of the claims formulated therein".

Judge Tomka notes that, in order to avoid problems relating to the scope of jurisdiction, it is always preferable for States to conclude a special agreement submitting questions agreed by the Parties to the Court for settlement.

Declaration of Judge Keith

Judge Keith in his declaration explains his conclusion that France, in the person of the investigating judge, did not exercise its power of refusal under Article 2 (c) of the 1986 Convention in accordance with the purpose of the Convention and relevant principles of law. In particular, the judge did not expressly consider whether she might hand over part of the file or suggest to Djibouti that it reformulate its request. That conclusion would not however have led Judge Keith, for reasons he sets out, to the conclusion that the file should be transferred to Djibouti.

Declaration of Judge Skotnikov

Judge Skotnikov disagrees with the Court's reading of France's consent to its jurisdiction as excluding developments arising directly out of the questions which constitute the subject-matter of the Application of Djibouti but which occurred after it was filed. The claims contained in Djibouti's Application, for which, as found by the Court, France accepted adjudication by the Court, refer to the dispute in progress. By giving its consent, France has not "frozen" the ongoing dispute. Judge Skotnikov considers that the Court should have decided that it has jurisdiction in respect of the arrest warrants issued against two senior Djiboutian officials on 27 September 2006. This would have been in line with the Court's jurisprudence which has been dismissed by the Court on the grounds that its jurisdiction in the present case is founded on *forum prorogatum*. In Judge Skotnikov's view this jurisprudence is pertinent in the present case and in *forum prorogatum* cases in general. For these reasons he voted against paragraph (1) (d) of the operative clause.

For exactly the same reasons he voted in favour of the Court's finding in paragraph (1) (c) of the operative clause that it has jurisdiction to adjudicate upon the dispute concerning the summons to testify as witness addressed to the President of Djibouti on 14 February 2007 (after the date the Application was filed). However, he disagrees with the Court's reasoning on that subject.

Judge Skotnikov is critical of the Court's conclusion that, if it was established that information concerning the two invitations to testify addressed to the President of Djibouti had been passed to the media from the offices of the French judiciary, it could have constituted a violation by France of its international obligations (see Judgment, paras. 176 and 180). In his view, providing the media with information about these procedural acts, which, as it has been found by this Court, do not constitute a violation of the terms of Article 29 of the Vienna Convention on Diplomatic Relations, cannot be considered a violation of these very same terms. Further, he points out that the terms of Article 29 relate to the inviolability of the person of a Head of State. They do not provide for protection from negative media reports. He agrees with the Court that "the determining factor in assessing whether or not there has been an attack on the immunity of the Head of State lies in the subjection of the latter to a constraining act of authority". A media campaign directed against a foreign Head of State, even if it is based on leaks from the authorities of the receiving State, cannot in itself be seen as a constraining act of authority. Had it been proven that the relevant information was passed to the press from the offices of the French judiciary, this, under the circumstances of the present case, concludes Judge Skotnikov, could have constituted a failure by France to act in accordance with the courtesy due to a foreign Head of State rather than a violation of its obligations under international law.

Declaration of Judge *ad hoc* Guillaume

In this case, France consented to the Court's jurisdiction in accordance with the procedure laid down in Article 38, paragraph 5, of the Rules of the Court, but made it clear that its consent was valid "only for the purposes of the case, i.e. in respect of the dispute forming the subject of the Application and strictly within the limits of the claims formulated therein".

Consequently, the Court does not have jurisdiction to deal with those claims by Djibouti which are not formulated in the Application and concern decisions taken by the French investigating judges after the Application was filed. That applies, as the Court has held, to the claim concerning the arrest warrants issued on 27 September 2006 against two senior Djiboutian officials. But that same approach should have been adopted with regard to the claim concerning the witness summons addressed to the Djiboutian Head of State on 14 February 2007.

Moreover, France had restricted its consent to the Court's jurisdiction to the dispute forming the subject of Djibouti's Application. That dispute was defined in an extremely confused manner in the Application, and France could legitimately have understood it to relate solely to its refusal of mutual assistance to Djibouti. Indeed, the Court itself entitled the case "Certain Questions of Mutual Assistance in Criminal Matters".

In the end, however, the Court has opted to give the Application a broad interpretation, taking the view that its subject included the summonses to appear as witnesses or *témoins assistés* (legally assisted witnesses) issued by the investigating judges before the Application was filed. That decision is understandable, but it seems to me to set a bad precedent. It is, in fact, likely to encourage the submission of applications drafted—sometimes deliberately—with a total lack of rigour, and to deter recourse to Article 38, paragraph 5, of the Rules of Court. I have supported it in the interest of Franco-Djiboutian relations, in order to secure a more comprehensive settlement of the dispute, but wished to record here my regrets and my concerns.

Separate opinion of Judge *ad hoc* Yusuf

The Court has decided that it has jurisdiction to adjudicate not only the dispute regarding execution of the letter rogatory addressed by the Republic of Djibouti to France on 3 November 2004, but also those concerning the witness summonses

addressed to the President of the Republic of Djibouti (on 17 May 2005 and 14 February 2007) and to senior Djiboutian officials (on 3 and 4 November 2004 and 17 June 2005), and I am glad that it has done so. On the other hand, I cannot subscribe to the decision of the Court that it lacks jurisdiction to entertain the dispute regarding the arrest warrants issued on 27 September 2006 against two senior Djiboutian officials. In my view, the Court should have applied the same criteria to both the acts subsequent to the filing of the Application (the arrest warrants issued against the two senior Djiboutian officials and the summons of 14 February 2007 addressed to the Djiboutian Head of State).

I agree entirely with the decision of the Court that France has breached its international obligation under Article 17 of the 1986 Convention by not giving reasons for its refusal to execute the letter rogatory presented by Djibouti on 3 November 2004. However, I take the view that France's violation of its obligations under the 1986 Convention goes much further, extending to Article 1, paragraphs 1, 2 (c) and 3, and Article 3, paragraph 1.

In my opinion, by twice refusing to grant the requests for mutual assistance presented by the Republic of Djibouti, France has not afforded that State "the widest measure" of mutual assistance in accordance with Article 1, paragraph 1, of the Convention, thereby engaging its international responsibility. Without reciprocity and mutual co-operation, the Convention would no longer be a convention for mutual assistance in proceedings, but an instrument to assist one or other of the Parties. It would be deprived of all meaning, and would answer the purpose for which it was concluded for one of the Parties only (in this case France).

I take the view with regard to Article 3, paragraph 1, of the Convention that the lawfulness of France's conduct should have been assessed by the Court on the basis of whether it complied with the relevant procedures laid down by French internal law. In my opinion, France has not acted in accordance with those procedures, especially as regards the authority that has the capacity, under the French Code of Criminal Procedure, to assess the concepts of prejudice to sovereignty, security and *ordre public*. Failure to comply with internal legal procedures entails a violation of the Convention, and when the Court is seised by the Parties to such a convention, it can and must exercise some degree of review. In the present Judgment, however, the Court has not done so.

With regard to the attacks on the immunity and inviolability of the Djiboutian Head of State, the Court concludes in its reasoning that "an apology would have been due from France", in view of the fact that the French judge had not followed French procedure in the summons addressed to the Djiboutian Head of State on 17 May 2005. It also acknowledges in the Judgment, in accordance with recent case law, that the rule of customary international law reflected in Article 29 of the Vienna Convention on Diplomatic Relations "translates into positive obligations for the receiving State as regards the actions of its own authorities, and into obligations of prevention as regards possible acts by individuals" (Judgment, para. 174). In addition, it imposes on receiving States "the obligation to protect the honour and dignity of Heads of State, in connection with their inviolability" (Judgment, para. 174). In the operative clause, however, the Court does not address the requirement for apologies.

For my part, I consider that the two summonses addressed to the Djiboutian Head of State (on 17 May 2005 and 14 February 2007) are not merely a breach of the "courtesy due to a foreign Head of State"; they also amount to a violation of France's obligation to protect the honour and dignity of foreign Heads of State. Given that the French courts can neither summon nor compel the President of their own country to appear before them during his term of office, it is difficult to accept that they should be able to ask foreign Heads of State to attend at their offices in order to be heard as witnesses. The Court had the opportunity in the present case to state clearly and unambiguously that this practice was a violation of international law, and that by acting in this way, the French judges were engaging France's international responsibility. Unfortunately, the language used in the reasoning of the Judgment, together with the absence of a clear decision in the operative clause, could lead to repetition of a practice that is disrespectful of international law. For these reasons, I take the view that the Court should have enjoined France to offer formal apologies, not only in the reasoning of the Judgment, but also in its operative clause.

The fact that the Republic of Djibouti and France wished to submit their dispute to the Court by mutual consent and by way of *forum prorogatum* is evidence of their willingness to find a complete and final solution to this dispute in order to strengthen the traditional ties of friendship between the two countries. The finding by the Court of all the violations described above could have made a further contribution to a return by the two States to better co-operation in their relations in general, as well as to more effective mutual assistance in criminal matters, and on a clearer legal basis.

170. REQUEST FOR INTERPRETATION OF THE JUDGMENT OF 31 MARCH 2004 IN THE CASE CONCERNING *AVENA AND OTHER MEXICAN NATIONALS (MEXICO* v. *UNITED STATES OF AMERICA)* (MEXICO *v.* UNITED STATES OF AMERICA) (REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES)

Order of 16 July 2008

On 16 July 2008, the International Court of Justice delivered its Order on the request for the indication of provisional measures submitted by Mexico in the case concerning the *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico *v.* United States of America) *(Mexico* v. *United States of America).* The Court indicated that the United States of America shall take "all measures necessary" to ensure that five Mexican nationals are not executed pending its final judgment and that the Government of the United States of America shall inform the Court of the measures taken in implementation of this Order.

The Court was composed as follows: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Koroma, Buergenthal, Owada, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Registrar Couvreur.

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The operative paragraph (para. 80) reads as follows:

" . . .

The Court,

I. By seven votes to five,

Finds that the submission by the United States of America seeking the dismissal of the Application filed by the United Mexican States can not be upheld;

In favour: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Koroma, Abraham, Sepúlveda-Amor, Bennouna;

Against: Judges Buergenthal, Owada, Tomka, Keith, Skotnikov;

II. *Indicates* the following provisional measures:

(*a*) By seven votes to five,

The United States of America shall take all measures necessary to ensure that Messrs. José Ernesto Medellín Rojas, César Roberto Fierro Reyna, Rubén Ramírez Cárdenas, Humberto Leal García, and Roberto Moreno Ramos are not executed pending judgment on the Request for interpretation submitted by the United Mexican States, unless and until these five Mexican nationals receive review and reconsideration consistent with paragraphs 138 to 141 of the Court's Judgment delivered on 31 March 2004 in the case concerning *Avena and Other Mexican Nationals (Mexico* v. *United States of America)*;

In favour: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Koroma, Abraham, Sepúlveda-Amor, Bennouna;

Against: Judges Buergenthal, Owada, Tomka, Keith, Skotnikov;

(*b*) By eleven votes to one,

The Government of the United States of America shall inform the Court of the measures taken in implementation of this Order;

In favour: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Koroma, Owada, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov;

Against: Judge Buergenthal;

III. By eleven votes to one,

Decides that, until the Court has rendered its judgment on the Request for interpretation, it shall remain seised of the matters which form the subject of this Order.

In favour: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Koroma, Owada, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov;

Against: Judge Buergenthal."

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Judge Buergenthal appended a dissenting opinion to the Order of the Court; Judges Owada, Tomka and Keith appended a joint dissenting opinion to the Order of the Court; Judge Skotnikov appended a dissenting opinion to the Order of the Court.

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The Court begins by recalling that, on 5 June 2008, the United Mexican States (hereinafter "Mexico"), filed an Application instituting proceedings whereby, referring to Article 60 of the Statute and Articles 98 and 100 of the Rules of Court, it requested the Court to interpret paragraph 153 (9) of the Judgment delivered by the Court on 31 March 2004 in the case concerning *Avena and Other Mexican Nationals (Mexico* v. *United States of America)* (hereinafter "the *Avena* Judgment").

The Court notes that, in its Application, Mexico states that in paragraph 153 (9) of the *Avena* Judgment the Court found "that the appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals" mentioned in the Judgment, taking into account both the violation of the rights set forth in Article 36 of the Vienna Convention on Consular Relations (hereinafter "the Vienna Convention") and paragraphs 138 to 141 of the Judgment. It observes that Mexico alleges that "requests by the Mexican nationals for the review and reconsideration mandated in their cases by the *Avena* Judgment have repeatedly been denied".

The Court indicates that in its Application, Mexico refers to Article 60 of the Statute of the Court which provides that "[i]n the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party" and that it contends, citing the Court's case law, that the Court's jurisdiction to entertain a request for interpretation of its own judgment is based directly on this provision.

The Court observes that Mexico understands the language of paragraph 153 (9) of the *Avena* Judgment as establishing "an obligation of result", while, according to Mexico, it follows from the conduct of the United States that the latter understands that "paragraph 153 (9) imposes only an obligation of means".

The Court recalls that, on 5 June 2008, Mexico also submitted a request for the indication of provisional measures, asking that, pending judgment on its Request for interpretation, the Court indicate:

> "(*a*) that the Government of the United States take all measures necessary to ensure that José Ernesto Medellín, César Roberto Fierro Reyna, Rubén Ramírez Cárdenas, Humberto Leal García, and Roberto Moreno Ramos are not executed pending the conclusion of the proceedings instituted [on 5 June 2008];
>
> (*b*) that the Government of the United States inform the Court of all measures taken in implementation of subparagraph (a); and
>
> (*c*) that the Government of the United States ensure that no action is taken that might prejudice the rights of Mexico or its nationals with respect to any interpretation this Court may render with respect to paragraph 153 (9) of its *Avena* Judgment."

The Court notes that Mexico asks that its request for the indication of provisional measures be treated as a matter of the greatest urgency "in view of the extreme gravity and immediacy of the threat that authorities in the United States will execute a Mexican national [a Texas court has scheduled Mr. Medellín's execution for 5 August 2008, and four more Mexican nationals are 'in imminent danger of having execution dates set by the State of Texas'] in violation of obligations the United States owes to Mexico".

The Court then summarizes the arguments put forward by the Parties during the public hearings held on 19 and 20 June 2008.

It indicates that Mexico restated the position set out in its Application and in its request for the indication of provisional measures, affirming that the requirements for the indication by the Court of such measures had been met, while the United States claimed that there existed no dispute between itself and Mexico as to "the meaning or scope of the Court's decision in *Avena*" because the United States "entirely agree[d]" with Mexico's position that the *Avena* Judgment imposed an international legal obligation of "result" and not merely of "means". In the United States view, the Court was being "requested by Mexico to engage in what [was] in substance the enforcement of its earlier judgments and the supervision of compliance with them" and, given the fact that the United States had withdrawn from the Optional Protocol to the Vienna Convention on Consular Relations on 7 March 2005, a proceeding on interpretation was "potentially the only jurisdictional basis" for Mexico to seise the Court in matters involving the violation of that convention.

The Court notes that at the end of the hearings, Mexico made the following request:

> "(*a*) that the United States, acting through all its competent organs and all its constituent subdivisions, including all branches of government and any official, state or federal, exercising government authority, take all measures necessary to ensure that José Ernesto Medellín, César Roberto Fierro Reyna, Rubén Ramírez Cárdenas, Humberto Leal García, and Roberto Moreno Ramos are not executed pending the conclusion of the proceedings instituted by Mexico on 5 June 2008, unless and until the five Mexican nationals have received review and reconsideration consistent with paragraphs 138 through 141 of this Court's *Avena* Judgment; and
>
> (*b*) that the Government of the United States inform the Court of all measures taken in implementation of subparagraph (a)."

The United States, for its part, requested that the Court reject the request of Mexico for the indication of provisional measures of protection and not indicate any such measures, and that the Court dismiss Mexico's Application for interpretation on grounds of manifest lack of jurisdiction.

The Court begins its reasoning by observing 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. It follows that, even if the basis of jurisdiction in the original case lapses, the Court, nevertheless, by virtue of Article 60 of the Statute, may entertain a request for interpretation.

The Court goes on to say that in the case of a request for the indication of provisional measures made in the context of a request for interpretation under Article 60 of the Statute, it has to consider whether the conditions laid down by that Article for the Court to entertain a request for interpretation appear to be satisfied.

The Court states that according to Mexico, paragraph 153 (9) of the *Avena* Judgment "establishes an obligation of result that obliges the United States, including all its component organs at all levels, to provide the requisite review and reconsideration irrespective of any domestic impediment", and that the "obligation imposed by the *Avena* Judgment requires the United States to prevent the execution of any Mexican national named in the Judgment unless and until that review and reconsideration has been completed and it has been determined whether any prejudice resulted from the Vienna Convention violations found by this Court". It adds that, in Mexico's view, the fact that "[n]either the Texas executive, nor the Texas legislature, nor the federal executive, nor the federal legislature [of the United States] has taken any legal steps at this point that would stop th[e] execution [of Mr. Medellín] from going forward . . . reflects a dispute over the meaning and scope of [the] *Avena*" Judgment. According to Mexico, "the United States understands the Judgment to constitute merely an obligation of means, not an obligation of result".

The Court recalls that the United States has argued that Mexico's understanding of paragraph 153 (9) of the *Avena* Judgment as an "obligation of result . . . is *precisely* the interpretation that the United States holds concerning the paragraph in question" (emphasis in the original) and that, while admitting that, because of the structure of its Government and its domestic law, the United States faces substantial obstacles in implementing its obligation under the *Avena* Judgment, the United States confirmed that "it has clearly accepted that the obligation to provide review and reconsideration is an obligation of result and it has sought to achieve that result". The Court indicates that, in the United States view, in the absence of a dispute with respect to the meaning and scope of paragraph 153 (9) of the *Avena* Judgment, Mexico's claim does not fall within the provisions of Article 60 and that the Court lacks "jurisdiction *ratione materiae*" to entertain Mexico's Application and accordingly lacks "the prima facie jurisdiction required for the indication of provisional measures".

Examining the French and English versions of Article 60 of the Statute, the Court observes that they are not in total harmony: the French text uses the term "contestation", which has a wider meaning than the term used in the English text ("dispute"), although in their ordinary meaning, both terms in a general sense denote opposing views. The Court notes that Article 60 of its Statute is identical to that of its predecessor, the Permanent Court of International Justice, and goes on to explain that the drafters of the Statute of the Permanent Court chose to use the term "contestation" (rather than "différend") in Article 60. It observes that the term "contestation" is wider in scope, does not require the same degree of opposition and that its underlying concept is more flexible in its application to a particular situation. The Court then looks at the way the Permanent Court and itself addressed the question of the meaning of the term "dispute" ("contestation") in their jurisprudence. It indicates that "the manifestation of the existence of the dispute in a specific manner, as for instance by diplomatic negotiations, is not required" for the purposes of Article 60, nor is it required that "the dispute should have manifested itself in a formal way". It adds that recourse could be had to the Permanent Court as soon as the interested States had in fact shown themselves as holding opposing views in regard to the meaning or scope of a judgment of the Court, and that this reading was confirmed by the ICJ in a 1985 Judgment in the case concerning *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya).*

The Court then explains that it needs to determine whether there appears to be a dispute between the Parties as to the meaning or scope of the *Avena* Judgment. Recalling the arguments of the Parties, it finds that, while it seems both Parties regard paragraph 153 (9) of the *Avena* Judgment as an international obligation of result, the Parties nonetheless apparently hold different views as to the meaning and scope of that obligation of result, namely, whether that understanding is shared by all United States federal and state authorities and whether that obligation falls upon those authorities.

It points out that, in the light of the positions taken by the Parties, there appears to be a difference of opinion between them as to the meaning and scope of the Court's finding in paragraph 153 (9) of the operative part of the Judgment and thus recourse could be had to the Court under Article 60 of the Statute. The Court finds that it may, under Article 60 of the Statute, deal with the Request for interpretation, that the submission of the United States, that the Application of Mexico be dismissed *in limine* "on grounds of manifest lack of jurisdiction", cannot be upheld, and that it may address the request for the indication of provisional measures.

Turning to Mexico's request for the indication of provisional measures, the Court states that, when considering such a request, it "must be concerned to preserve . . . the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent". The Court adds that a link must be established between the alleged rights the protection of which is the subject of the provisional measures being sought, and the subject of the principal request submitted to the Court.

After recalling the arguments of the Parties thereon, the Court notes that Mexico seeks clarification of the meaning and scope of paragraph 153 (9) of the operative part of the 2004 Judgment in the *Avena* case, whereby the Court found that the United States is under an obligation to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals, taking into account both the violation of the rights set forth in Article 36 of the Vienna Convention and paragraphs 138 to 141 of the Judgment. The Court observes that it is the interpretation of the meaning and scope of that obligation, and hence of the rights which Mexico and its nationals have on the basis of paragraph 153 (9) that constitutes the subject of the proceedings before the Court on the Request for interpretation, and that Mexico filed a request for the indication of provisional measures in order to protect these rights pending the Court's final decision. The Court thus finds that the rights which Mexico seeks to protect by its request have a sufficient connection with the Request for interpretation.

The Court goes on to say that its power to indicate provisional measures under Article 41 of its Statute "presupposes that irreparable prejudice shall not be caused to rights which are the subject of a dispute in judicial proceedings" and that it will be exercised only if there is urgency in the sense that action prejudicial to the rights of either party is likely to be taken before the Court has given its final decision.

The Court notes that Mexico claims that there indisputably is urgency, while the United States argues that, as there are no rights in dispute, "*none* of the requirements for provisional measures are met" (emphasis in the original).

The Court points out that the execution of a national, the meaning and scope of whose rights are in question, before the Court delivers its judgment on the Request for interpretation "would render it impossible for the Court to order the relief that [his national State] seeks and thus cause irreparable harm to the rights it claims". It finds that it is apparent from the information before it that Mr. José Ernesto Medellín Rojas, a Mexican national, will face execution on 5 August 2008 and four other Mexican nationals, Messrs. César Roberto Fierro Reyna, Rubén Ramírez Cárdenas, Humberto Leal García,

and Roberto Moreno Ramos, are at risk of execution in the coming months; that their execution would cause irreparable prejudice to any rights, the interpretation of the meaning and scope of which is in question, and that it could be that the said Mexican nationals will be executed before the Court has delivered its judgment on the Request for interpretation and therefore there undoubtedly is urgency. The Court accordingly concludes that the circumstances require that it indicate provisional measures to preserve the rights of Mexico, as Article 41 of its Statute provides.

The Court indicates that it is fully aware that the federal Government of the United States has been taking many diverse and insistent measures in order to fulfil the international obligations of the United States under the *Avena* Judgment. It notes that the United States has recognized that, were any of the Mexican nationals named in the request for the indication of provisional measures to be executed without the necessary review and reconsideration required under the *Avena* Judgment, that fact would constitute a violation of United States obligations under international law. It recalls, in particular, that the Agent of the United States declared before the Court that "[t]o carry out Mr. Medellín's sentence without affording him the necessary review and reconsideration obviously would be inconsistent with the *Avena* Judgment".

The Court further notes that the United States has recognized that "it is responsible under international law for the actions of its political subdivisions", including "federal, state, and local officials", and that its own international responsibility would be engaged if, as a result of acts or omissions by any of those political subdivisions, the United States was unable to respect its international obligations under the *Avena* Judgment. It observes that, in particular, the Agent of the United States acknowledged before the Court that "the United States would be responsible, clearly, under the principle of State responsibility for the internationally wrongful actions of [state] officials".

The Court finally underscores that it regards it as in the interest of both Parties that any difference of opinion as to the interpretation of the meaning and scope of their rights and obligations under paragraph 153 (9) of the *Avena* Judgment be resolved as early as possible, and that it is therefore appropriate that it ensure that a judgment on the Request for interpretation be reached with all possible expedition.

The Court concludes by pointing out that the decision given on the request for the indication of provisional measures in no way prejudges any question that it may have to deal with relating to the Request for interpretation.

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Dissenting opinion of Judge Buergenthal

1. In his dissenting opinion, Judge Buergenthal notes that he voted in favour of the *Avena* Judgment, where the Court determined that the United States had violated the Vienna Convention on Consular Rights with regard to a group of Mexican nationals incarcerated in the United States and ordered the United States to provide review and reconsideration of the convictions and sentences of those individuals. According to Judge Buergenthal, the continuing binding character of the *Avena* Judgment is not in issue in this case; what is in issue is the Court's jurisdiction to adopt the present Order. In his view, the Court lacks that jurisdiction and should have dismissed the request for interpretation.

2. In the *Avena* case, the Court's jurisdiction was based on the Protocol to the Vienna Convention from which the United States regrettably withdrew. The Protocol can therefore no longer provide the requisite jurisdiction for the present Order. That is why Mexico invokes Article 60 of the Statute of the Court, which provides in part that "[i]n the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party". But for Article 60 to apply to this case and, hence, for the Court to have jurisdiction to issue the Order, Mexico must show, albeit only on a preliminary basis, that there exists a dispute between the parties regarding the meaning or scope of the *Avena* Judgment. That, according to Judge Buergenthal, Mexico has not been able to show.

3. Mexico argues that there is a dispute because the Parties disagree regarding the meaning or scope of paragraph 153 (9) of the *Avena* Judgment. That paragraph reads as follows:

> "[The Court] [f]inds that the appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals referred to in [the Judgment], by taking account both of the violation of the rights set forth in Article 36 of the Convention and paragraphs 138 to 141 of this Judgment" *(Avena and Other Mexican Nationals (Mexico* v. *United States of America), I.C.J. Reports 2004*, p. 72, para. 153 (9)).

4. According to Mexico, paragraph 153 (9) of the Judgment established an obligation of result, whereas it asserts that the United States believes that it only has an obligation as to means. The United States denies Mexico's contention and agrees with Mexico that the paragraph in question imposes an obligation of result. In Judge Buergenthal's view, Mexico has presented no evidence whatsoever to support its contention that the Parties are in a disagreement regarding the meaning or scope of that paragraph of the *Avena* Judgment. Here there is a claim by one of the Parties only regarding the existence of a dispute that is not supported by any relevant evidence before the Court. Judge Buergenthal concludes, therefore, that the Court's determination that there "appears" to be a dispute within the meaning of Article 60 is not borne out by the evidence. The Court consequently lacks jurisdiction to issue this Order. That Order, moreover, adds nothing to the obligations the United States continues to have under paragraph 153 (9) of the *Avena* Judgment, namely, not to execute any of the Mexican nationals unless they have been provided the review and reconsideration pursuant to that Judgment.

5. Judge Buergenthal believes, furthermore, that by issuing the present Order on the facts of this case, the Court opens itself up to the future misuse for jurisdictional purposes of the Article 60 interpretation route which, it should be noted,

imposes no time-limits for the introduction of requests for interpretation.

Joint dissenting opinion of Judges Owada, Tomka and Keith

In their dissenting opinion, Judges Owada, Tomka and Keith express their great regret that they are unable to support the Court's Order indicating provisional measures. Humanitarian considerations which may underlie the decision cannot override the legal requirements of the Statute of the Court.

The judges conclude that Mexico has not established, as required by Article 60 of the Statute, that there is a dispute between it and the United States about the meaning or scope of the 2004 *Avena* Judgment. Accordingly the Application for interpretation, the principal proceeding before the Court, should be dismissed. The request for provisional measures should also be dismissed since there would be no pending proceeding to which it would be related.

The judges also observe that the Order made by the Court today adds no additional protection, additional to that already provided by the Court in its 2004 *Avena* Judgment, to the Mexican nationals whose rights under the Vienna Convention on Consular Relations had been breached by the United States and who are entitled to review and reconsideration of their convictions and sentences in accordance with the 2004 Judgment of the Court.

There is no doubt, the judges say, that if any of the 51 Mexican nationals mentioned in that Judgment is executed without receiving the review and reconsideration of his conviction and sentence, required by the 2004 Judgment, the United States will be in breach of its international obligation as determined by the Court.

Judges Owada, Tomka and Keith conclude by expressing their earnest trust that effective review and reconsideration of the convictions and sentences of the Mexican nationals, as required by the 2004 Judgment, will be provided.

Dissenting opinion of Judge Skotnikov

Judge Skotnikov fully shares Mexico's concerns regarding the scheduled execution of a Mexican national and its frustration with the United States being so far unable to take measures which would ensure its compliance with the *Avena* Judgment. However, he is critical of the Court's Order indicating provisional measures. He believes that the Court should have proceeded differently in order to support Mexico's ultimate goal of enforcement of the *Avena* Judgment.

In his view, the Court should have taken judicial notice of the United States position that it agrees without reservations with the interpretation of the *Avena* Judgment requested by Mexico. There is no lack of clarity as to the meaning or scope of the binding provisions of the *Avena* Judgment. Mexico insists and the United States accepts that no death penalties should be carried out unless and until the time the Mexican nationals in question receive review and reconsideration in accordance with the *Avena* Judgment. This is the result which the United States must achieve, "by means of its own choosing" (para. 153 (9) of the *Avena* Judgment), to comply with its obligations under the *Avena* Judgment. There is no ambiguity. There is no disagreement. There is nothing for the Court to interpret. Consequently, the Court should have concluded that Mexico's Request for interpretation does not fall within the scope of Article 60 of the Statute of the Court, which is applicable only where a dispute exists with respect to the meaning or scope of a judgment of the Court.

Furthermore, the Court should have used its inherent powers to request the United States to take all measures necessary, acting through its competent organs and authorities, state or federal, to ensure its compliance with the *Avena* Judgment.

Instead of thus reminding the United States of its obligations, the Court has chosen to decide that the *Avena* Judgment might require clarification and has ordered provisional measures.

Judge Skotnikov notes that these measures add nothing to the obligations of the United States under the Judgment and therefore serve no purpose. Moreover, these measures are to have effect only until the Court has given its decision on the interpretation of the *Avena* Judgment. Consequently, the Court's Order is not only redundant, it also contains a temporal limit which is absent from the Judgment itself. This result is a clear indication that the Court has taken a wrong route.

Judge Skotnikov believes that the real issue is compliance with the Judgment rather than its interpretation. The United States admits that, because of internal difficulties, it has so far been unable to put in place a legal framework necessary to ensure compliance with the *Avena* Judgment. That is deeply regrettable. The United States must act to comply with the *Avena* Judgment.

171. CASE CONCERNING APPLICATION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (GEORGIA *v.* RUSSIAN FEDERATION) (REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES)

Order of 15 October 2008

On 15 October 2008, the International Court of Justice delivered its Order on the request for the indication of provisional measures submitted by Georgia in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation*). The Court indicated *inter alia* that both Parties shall refrain from any act of racial discrimination and from sponsoring, defending or supporting such acts; that they shall facilitate humanitarian assistance; and that they shall refrain from any action which might prejudice the respective rights of the Parties or might aggravate or extend the dispute.

The Court was composed as follows: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge *ad hoc* Gaja; Registrar Couvreur.

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The operative paragraph (para. 149) reads as follows:

" . . .

The Court, reminding the Parties of their duty to comply with their obligations under the International Convention on the Elimination of All Forms of Racial Discrimination,

Indicates the following provisional measures:

A. By eight votes to seven,

Both Parties, within South Ossetia and Abkhazia and adjacent areas in Georgia, shall

(1) refrain from any act of racial discrimination against persons, groups of persons or institutions;

(2) abstain from sponsoring, defending or supporting racial discrimination by any persons or organizations,

(3) do all in their power, whenever and wherever possible, to ensure, without distinction as to national or ethnic origin,

(i) security of persons;

(ii) the right of persons to freedom of movement and residence within the border of the State;

(iii) the protection of the property of displaced persons and of refugees;

(4) do all in their power to ensure that public authorities and public institutions under their control or influence do not engage in acts of racial discrimination against persons, groups of persons or institutions;

In favour: President Higgins; Judges Buergenthal, Owada, Simma, Abraham, Keith, Sepúlveda-Amor, Judge *ad hoc* Gaja;

Against: Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Tomka, Bennouna, Skotnikov;

B. By eight votes to seven,

Both Parties shall facilitate, and refrain from placing any impediment to, humanitarian assistance in support of the rights to which the local population are entitled under the International Convention on the Elimination of All Forms of Racial Discrimination;

In favour: President Higgins; Judges Buergenthal, Owada, Simma, Abraham, Keith, Sepúlveda-Amor; Judge *ad hoc* Gaja;

Against: Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Tomka, Bennouna, Skotnikov;

C. By eight votes to seven,

Each Party shall refrain from any action which might prejudice the rights of the other Party in respect of whatever judgment the Court may render in the case, or which might aggravate or extend the dispute before the Court or make it more difficult to resolve;

In favour: President Higgins; Judges Buergenthal, Owada, Simma, Abraham, Keith, Sepúlveda-Amor; Judge *ad hoc* Gaja;

Against: Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Tomka, Bennouna, Skotnikov;

D. By eight votes to seven,

Each Party shall inform the Court as to its compliance with the above provisional measures;

In favour: President Higgins; Judges Buergenthal, Owada, Simma, Abraham, Keith, Sepúlveda-Amor; Judge *ad hoc* Gaja;

Against: Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Tomka, Bennouna, Skotnikov."

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Vice-President Al-Khasawneh and Judges Ranjeva, Shi, Koroma, Tomka, Bennouna and Skotnikov appended a joint dissenting opinion to the Order of the Court; Judge *ad hoc* Gaja appended a declaration to the Order of the Court.

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The Court begins by recalling that, on 12 August 2008, Georgia filed an Application instituting proceedings against the Russian Federation for alleged violations of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter the "CERD").

It notes that, in order to found the jurisdiction of the Court, Georgia relied in its Application on Article 22 of CERD which provides that:

"Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement."

The Court observes that, in its Application, Georgia contends *inter alia* that

"the Russian Federation, acting through its organs, agents, persons and entities exercising elements of governmental authority, and through South Ossetian and Abkhaz separatist forces under its direction and control, has practised, sponsored and supported racial discrimination through attacks against, and mass-expulsion of, ethnic Georgians, as well as other ethnic groups, in the South Ossetia and Abkhazia regions of the Republic of Georgia".

The Court states that, on 14 August 2008, Georgia submitted a Request for the indication of provisional measures, pending the Court's judgment in the proceedings, in order to preserve its rights under CERD "to protect its citizens against violent discriminatory acts by Russian armed forces, acting in concert with separatist militia and foreign mercenaries".

It recalls that, on 15 August 2008, the President of the Court, referring to Article 74, paragraph 4, of the Rules of Court, addressed a communication to the two Parties, urgently calling upon them "to act in such a way as will enable any order the Court may take on the request for provisional measures to have its appropriate effects".

The Court observes that, on 25 August 2008, Georgia, referring to "the rapidly changing circumstances in Abkhazia and South Ossetia", submitted an "Amended Request for the Indication of Provisional Measures of Protection".

The Court then summarizes the arguments put forward by the Parties during the public hearings held on 8, 9 and 10 September 2008.

The Court observes that, at the end of the hearings, Georgia requested it

"as a matter of urgency, to order the following provisional measures, pending its determination of this case on the merits, in order to prevent irreparable harm to the rights of ethnic Georgians under Articles 2 and 5 of the Convention on Racial Discrimination:

(*a*) The Russian Federation shall take all necessary measures to ensure that no ethnic Georgians or any other persons are subject to violent or coercive acts of racial discrimination, including but not limited to the threat or infliction of death or bodily harm, hostage-taking and unlawful detention, the destruction or pillage of property, and other acts intended to expel them from their homes or villages in South Ossetia, Abkhazia and/or adjacent regions within Georgia;

(*b*) The Russian Federation shall take all necessary measures to prevent groups or individuals from subjecting ethnic Georgians to coercive acts of racial discrimination, including but not limited to the threat or infliction of death or bodily harm, hostage-taking and unlawful detention, the destruction or theft of property, and other acts intended to expel them from their homes or villages in South Ossetia, Abkhazia and/or adjacent regions within Georgia;

(*c*) The Russian Federation shall refrain from adopting any measures that would prejudice the right of ethnic Georgians to participate fully and equally in the public affairs of South Ossetia, Abkhazia and/or adjacent regions of Georgia."

Georgia further requested the Court "as a matter of urgency to order the following provisional measures to prevent irreparable injury to the right of return of ethnic Georgians under Article 5 of the Convention on Racial Discrimination pending the Court's determination of this case on the merits:

(*d*) The Russian Federation shall refrain from taking any actions or supporting any measures that would have the effect of denying the exercise by ethnic Georgians and any other persons who have been expelled from South Ossetia, Abkhazia, and adjacent regions on the basis of their ethnicity or nationality, their right of return to their homes of origin;

(*e*) The Russian Federation shall refrain from taking any actions or supporting any measures by any group or individual that obstructs or hinders the exercise of the right of return to South Ossetia, Abkhazia, and adjacent regions by ethnic Georgians and any other persons who have been expelled from those regions on the basis of their ethnicity or nationality;

(*f*) The Russian Federation shall refrain from adopting any measures that would prejudice the right of ethnic Georgians to participate fully and equally in public affairs upon their return to South Ossetia, Abkhazia, and adjacent regions."

Georgia also requested the Court to order that:

"The Russian Federation shall refrain from obstructing, and shall permit and facilitate, the delivery of humanitarian assistance to all individuals in the territory under its control, regardless of their ethnicity."

The Court indicates that, at the end of the hearings, the Russian Federation summarized its position as follows:

"First: The dispute that the Applicant has tried to plead before this Court is evidently not a dispute under the 1965 Convention. If there were a dispute, it would relate to the use of force, humanitarian law, territorial integrity, but in any case not to racial discrimination.

Second: Even if this dispute were under the 1965 Convention, the alleged breaches of the Convention are not capable of falling under the provisions of the said Convention, not the least because Articles 2 and 5 of the Convention are not applicable extraterritorially.

Third: Even if such breaches occurred, they could not, even *prima facie*, be attributable to Russia that never did and does not now exercise, in the territories concerned, the extent of control required to overcome the set threshold.

Fourth: Even if the 1965 Convention could be applicable, which . . . is not the case, the procedural requirements of Article 22 of the 1965 Convention have not been met. No evidence that the Applicant proposed to negotiate or employ the mechanisms of the Committee on Racial Discrimination prior to reference to this Court, has been nor could have been produced.

Fifth: With these arguments in mind, the Court manifestly lacks jurisdiction to entertain the case.

Sixth: Should the Court, against all odds, find itself prima facie competent over the dispute, we submit that the Applicant has failed to demonstrate the criteria essential for provisional measures to be indicated. No credible evidence has been produced to attest to the existence of an imminent risk of irreparable harm, and urgency. The circumstances of the case definitely do not require measures, in particular, in the light of the ongoing process of post-conflict settlement. And the measures sought failed to take account of the key factor going to discretion: the fact that the events of August 2008 were born out of Georgia's use of force.

Finally: Provisional measures as they were formulated by the Applicant in the Requests cannot be granted since they would impose on Russia obligations that it is not able to fulfil. The Russian Federation is not exercising effective control vis-à-vis South Ossetia and Abkhazia or any adjacent parts of Georgia. Acts of organs of South Ossetia and Abkhazia or private groups and individuals are not attributable to the Russian Federation. These measures if granted would prejudge the outcome of the case."

The Court notes that the Russian Federation thus requested it to remove the case from the General List.

The Court begins its reasoning by observing that, under its Statute, it does not automatically have jurisdiction over legal disputes between States parties to that Statute or between other States entitled to appear before it. Indeed, one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction.

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

Since Georgia, at that stage, has sought to found the jurisdiction of the Court solely on the compromissory clause contained in Article 22 of CERD, the Court explains that it must proceed to examine whether the jurisdictional clause relied upon does furnish a basis for prima facie jurisdiction to rule on the merits such as would allow the Court, should it think that the circumstances so warranted, to indicate provisional measures.

The Court first ascertains that both Georgia and the Russian Federation are parties to CERD. It observes that Georgia deposited its instrument of accession on 2 June 1999 without reservation and that the Union of Soviet Socialist Republics (USSR) deposited its instrument of ratification on 4 February 1969 with a reservation to Article 22 of the Convention but that this reservation was withdrawn by the USSR on 8 March 1989. The Court adds that the Russian Federation, as the State continuing the legal personality of the USSR, is a party to CERD without reservation.

The Court then notes that the Parties disagree on the territorial scope of the application of the obligations of a State party under CERD: Georgia claims that CERD does not include any limitation on its territorial application and that accordingly "Russia's obligations under the Convention extend to acts and omissions attributable to Russia which have their locus within Georgia's territory and in particular in Abkhazia and South Ossetia", while the Russian Federation claims that the provisions of CERD cannot be applied extraterritorially and that in particular Articles 2 and 5 of CERD cannot govern a State's conduct outside its own borders.

The Court observes that there is no restriction of a general nature in CERD relating to its territorial application and further notes that, in particular, neither Article 2 nor Article 5 of CERD contain a specific territorial limitation. The Court consequently finds that these provisions of CERD generally appear to apply, like other provisions of instruments of that nature, to the actions of a State party when it acts beyond its territory.

Pointing out that Georgia claims that the dispute concerns the interpretation and application of CERD, while the Russian Federation contends that the dispute really relates to the use of force, principles of non-intervention and self-determination and to violations of humanitarian law, the Court explains that it is for it to determine prima facie whether a dispute within the meaning of Article 22 of CERD exists.

Having reviewed the arguments of the Parties, the Court comes to the conclusion that they disagree with regard to the applicability of Articles 2 and 5 of CERD in the context of the events in South Ossetia and Abkhazia. Consequently, there appears to exist a dispute between the Parties as to the interpretation and application of CERD. The Court notes, moreover, that the acts alleged by Georgia appear to be capable of contravening rights provided for by CERD, even if certain of these alleged acts might also be covered by other rules of international law, including humanitarian law. The Court believes that this is sufficient to establish the existence of a dispute between the Parties capable of falling within the provisions of CERD, which is a necessary condition for the Court to have prima facie jurisdiction under Article 22 of CERD.

The Court then turns to the question whether the procedural conditions set out in Article 22 of the Convention have been met. It recalls that Article 22 provides that a dispute relating to the interpretation or application of CERD may be referred to the Court if it "is not settled by negotiation or by the procedure expressly provided for in this Convention". The Court observes that Georgia claims that this phrase does not represent conditions to be exhausted before the Court can be seised of the dispute and that, according to Georgia, bilateral discussions and negotiations relating to the issues which form the subject-matter of the Convention have been held between the Parties. It also notes that the Russian Federation argues

that pursuant to Article 22 of CERD, prior negotiations or recourse to the procedures under CERD constitute an indispensable precondition for the seisin of the Court, and that no negotiations have been held between the Parties on issues relating to CERD nor has Georgia, in accordance with the procedures envisaged in the Convention, brought any such issues to the attention of the Committee on the Elimination of Racial Discrimination.

The Court states that the phrase "any dispute . . . which is not settled by negotiation or by the procedure expressly provided for in this Convention" in Article 22 does not, on its plain meaning, suggest that formal negotiations in the framework of the Convention or recourse to the procedure referred to in Article 22 thereof constitute preconditions to be fulfilled before the seisin of the Court. It however finds that Article 22 does suggest that some attempt should have been made by the claimant party to initiate, with the respondent party, discussions on issues that would fall under CERD. The Court notes that it is apparent from the case file that such issues have been raised in bilateral contacts between the Parties and that these issues have manifestly not been resolved by negotiation prior to the filing of the Application. It adds that, in several representations to the United Nations Security Council in the days before the filing of the Application, those same issues were raised by Georgia and commented upon by the Russian Federation and that, therefore, the Russian Federation was made aware of Georgia's position in that regard. It goes on to say that the fact that CERD has not been specifically mentioned in a bilateral or multilateral context is not an obstacle to the seisin of the Court on the basis of Article 22 of the Convention.

The Court, in view of all the foregoing, considers that, prima facie, it has jurisdiction under Article 22 of CERD to deal with the case to the extent that the subject-matter of the dispute relates to the "interpretation or application" of the Convention.

The Court points out that its power to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights of the parties pending the decision of the Court, in order to ensure that irreparable prejudice shall not be caused to rights which are the subject of dispute in judicial proceedings. It further states that, when considering such a request, it must be concerned to preserve the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent. The Court adds that a link must be established between the alleged rights the protection of which is the subject of the provisional measures being sought, and the subject of the proceedings before the Court on the merits of the case.

After recalling the arguments of the Parties thereon, the Court notes that Articles 2 and 5 of CERD are intended to protect individuals from racial discrimination by obliging States parties to undertake certain measures specified therein; that States parties to CERD have the right to demand compliance by a State party with specific obligations incumbent upon it under Articles 2 and 5 of the Convention; and 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 finds that the rights which Georgia invokes in, and seeks to protect by, its request for the indication of provisional measures (namely the rights provided for in Articles 2 and 5 of CERD) have a sufficient connection with the merits of the case it brings for the purposes of the proceedings. The Court adds that it is upon the rights thus claimed that it must focus its attention in its consideration of Georgia's Request for the indication of provisional measures.

The Court goes on to say that its power to indicate provisional measures under Article 41 of its Statute "presupposes that irreparable prejudice shall not be caused to rights which are the subject of a dispute in judicial proceedings" and that it will be exercised only if there is urgency in the sense that there is a real risk that action prejudicial to the rights of either party might be taken before the Court has given its final decision.

The Court notes that Georgia claims that, "in view of the conduct of the Russian Federation in South Ossetia, Abkhazia, and adjacent regions, provisional measures are urgently needed" because the ethnic Georgians in these areas "are at imminent risk of violent expulsion, death or personal injury, hostage-taking and unlawful detention, and damage to or loss of their homes and other property" and "in addition, the prospects for the return of those ethnic Georgians who have already been forced to flee are rapidly deteriorating". Georgia also contends that "the rights in dispute are threatened with harm that by its very nature is irreparable" because "no satisfaction, no award of reparations, could ever compensate for the extreme forms of prejudice" to those rights.

The Court indicates that, for its part, the Russian Federation submits that "Georgia has not established that any rights opposable to Russia under Articles 2 and 5 of CERD—however broadly drawn—are exposed to 'serious risk' of irreparable damage". With reference to the events of August 2008, the Russian Federation argues that "the facts that can be relied on with reasonable certitude" go against the existence of a serious risk to the rights Georgia claims, for the reasons that, first, armed actions have led to "deaths of the armed forces of all parties concerned, deaths of civilians of all ethnicities, and a mass displacement of persons of all ethnicities", and, second, that "the armed actions have now ceased, and civilians of all ethnicities are returning to some, although not yet all, of the former conflict zones". The Russian Federation refers to the ceasefire announced on 12 August 2008 and to the six principles for the peaceful settlement of the conflict adopted by the Presidents of the Russian Federation and France on the same day and subsequently signed on 13–16 August 2008 by the President of Georgia and leaders of South Ossetia and Abkhazia, "through the intermediary of Russia and in the presence of the OSCE and the European Union". It also mentions the "positive démarches before the OSCE . . . with the European Union and President Sarkozy" and notes that, in accordance with the further principles announced on 8 September 2008, 200 European Union monitors will be deployed into the South Ossetian and Abkhaz buffer zones, and Russian peacekeeping troops will subsequently make a full withdrawal.

The Court insists that it is not called upon, for the purpose of its decision on the Request for the indication of provisional measures, to establish the existence of breaches of

CERD, but to determine whether the circumstances require the indication of provisional measures for the protection of rights under CERD. The Court observes that nevertheless, the rights in question, in particular those stipulated in Article 5, paragraphs (b) and (d) (i) of CERD, are of such a nature that prejudice to them could be irreparable.

The Court indicates that it is aware of the exceptional and complex situation on the ground in South Ossetia, Abkhazia and adjacent areas and takes note of the continuing uncertainties as to where lines of authority lie. Based on the information before it in the case file, the Court is of the opinion that the ethnic Georgian population in the areas affected by the recent conflict remains vulnerable. The Court also notes that the situation in South Ossetia, Abkhazia and adjacent areas in Georgia is unstable and could rapidly change. Given the ongoing tension and the absence of an overall settlement to the conflict in this region, it considers that the ethnic Ossetian and Abkhazian populations also remain vulnerable. The Court adds that, while the problems of refugees and internally displaced persons in this region are currently being addressed, they have not yet been resolved in their entirety.

In light of the foregoing, with regard to these above-mentioned ethnic groups of the population, the Court finds that there exists an imminent risk that the rights at issue in the case may suffer irreparable prejudice.

The Court recalls that States parties to CERD "condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms". In the view of the Court, in the circumstances brought to its attention in which there is a serious risk of acts of racial discrimination being committed, Georgia and the Russian Federation, whether or not any such acts in the past may be legally attributable to them, are under a clear obligation to do all in their power to ensure that any such acts are not committed in the future.

The Court explains that it is satisfied that the indication of measures is required for the protection of rights under CERD which form the subject-matter of the dispute. It states 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, or measures that are addressed to the party which has itself made the request.

Having considered the terms of the provisional measures requested by Georgia, the Court explains that it does not find that, in the circumstances of the case, the measures to be indicated are to be identical to those requested by Georgia. On the basis of the material before it, the Court considers it appropriate to indicate measures addressed to both Parties.

The Court recalls that its orders on provisional measures under Article 41 of the Statute have binding effect and thus create international legal obligations which both Parties are required to comply with.

It concludes by pointing out that the decision given on the Request for the indication of provisional measures 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.

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Joint dissenting opinion of Vice-President Al-Khasawneh and Judges Ranjeva, Shi, Koroma, Tomka, Bennouna and Skotnikov

1. Vice-President Al-Khasawneh and Judges Ranjeva, Shi, Koroma, Tomka, Bennouna and Skotnikov voted against the Order, as they consider that the requisite conditions for the indication of provisional measures have not been met in the present case.

2. While the power to indicate provisional measures is inherent in the judicial function, the judges note that the Court must satisfy itself that the conditions necessary for their indication have been met. They observe that the Court must ensure that it has jurisdiction prima facie at least and that the criteria as to a risk of irreparable harm and urgency have been met. They point out that the Parties differ on two questions: i.e., whether there is a dispute between them "with respect to the interpretation or application" of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); and whether the precondition that the dispute must not have been settled "by negotiation or by the procedures expressly provided for in [the] Convention" has been satisfied.

3. The authors of the joint dissenting opinion are of the view that a dispute with respect to the application of CERD must be in existence prior to the seisin of the Court. They consider however that the acts which Georgia attributes to the Russian Federation are not necessarily likely to fall within the provisions of the Convention. They express their disagreement on this point with the majority, which, in their view, was content to observe merely that a dispute appeared to exist, without any showing having been made that the acts alleged by Georgia fell within the scope of CERD.

4. On the subject of the precondition of negotiations laid down in Article 22 of CERD, the authors of the joint dissenting opinion take issue with the majority's conclusion that bilateral contacts between the Parties and representations made by Georgia to the Security Council fulfilled that precondition. They explain that such contacts needed to regard the very substance of CERD, that is to say its interpretation or application, and that the Court should have asked itself whether negotiations had been opened and, if so, whether they were likely to yield a result.

5. As for the precondition concerning recourse to the procedures referred to in Article 22 of CERD, the authors of the joint dissenting opinion point out that the Court has confined itself to observing that neither Georgia nor the Russian Federation claimed that the questions in dispute had been brought to the attention of the Committee on the Elimination of Racial Discrimination. They consider that the majority's interpretation in respect of this question confirms neither the ordinary meaning of Article 22 nor its object and purpose, which is to encourage the maximum number of States to submit to the jurisdiction of the Court, with the assurance that the procedures provided for in the Convention will first be exhausted.

6. Finally, the seven judges state their view that the Order fails to demonstrate the existence of either any risk of irrepa-

rable harm to Georgia's rights under CERD or an urgent situation. They infer that this weakness is echoed in the operative clause, in so far as the Court ultimately asks both Parties to respect the Convention, which they are in any event obliged to do, with or without provisional measures.

Declaration of Judge *ad hoc* Gaja

In his declaration Judge *ad hoc* Gaja explains that, while he voted in favour of all the provisional measures, including those under A, he cannot share the view that the conditions have been met for addressing the latter measures also to the applicant State. The respondent State did not allege that in Abkhazia, South Ossetia or adjacent areas the conduct of Georgian authorities or of individuals, groups or institutions under their control or influence may cause the risk of irreparable harm to rights conferred under CERD. Nor does the Court provide an adequate explanation when appraising that risk (see para. 143).

172. CASE CONCERNING APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE (CROATIA *v.* SERBIA) (PRELIMINARY OBJECTIONS)

Judgment of 18 November 2008

On 18 November 2008, the International Court of Justice rendered its Judgment on the preliminary objections raised by Serbia on the Court's jurisdiction and on the admissibility of Croatia's Application in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*. The Court found that it had jurisdiction, on the basis of Article IX of the Genocide Convention, to entertain the case on the merits.

The Court was composed as follows: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Parra-Aranguren, Buergenthal, Owada, Simma, Tomka, Sepúlveda-Amor, Bennouna, Skotnikov; Judges *ad hoc* Vukas, Kreća; Registrar Couvreur.

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The operative paragraph (para. 146) of the Judgment reads as follows:

" . . .

The Court,

(1) By ten votes to seven,

Rejects the first preliminary objection submitted by the Republic of Serbia in so far as it relates to its capacity to participate in the proceedings instituted by the Application of the Republic of Croatia;

In favour: President Higgins; Vice-President Al-Khasawneh; Judges Buergenthal, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna; Judge *ad hoc* Vukas;

Against: Judges Ranjeva, Shi, Koroma, Parra-Aranguren, Owada, Skotnikov; Judge *ad hoc* Kreća;

(2) By twelve votes to five,

Rejects the first preliminary objection submitted by the Republic of Serbia in so far as it relates to the jurisdiction *ratione materiae* of the Court under Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide to entertain the Application of the Republic of Croatia;

In favour: President Higgins; Vice-President Al-Khasawneh; Judges Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge *ad hoc* Vukas;

Against: Judges Ranjeva, Shi, Koroma, Parra-Aranguren; Judge *ad hoc* Kreća;

(3) By ten votes to seven,

Finds that, subject to paragraph 4 of the present operative clause, the Court has jurisdiction to entertain the Application of the Republic of Croatia;

In favour: President Higgins; Vice-President Al-Khasawneh; Judges Buergenthal, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna; Judge *ad hoc* Vukas;

Against: Judges Ranjeva, Shi, Koroma, Parra-Aranguren, Owada, Skotnikov; Judge *ad hoc* Kreća;

(4) By eleven votes to six,

Finds that the second preliminary objection submitted by the Republic of Serbia does not, in the circumstances of the case, possess an exclusively preliminary character;

In favour: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Buergenthal, Owada, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna; Judge *ad hoc* Vukas;

Against: Judges Shi, Koroma, Parra-Aranguren, Tomka, Skotnikov; Judge ad hoc Kreća;

(5) By twelve votes to five,

Rejects the third preliminary objection submitted by the Republic of Serbia;

In favour: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna; Judge *ad hoc* Vukas;

Against: Judges Shi, Koroma, Parra-Aranguren, Skotnikov; Judge *ad hoc* Kreća."

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Vice-President Al-Khasawneh appended a separate opinion to the Judgment of the Court; Judges Ranjeva, Shi, Koroma and Parra-Aranguren appended a joint declaration to the Judgment of the Court; Judges Ranjeva and Owada appended dissenting opinions to the Judgment of the Court; Judges Tomka and Abraham appended separate opinions to the Judgment of the Court; Judge Bennouna appended a declaration to the Judgment of the Court; Judge Skotnikov appended a dissenting opinion to the Judgment of the Court; Judge *ad hoc* Vukas appended a separate opinion to the Judgment of the Court; Judge *ad hoc* Kreća appended a dissenting opinion to the Judgment of the Court.

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Chronology of the procedure and submissions of the Parties (paras. 1–22)

The Court recalls that, on 2 July 1999, 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, approved by the General

Assembly of the United Nations on 9 December 1948 (hereinafter "the Genocide Convention"). The Application invoked Article IX of the Genocide Convention as the basis of the jurisdiction of the Court.

By an Order dated 14 September 1999, the Court fixed 14 March 2000 as the time-limit for the filing of the Memorial of Croatia and 14 September 2000 as the time-limit for the filing of the Counter-Memorial of the FRY. By an Order dated 10 March 2000, the President of the Court, at the request of Croatia, extended the time-limit for the filing of the Memorial to 14 September 2000 and accordingly extended the time-limit for the filing of the Counter-Memorial of the FRY to 14 September 2001. By an Order dated 27 June 2000, the Court extended the time limits to 14 March 2001 and 16 September 2002, respectively, for the filing of the Memorial of Croatia and the Counter-Memorial of the FRY. Croatia duly filed its Memorial within the time-limit thus extended.

Since the Court included upon the Bench no judge of the nationality of the Parties, each of them exercised its right under Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case: Croatia chose Mr. Budislav Vukas and the FRY chose Mr. Milenko Kreća.

On 11 September 2002, within the time-limit provided for in Article 79, paragraph 1, of the Rules of Court as adopted on 14 April 1978, the FRY raised preliminary objections relating to the Court's jurisdiction to entertain the case and to the admissibility of the Application. Accordingly, by an Order of 14 November 2002, the Court stated that, by virtue of Article 79, paragraph 3, of the Rules of Court as adopted on 14 April 1978, the proceedings on the merits were suspended, and fixed 29 April 2003 as the time-limit for the presentation by Croatia of a written statement of its observations and submissions on the preliminary objections raised by the FRY. Croatia filed such a statement within the time-limit thus fixed.

By a letter dated 5 February 2003, the FRY informed the Court that, following the adoption and promulgation of the Constitutional Charter of Serbia and Montenegro by the Assembly of the FRY on 4 February 2003, the name of the State had been changed from the "Federal Republic of Yugoslavia" to "Serbia and Montenegro". Following the announcement of the result of a referendum held in Montenegro on 21 May 2006 (as contemplated in the Constitutional Charter of Serbia and Montenegro), the National Assembly of the Republic of Montenegro adopted a declaration of independence on 3 June 2006.

By letters dated 6 May 2008, the Registrar informed the Parties that the Court asked them to address, during the hearings, the issue of the capacity of the Respondent to participate in proceedings before the Court at the time of filing of the Application, given the fact that the issue had not been addressed as such in the written pleadings.

Public sittings were held from 26 May to 30 May 2008. At the conclusion of the oral proceedings, the Parties presented the following final submissions to the Court:

On behalf of the Government of Serbia,

at the hearing of 29 May 2008:

"For the reasons given in its written submissions and its oral pleadings, Serbia requests the Court to adjudge and declare:

1. that the Court lacks jurisdiction,

or, in the alternative:

2. (a) that claims based on acts and omissions which took place prior to 27 April 1992 are beyond the jurisdiction of this Court and inadmissible; and

(b) that claims referring to

- submission to trial of certain persons within the jurisdiction of Serbia,

- providing information regarding the whereabouts of missing Croatian citizens, and

- return of cultural property

are beyond the jurisdiction of this Court and inadmissible."

On behalf of the Government of Croatia,

at the hearing of 30 May 2008:

"On the basis of the facts and legal arguments presented in our Written Observations, as well as those during these oral pleadings, the Republic of Croatia respectfully requests the International Court of Justice to:

(1) reject the first, second and third preliminary objection of Serbia, with the exception of that part of the second preliminary objection which relates to the claim concerning the submission to trial of Mr. Slobodan Milošević, and accordingly to

(2) adjudge and declare that it has jurisdiction to adjudicate upon the Application filed by the Republic of Croatia on 2 July 1999."

Identification of the respondent Party
(paras. 23–34)

The Court first observes that it needs to identify the respondent Party before it. It notes that, by a letter dated 3 June 2006, the President of the Republic of Serbia (hereinafter "Serbia") informed the Secretary-General of the United Nations that, following a referendum held on 21 May 2006, the National Assembly of the Republic of Montenegro adopted a declaration of independence, and that

"the membership of the state union Serbia and Montenegro in the United Nations, including all organs and organizations of the United Nations system, [would be] continued by the Republic of Serbia, on the basis of Article 60 of the Constitutional Charter of Serbia and Montenegro".

He further stated that "in the United Nations the name 'Republic of Serbia' [was] to be henceforth used instead of the name 'Serbia and Montenegro'" and added that the Republic of Serbia "remain[ed] responsible in full for all the rights and obligations of the state union of Serbia and Montenegro under the UN Charter".

The Court recalls that, by letters dated 19 July 2006, the Registrar requested the Agent of Croatia, the Agent of Serbia and the Minister for Foreign Affairs of Montenegro to communicate to the Court the views of their Governments on the

consequences to be attached to the above-mentioned developments regarding the identity of the Respondent in the case. It notes that, by a letter dated 22 July 2006, the Agent of Serbia explained that, in his Government's opinion, "the Applicant ha[d] first to take a position, and to decide whether it wishe[d] to maintain its original claim encompassing both Serbia and Montenegro, or whether it [chose] to do otherwise". By a letter dated 29 November 2006, the Chief State Prosecutor of Montenegro stated that "Montenegro [might] not have [the] capacity of respondent" in the dispute before the Court. The Court further notes that, by a letter dated 15 May 2008, the Agent of Croatia confirmed that the proceedings instituted by Croatia on 2 July 1999 were "maintained against [the] Republic of Serbia as Respondent" and that this conclusion was "without prejudice to the potential responsibility of [the] Republic of Montenegro and the possibility of instituting separate proceedings against it".

The Court observes that the facts and events on which the submissions of Croatia on the merits are based occurred at a period of time when Serbia and Montenegro were part of the same State. It further notes that Serbia has accepted "continuity between Serbia and Montenegro and the Republic of Serbia". Montenegro, on the other hand, is a new State admitted as such to the United Nations. It does not continue the international legal personality of the State union of Serbia and Montenegro.

The Court recalls the fundamental principle that no State may be subject to its jurisdiction without its consent. It states that Montenegro made clear in its letter of 29 November 2006 that it does not give its consent to the jurisdiction of the Court over it for the purposes of the dispute. Furthermore, according to the Court, the events referred to above clearly show that Montenegro does not continue the legal personality of Serbia and Montenegro; it cannot therefore have acquired, on that basis, the status of Respondent in the case. The Court finally notes that the Applicant did not in its letter of 15 May 2008 assert that Montenegro is still a party to the case.

The Court thus concludes that Serbia is the sole Respondent in the case.

General overview of the arguments of the Parties
(paras. 35–42)

The Court observes that, in its Application, Croatia, referring to acts which occurred during the conflict that took place between 1991 and 1995 in the territory of the former Socialist Federal Republic of Yugoslavia (hereinafter the "SFRY"), contended that the FRY had committed violations of the Genocide Convention. The Government of the FRY contested the admissibility of the Application as well as the jurisdiction of the Court under Article IX of the Genocide Convention on several grounds.

The Court notes that, with regard to the question of the capacity of the Respondent under Article 35 of the Statute to participate in the proceedings, the Respondent claimed that it did not have such capacity, because, as the Court had confirmed in 2004 in the cases concerning Legality of Use of Force, it was not a Member of the United Nations until 1 November 2000 and therefore not party to the Statute at the time of filing of the Application on 2 July 1999. Croatia, however, argued that the FRY was a Member of the United Nations at the time of filing of the Application and that even if that was not the case, the status of Serbia within the United Nations in 1999 did not affect the proceedings as the Respondent became a Member of the United Nations in 2000 and thereby validly gained capacity to take part in the present proceedings.

The Court notes that the Respondent raised a preliminary objection concerning the jurisdiction of the Court on the basis of Article IX of the Genocide Convention. In the Application, Croatia had maintained that both Parties were bound by the Genocide Convention as successor States of the SFRY. Serbia stated that the Court's jurisdiction in the case, which was instituted on 2 July 1999, could not be based on Article IX of the Genocide Convention, in view of the fact that the FRY did not become bound by the Convention in any way before 10 June 2001, the date at which its notification of accession to the Genocide Convention became effective with a reservation regarding Article IX.

The Court observes that Serbia also contended that Croatia's Application was inadmissible so far as it refers to acts or omissions prior to the FRY's proclamation of independence on 27 April 1992. Serbia stated that acts or omissions which took place before the FRY came into existence could not be attributed to it. Croatia stated that although Serbia's preliminary objection, as stated in its final submission 2 (a), is presented as an objection to the admissibility of the claim, in point of fact Serbia seemed to be arguing that the Court had no jurisdiction *ratione temporis* over acts or events occurring before 27 April 1992. In this regard, it referred to the Court's Judgment of 11 July 1996 in which the Court stated that there are no temporal limitations to the application of the Genocide Convention and to its exercise of jurisdiction under the said Convention, in the absence of reservations to that effect. During the oral pleadings, Serbia maintained the alternative argument that the Court lacked jurisdiction *ratione temporis* for acts or events that occurred before 27 April 1992, the date it came into existence, on the grounds that this date was the earliest possible point in time at which the FRY could have become bound by the Genocide Convention.

The Court finally notes that Serbia maintained that Croatia's submissions 2 (a), 2 (b) and 2 (c) in its Memorial concerning, respectively, the submission to trial of persons suspected of having committed acts of genocide (including Slobodan Milošević), missing persons and return of cultural property, were "inadmissible and moot.

The Court examines each of these arguments in turn.

Brief history of the status of the FRY with regard to the United Nations
(paras. 43–51)

The Court gives a brief account of the disintegration process of the SFRY in the early 1990s and of the decisions of the United Nations with respect to the legal status of the FRY. It recalls *inter alia* that on 22 September 1992, the General Assembly, acting on the recommendation of the Security Council, adopted resolution 47/1, whereby it was decided that the FRY should apply for membership in the United Nations and that it should

not participate in the work of the General Assembly. It notes that the "*sui generis* position which the FRY found itself in" during the period between 1992 to 2000 (as the Court characterized it in a 2003 Judgment) came to an end with a letter dated 27 October 2000 sent by Mr. Koštunica to the United Nations Secretary-General, by which the newly elected President of the FRY requested admission of the FRY to membership in the United Nations. This membership was effective as of 1 November 2000.

Relevance of previous decisions of the Court
(paras. 52–56)

The Court observes that the question of the status and position of the State known at the time of the filing of the Application as the FRY, in relation to the Statute of the Court and to the Genocide Convention, has been in issue in a number of previous decisions. In the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, there were two decisions on requests for the indication of provisional measures (Orders of 8 April and 13 September 1993), a decision on preliminary objections (Judgment of 11 July 1996) and a decision on the merits (Judgment of 26 February 2007). In the case concerning *Application for Revision of the Judgment of 11 July 1996* in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia* v. *Bosnia and Herzegovina)*, the Court delivered a Judgment on 3 February 2003. In the set of cases concerning the *Legality of Use of Force* brought by the FRY against ten Member States of the North Atlantic Treaty Organization the Court rendered Judgments in eight of those cases on 15 December 2004 upholding preliminary objections on the ground of a lack of capacity on the part of the Applicant to appear before the Court.

Both Parties having cited these various decisions in support of their respective contentions, the Court finds it convenient at the outset to indicate to what extent it considers that these decisions may have weight for the purpose of deciding the matters before it.

The Court states that, while some of the facts and the legal issues dealt with in the other cases arise also in the current one, none of those decisions were given in proceedings between the two Parties to the case (Croatia and Serbia), so that, as the Parties recognize, no question of *res judicata* arises (Article 59 of the Statute of the Court). To the extent that the decisions contain findings of law, the Court indicates that it will treat them as it treats all previous decisions: that is to say that, while those decisions are in no way binding on the Court, it will not depart from its settled jurisprudence unless it finds very particular reasons to do so.

Preliminary objection to the jurisdiction of the Court
(paras. 57–119)

— Issues of capacity to be a party to the proceedings
(paras. 57–92)

The Court first examines whether the Parties satisfy the general conditions, under Articles 34 and 35 of the Statute, for capacity to participate in proceedings before the Court.

It notes that it is neither disputed nor disputable that both Parties satisfy the condition laid down in Article 34 of the Statute: Croatia and Serbia are States for purposes of Article 34, paragraph 1. It further notes that it is not disputed nor is it open to doubt that, at the date it filed its Application, 2 July 1999, Croatia satisfied a condition under Article 35 of the Statute sufficient for the Court to be "open" to it: at that date it was a Member of the United Nations and, as such, therefore a party to the Statute of the Court. The question is whether Serbia satisfies, for the purposes of the case, the conditions under Article 35, paragraph 1 or paragraph 2, of the Statute and whether, in view of the foregoing, it has capacity to participate in the proceedings before the Court.

After describing the Parties' positions in this respect, the Court stresses again that no previous decision having of itself any authority as *res judicata* in the case, the question of the Respondent's capacity must be examined *de novo*, in the context of the dispute before the Court.

The Court deems it appropriate to examine the question of Serbia's access to the Court on the basis of Article 35, paragraph 1, before any examination on the basis of paragraph 2. It then considers whether fulfilment of the conditions laid down in Article 35 of the Statute must be assessed solely as of the date of filing of the Application, or whether it can be assessed, at least under the specific circumstances of the case, at a subsequent date, more precisely at a date after 1 November 2000.

The Court recalls that in numerous cases, it has reiterated the general rule which it applies in this regard, namely: "the jurisdiction of the Court must normally be assessed on the date of the filing of the act instituting proceedings". It notes however that, like its predecessor the Permanent Court of International Justice (PCIJ), it has also shown realism and flexibility in certain situations in which the conditions governing the Court's jurisdiction were not fully satisfied when proceedings were initiated but were subsequently satisfied, before the Court ruled on its jurisdiction. It recalls that, in its Judgment of 30 August 1924 on the objection to jurisdiction raised by the Respondent in the *Mavrommatis Palestine Concessions* case, the PCIJ stated:

> "it must . . . be considered whether the validity of the institution of proceedings can be disputed on the ground that the application was filed before Protocol XII [annexed to the Treaty of Lausanne] had become applicable. This is not the case. Even assuming that before that time the Court had no jurisdiction because the international obligation referred to in Article 11 [of the Mandate for Palestine] was not yet effective, it would always have been possible for the applicant to re-submit his application in the same terms after the coming into force of the Treaty of Lausanne, and in that case, the argument in question could not have been advanced. Even if the grounds on which the institution of proceedings was based were defective for the reason stated, this would not be an adequate reason for the dismissal of the applicant's suit. The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law. Even, therefore, if the application were premature

because the Treaty of Lausanne had not yet been ratified, this circumstance would now be covered by the subsequent deposit of the necessary ratifications." (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 34.)

The Court goes on to recall that, in its own jurisprudence, operation of the same idea is discernible in the *Northern Cameroons (Cameroon* v. *United Kingdom)* case (*Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 28), and in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, in the passage stating: "It would make no sense to require Nicaragua now to institute fresh proceedings based on the [1956] Treaty [of Friendship], which it would be fully entitled to do." (*Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984,* pp. 428–429, para. 83.)

Finally, the Court notes that it was confronted more recently with a comparable situation when it ruled on the preliminary objections in the case concerning *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). The Respondent argued that the Genocide Convention—the basis of jurisdiction—had only begun to apply to relations between the two Parties on 14 December 1995, the date when, pursuant to the Dayton-Paris Agreement, they recognized each other, whereas the Application had been submitted on 20 March 1993, that is to say more than two-and-a-half years earlier.

The Court responded to that argument as follows:

"In the present case, even if it were established that the Parties, each of which was bound by the Convention when the Application was filed, had only been bound as between themselves with effect from 14 December 1995, the Court could not set aside its jurisdiction on this basis, inasmuch as Bosnia and Herzegovina might at any time file a new application, identical to the present one, which would be unassailable in this respect." (*Ibid.,* p. 614, para. 26.)

The Court notes that Croatia relies on this jurisprudence, which it contends can be directly transposed to the case, while Serbia disputes these arguments, contending that the jurisprudence in question is not applicable to the case for two reasons. First, the Respondent notes that in all of the precedents cited it was not the respondent alone, which was unable to fulfil one of the conditions necessary for the Court to uphold jurisdiction at the date the proceedings were instituted, but this was not a point Serbia chose to rely on. Secondly and more importantly, according to Serbia, the jurisprudence cannot be applied where the unmet condition concerns the capacity of a party to participate in proceedings before the Court, in accordance with Articles 34 and 35 of the Statute. Further, Serbia adds, the Court did not apply the "Mavrommatis doctrine" in its 2004 Judgments in the *Legality of Use of Force* cases, since, after finding that the Applicant was not a party to the Statute of the Court at the date the Applications were filed and did not therefore have the right of access to the Court, it held that it lacked jurisdiction, even though it mentioned the fact that the Applicant had been a Member of the United Nations since 1 November 2000.

The Court observes that as to the first of these two arguments, given the logic underlying the cited jurisprudence of the Court deriving from the 1924 Judgment in the *Mavrommatis Palestine Concessions* case, it does not matter whether it is the applicant or the respondent that does not fulfil the conditions for the Court's jurisdiction, or both of them—as is the situation where the compromissory clause invoked as the basis for jurisdiction only enters into force after the proceedings have been instituted. The Court sees no convincing reason why an applicant's deficiency might be overcome in the course of proceedings, while that of a respondent may not. 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.

With respect to the second argument, the Court admits that it is true that all of the cited precedents concern cases where the initially unfulfilled condition related to jurisdiction *ratione materiae* or *ratione personae* in the narrow sense and not to the question of access to the Court, which has to do with a party's capacity to participate in any proceedings whatever before the Court. Nevertheless, the Court states that it cannot endorse the radical interpretation advanced by Serbia, namely that whenever it is seised by a State which does not fulfil the conditions of access under Article 35, or seised of a case brought against a State which does not fulfil those conditions, the Court does not even have the *compétence de la compétence*, the competence to decide whether or not it has jurisdiction. The Court recalls that it always possesses the *compétence de la compétence* (see Article 36, paragraph 6, of the Statute).

The Court adds that, more importantly, it cannot accept Serbia's argument that when the defect is that one party does not have access to the Court, it is so fatal that it can in no case be cured by a subsequent event in the course of the proceedings, for example when that party acquires the status of party to the Statute of the Court which it initially lacked. It notes that it is not apparent why the arguments based on the sound administration of justice which underpin the *Mavrommatis* case jurisprudence cannot also have a bearing in the case. It would not be in the interests of justice to oblige the Applicant, if it wishes to pursue its claims, to initiate fresh proceedings. In this respect it finds that it is of no importance which condition was unmet at the date the proceedings were instituted, and thereby prevented the Court at that time from exercising its jurisdiction, once it has been fulfilled subsequently.

The Court observes that it is true that it apparently did not take account in its 2004 Judgments of the fact that Serbia and Montenegro had by that date become a party to the Statute: indeed, the Court found that it lacked jurisdiction on the sole ground that the Applicant did not have access to the Court in 1999, when the Applications were filed, without taking its reasoning any further. But if the Court abided in those cases strictly by the general rule that its jurisdiction is to be assessed at the date of filing of the act instituting proceedings, without

adopting the more flexible approach following from the other decisions cited above, that is justified by particular considerations relevant to those cases. It notes *inter alia* that it was clear that Serbia and Montenegro did not have the intention of pursuing its claims by way of new applications. According to the Court, that State itself argued before the Court that it was not, and never had been, bound by Article IX of the Genocide Convention, even though that was the basis for jurisdiction which it had initially invoked in said cases. In the Court's view, it is concern for judicial economy, an element of the requirements of the sound administration of justice, which justifies application of the jurisprudence deriving from the *Mavrommatis* Judgment in appropriate cases. The purpose of this jurisprudence is to prevent the needless proliferation of proceedings. It goes on to say that while Croatia is asking the Court to apply the jurisprudence of the *Mavrommatis* case to the current case, no such request was made, or could logically have been made, by the Applicant in 2004.

The Court accordingly concludes that on 1 November 2000 the Court was open to the FRY. Therefore, should the Court find that Serbia was bound by Article IX of the Convention on 2 July 1999, the date on which proceedings in the case were instituted, and remained bound by that Article until at least 1 November 2000, the Court will be in a position to uphold its jurisdiction.

In view of this finding, the question whether the conditions laid down in Article 35, paragraph 2, have been fulfilled has no pertinence in the case.

— *Issues of jurisdiction* ratione materiae
(paras. 93–117)

The Court then considers the question of its jurisdiction *ratione materiae*, which forms the second aspect of the first preliminary objection submitted by Serbia requesting the Court to declare that it lacks jurisdiction. It notes that Serbia categorizes this as an element of jurisdiction *ratione personae*.

The Court recalls that the basis of jurisdiction asserted by Croatia is Article IX of the Genocide Convention and that it is common ground between the Parties that Croatia is, and has been at all relevant times, a party to the Genocide Convention, and has not made any reservation excluding the application of Article IX.

It notes that Serbia's objection is to the effect that it was not itself a party to that Convention at the date of filing of the Application instituting proceedings (2 July 1999); it maintains that it only became a party by accession in June 2001. Furthermore the notification of accession by the FRY, dated 6 March 2001 and deposited on 12 March 2001, contained a reservation to the effect that the FRY "does not consider itself bound by Article IX of the Convention".

The Court starts by recalling that according to its established jurisprudence, if a title of jurisdiction is shown to have existed at the date of the institution of proceedings, any subsequent lapse or withdrawal of the jurisdictional instrument is without effect on the jurisdiction of the Court. It adds that if therefore the FRY was a party to the Genocide Convention, including its Article IX, on 2 July 1999, the date on which proceedings were instituted, and if it continued to be bound by Article IX of the Convention until at least 1 November 2000, the date on which the FRY became a party to the Statute of the Court, then, the Court continues to have jurisdiction.

The Court considers the history of the relationship to the Convention of, first, the SFRY, and, subsequently, of the Respondent. It examines in particular a formal declaration adopted on behalf of the FRY on 27 April 1992, and an official Note of the same date transmitted with that declaration to the Secretary-General of the United Nations. It notes that the FRY did not consider itself to be one of the successor States of the SFRY emerging from the dissolution of that State, but the sole continuing State, maintaining the personality of the former SFRY, with the implication that the other States formed from the former Yugoslavia were new States, though entitled to assert the rights of successor States. This policy of the FRY was maintained until a change of Government in 2000, and a subsequent application to the United Nations for admission as a new Member.

The Court examines what was the nature and effect of the 1992 declaration and Note on the position of the FRY in relation to the Genocide Convention. It first finds that there can be no doubt, from the subsequent conduct of those charged with the affairs of the FRY, that the declaration was regarded by the State as made on its behalf, and the commitments contained in it were endorsed and accepted by the FRY. The Court then considers whether the 1992 declaration and Note were "made in sufficiently specific terms in relation to the particular question" of acceptance to be bound by international treaty obligations. It notes that the 1992 declaration and Note did not merely state that the FRY would abide by certain commitments: it specified that these were the commitments "that the SFR of Yugoslavia assumed internationally" or "in international relations". While the treaties contemplated were not specified by name, the declaration referred to a class of instruments which was perfectly ascertainable at the moment of making of the declaration: the treaty "commitments" binding on the SFRY at the moment of its dissolution. In the Court's view, there is no doubt that the Genocide Convention was one of these "commitments". The Court goes on to say that there is a distinction between the legal nature of ratification of, or accession to a treaty, on the one hand, and on the other, the process by which a State becomes bound by a treaty as a successor State or remains bound as a continuing State. Accession or ratification is a simple act of will on the part of the State manifesting an intention to undertake new obligations and to acquire new rights in terms of the treaty, effected in writing in the formal manner set out in the Treaty (cf. Arts. 15 and 16 of the Vienna Convention on the Law of Treaties). In the case of succession or continuation on the other hand, the act of will of the State relates to an already existing set of circumstances, and amounts to a recognition by that State of certain legal consequences flowing from those circumstances, so that any document issued by the State concerned, being essentially confirmatory, may be subject to less rigid requirements of form. Article 2 (g) of the 1978 Vienna Convention on Succession of States in Respect of Treaties reflects this idea, defining a "notification of succession" as meaning "in relation to a multilateral treaty, any notification, however framed or named, made by a successor State expressing its consent to be

considered as bound by the treaty". Nor does international law prescribe any specific form for a State to express a claim of continuity. The Court notes that the 1992 declaration was not expressed in the terms of one of the recognized legal acts by which a State may become a party to a multilateral convention. It observes, however, that in order to constitute a valid and effective means by which the declaring State could assume obligations under the Convention, the declaration need not strictly comply with all formal requirements.

The Court then considers whether the 1992 declaration and Note, coupled with other consistent conduct of Serbia, indicate such a unilateral acceptance of the obligations of the Genocide Convention, by a process equivalent, in the special circumstances of the case, to a succession to the status of the SFRY. It finds that the 1992 declaration must be considered as having had the effects of a notification of succession to treaties, notwithstanding that its political premise was different. It further finds that the conduct of Serbia after the transmission of the declaration made it clear that it regarded itself bound by the Genocide Convention. It notes *inter alia* that, during the period between the making of the 1992 declaration and the filing of Croatia's Application, neither the FRY nor any other State for which the issue might have had significance questioned that the FRY was a party to the Genocide Convention, without reservations; and no other event occurring during that period had any impact on the legal situation arising from the 1992 declaration. On 1 November 2000, the FRY was admitted as a new Member of the United Nations, but the FRY did not at that time withdraw, or purport to withdraw, the declaration and Note of 1992, which had been drawn up in the light of the contention that the FRY was continuing the legal personality of the SFRY. The Court notes that it was not until March 2001 that the FRY took any further step inconsistent with the status which it had since 1992 been claiming to possess, namely that of a State party to the Genocide Convention. On 12 March 2001 it deposited with the Secretary-General a notification of accession to the Genocide Convention, containing a reservation to Article IX.

In sum, the Court, taking into account both the text of the declaration and Note of 27 April 1992, and the consistent conduct of the FRY at the time of its making and throughout the years 1992–2001, considers that it should attribute to those documents precisely the effect that they were, in the view of the Court, intended to have on the face of their terms: namely, that from that date onwards the FRY would be bound by the obligations of a party in respect of all the multilateral conventions to which the SFRY had been a party at the time of its dissolution, subject of course to any reservations lawfully made by the SFRY limiting its obligations. It notes that it is common ground that the Genocide Convention was one of these conventions, and that the SFRY had made no reservation to it; thus the FRY in 1992 accepted the obligations of that Convention, including Article IX providing for the jurisdiction of the Court and that jurisdictional commitment was binding on the Respondent at the date the proceedings were instituted. In the events that have occurred, this signifies that the 1992 declaration and Note had the effect of a notification of succession by the FRY to the SFRY in relation to the Genocide Convention. The Court concludes that, subject to the more specific objections of Serbia to be further examined, it had, on the date on which the proceedings were instituted, jurisdiction to entertain the case on the basis of Article IX of the Genocide Convention. That situation continued at least until 1 November 2000, the date on which Serbia and Montenegro became a Member of the United Nations and thus a party to the Statute of the Court.

Having established that the conditions for its jurisdiction are met and without prejudice to its findings on the other preliminary objections submitted by Serbia, the Court concludes that the first preliminary objection, "that the Court lacks jurisdiction", must be rejected.

Preliminary objection to the jurisdiction of the Court and to admissibility, ratione temporis
(paras. 120–130)

The Court then turns to the second preliminary objection as stated in Serbia's final submission 2 (a), namely the objection that "claims based on acts and omissions which took place prior to 27 April 1992", that is to say prior to the formal establishment of the "Federal Republic of Yugoslavia (Serbia and Montenegro)", "are beyond the jurisdiction of this Court and inadmissible".

The Court notes that the preliminary objection is presented as, at one and the same time, an objection to jurisdiction and one going to the admissibility of the claims. It recalls that the title of jurisdiction relied on by Croatia is Article IX of the Genocide Convention, and that it has already established that Croatia and Serbia were both parties to that Convention on the date on which proceedings were instituted (2 July 1999). Serbia's contention is however that the Court has no jurisdiction under Article IX, or that jurisdiction cannot be exercised, so far as the claim of Croatia concerns "acts and omissions that took place prior to 27 April 1992", i.e., that the Court's jurisdiction is limited *ratione temporis*.

In the view of the Court, the questions of jurisdiction and admissibility raised by Serbia's preliminary objection *ratione temporis* constitute two inseparable issues in the case. The first issue is that of the Court's jurisdiction to determine whether breaches of the Genocide Convention were committed in the light of the facts that occurred prior to the date on which the FRY came into existence as a separate State, capable of being a party in its own right to the Convention; this may be regarded as a question of the applicability of the obligations under the Genocide Convention to the FRY before 27 April 1992. The second issue, that of admissibility of the claim in relation to those facts, and involving questions of attribution, concerns the consequences to be drawn with regard to the responsibility of the FRY for those same facts under the general rules of State responsibility. In order to be in a position to make any findings on each of these issues, the Court needs to have more elements before it.

In view of the foregoing, the Court concludes that Serbia's preliminary objection *ratione temporis* does not possess, in the circumstances of the case, an exclusively preliminary character.

Preliminary objection concerning the submission of certain persons to trial; the provision of information on missing Croatian citizens; and the return of cultural property
(paras. 131–144)

The Court finally considers Serbia's third objection, according to which "claims referring to submission to trial of certain persons within the jurisdiction of Serbia, providing information regarding the whereabouts of missing Croatian citizens and return of cultural property are beyond the jurisdiction of this Court and inadmissible".

— *Submission of persons to tria*l

The Court recalls that in submission 2 (a) of its Memorial, Croatia requested the Court to find that Serbia is under an obligation:

> "to take immediate and effective steps to submit to trial before the appropriate judicial authority, those citizens or other persons within its jurisdiction who are suspected on probable grounds of having committed acts of genocide as referred to in paragraph (1) (a), or any of the other acts referred to in paragraph (1) (b) [of the Submissions of Croatia], in particular Slobodan Milošević, the former President of the Federal Republic of Yugoslavia, and to ensure that those persons, if convicted, are duly punished for their crimes".

The Court notes that Croatia has adjusted its submissions to take account of the fact that former President Slobodan Milošević had, since the presentation of the Memorial, been transferred to the ICTY, and has since died. Furthermore, Croatia accepts that this submission is now moot in respect of a number of other persons whom Serbia has transferred to the International Criminal Tribunal for the former Yugoslavia (ICTY), but insists that there continues to be a dispute between Croatia and Serbia with respect to persons who have not been submitted to trial either in Croatia or before the ICTY in respect of acts or omissions which are the subject of the current proceedings. Serbia, for its part, maintains, as a first basis of its objection, that as a matter of fact there is only one person still at large who has been accused by the ICTY of crimes allegedly committed in Croatia, and these accusations relate not to genocide but to war crimes and crimes against humanity.

Having reviewed the arguments of both Parties, the Court explains that it understands the first basis of Serbia's submission to be essentially a matter of admissibility: it amounts to an assertion that, on the facts of the case as they now stand, the claim is moot, in the sense that Croatia has not shown that there are at the present time any persons charged with genocide, either by the ICTY or by the courts of Croatia, who are on the territory or within the control of Serbia. Whether that is correct will be a matter for the Court to determine when it examines the claims of Croatia on the merits. The Court therefore rejects the objection and sees no remaining issue of admissibility.

— *Provision of information on missing Croatian citizens*

The Court recalls that the Applicant asked the Court by submission 2 (b) to find that Serbia is under an obligation

> "to provide forthwith to the Applicant all information within its possession or control as to the whereabouts of Croatian citizens who are missing as a result of the genocidal acts for which [Serbia] is responsible, and generally to cooperate with the authorities of the Republic of Croatia to jointly ascertain the whereabouts of the said missing persons or their remains".

It notes that according to Serbia, the relevant acts committed in Croatia do not amount to genocide, so that the obligations under the Genocide Convention do not apply. Serbia has also drawn attention to co-operation between the two States concerning the location and identification of missing persons, both direct and in the context of the work of the International Commission for Missing Persons, and to the existence of bilateral treaty-instruments concluded by the two States imposing obligations to exchange data about missing persons.

The Court finds that the question what remedies it might appropriately order in the exercise of its jurisdiction under Article IX of the Convention is one which is necessarily dependent upon the findings that it may in due course make of breaches of the Convention by the Respondent. As a matter which is essentially one of the merits, and one dependent upon the principal question of responsibility raised by the claim, this is not a matter that may be the proper subject of a preliminary objection and the Court concludes that the preliminary objection submitted by Serbia, so far as it relates to Croatian submission 2 (b), must be rejected.

— *Return of cultural property*

By submission 2 (c) advanced by Croatia, which is also challenged by Serbia, the Applicant asked the Court to find that Serbia is under an obligation "forthwith to return to the Applicant any items of cultural property within its jurisdiction or control which were seized in the course of the genocidal acts for which it is responsible".

Here again, having reviewed the arguments of the Parties, the Court finds that the question what remedies it might appropriately order is one which is necessarily dependent upon the findings that it may in due course make of breaches of the Genocide Convention by the Respondent; it is not a matter that may be the proper subject of a preliminary objection. The Court thus concludes that the preliminary objection submitted by Serbia, so far as it relates to Croatian submission 2 (c), must be rejected.

— *Conclusion*

The Court thus finds that Serbia's third preliminary objection must be rejected in its entirety.

Subsequent procedure
(para. 145)

Having established its jurisdiction, the Court observes that it will consider the preliminary objection that it has found to be not of an exclusively preliminary character when it reaches the merits of the case. In accordance with Article 79, paragraph 7, of the Rules of Court as adopted on 14 April 1978, time-limits for the further proceedings will be fixed subsequently by the Court.

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Separate opinion of Vice-President Al-Khasawneh

The Vice-President appended a separate opinion in which he agreed that the Court has jurisdiction to decide the case on the merits, but disagreed with two of the premises on which the Judgment of the Court is based, namely (i) that the Federal Republic of Yugoslavia (FRY) had no access to the Court between its inception and its admission as a new Member of the United Nations and (ii) that this defect is curable by an innovative interpretation of the Mavrommatis principle.

The Vice-President noted that the first of those premises is based on the 2004 Judgments in the *Legality of Use of Force* cases (2004 Judgment), in which the Court inferred, from the 2000 admission of the FRY to the United Nations, a retroactive clarification of the status of the FRY revealing that it had not been a United Nations Member in the period 1992–2000. The Vice-President, recalling his disagreement with the reasoning in the 2004 Judgment, stated that the 2007 Genocide Judgment did not resolve the contradictions in the 2004 Judgment but obscured them by invoking the doctrine of *res judicata*. The Vice-President expressed his regret that in the present case the Court has chosen to revive the 2004 Judgment rather than putting it to rest, noting the moral and logical implications of the eight-year collective disappearing act of the FRY.

The second premise with which the Vice-President disagreed was the interpretation by the majority of the *Mavrommatis* principle, which is the rule whereby the Court will not insist on a new application if at the time of the institution of proceedings a procedural defect exists which is curable by a subsequent action of the applicant. The Vice-President recalled the sequence of pertinent developments in this case, notably the admission of the FRY to the United Nations in November 2000; the depositing by the FRY of an instrument of accession to the Genocide Convention dated 6 March 2001 containing a reservation to Article IX of that Convention; and the objection to that reservation by Croatia on the grounds that the FRY was "already bound by the Convention since its emergence as one of the five equal successor States of the SFRY". In the Vice-President's view, this reservation, unless invalid, is an obstacle to invoking the *Mavrommatis* principle, and the invalidation of this reservation would be a prerequisite for upholding the Court's jurisdiction *ratione materiae* on the basis of the *Mavrommatis* principle. Since the Judgment avoided reaching a conclusion whereby the reservation is invalid, he thought that the reasoning based on *Mavrommatis* would lead nowhere.

The Vice-President concluded by recalling that in his opinion the FRY was a continuator of the SFRY until 2000 when it became a successor State and was bound by the Genocide Convention by virtue of the ratification of that Convention by the SFRY. For those reasons, the Vice-President would uphold the jurisdiction of the Court.

Joint declaration of Judges Ranjeva, Shi, Koroma and Parra-Aranguren

In their joint declaration, Judges Ranjeva, Shi, Koroma and Parra-Aranguren conclude that the present Judgment lacks validity and consistency, and is even *contra legem*.

The authors of the joint declaration observe that one crucial question which the Court had to determine in this phase of the proceedings is whether the Respondent, Serbia, had access to the Court at the time of the filing of the Application on 2 July 1999, a question which they note is both "pre-preliminary" to the issue of jurisdiction and also fundamental. They emphasize that under the Court's Statute, a State must have access to the Court in order to participate in a contentious case.

The judges note that in the *Legality of Use of Force* cases, the Court concluded that when Serbia and Montenegro filed its Application on 29 April 1999, it was not a Member of the United Nations and thus lacked access to the Court under Article 35, paragraph 1, of the Statute. Consequently, they reason that Serbia and Montenegro must also have lacked access to the Court when Croatia filed its Application in the present case on 2 July 1999. They point out that the Court's other judgments dealing with parallel proceedings support and do not contradict this view. These findings notwithstanding, the authors of the joint declaration note that the Court has held in the present Judgment that it is entitled to exercise jurisdiction in the present case through reliance on the *Mavrommatis Palestine Concessions* case, where the Permanent Court of International Justice held that "[e]ven if the grounds on which the institution of proceedings was based were defective for the reason stated, this would not be an adequate reason for the dismissal of the applicant's suit" (*Judgment No. 2, 1924, P.C.I.J. Series A, No. 2,* p. 34), because "[t]he Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law" (*ibid*.).

The authors of the joint declaration are critical of the Court's misapplication of the *Mavrommatis* dicta for the following reasons. First, they argue that the present case does not fall under the *Mavrommatis* dictum because the *Mavrommatis* case did not concern access to the Court. Second, that the issue in the present case is not "procedural", as it was in *Mavrommatis* (concerning what a party has filed or could file), but is decidedly preliminary and fundamental (concerning the status of that party under the Charter of the United Nations and the Statute of the Court). In their view, a party can correct a procedural error, but cannot simply change a fundamental characteristic of the opposing party's legal status. Third, they explain that *Mavrommatis* and all of its progeny dealt with very short-lived defects, unlike the situation in the present case. Fourth, they note that the *Mavrommatis* approach has been applied where it has been the Applicant or both parties, but not the Respondent alone, which failed to fulfil one of the conditions necessary for the Court to find jurisdiction at the date the proceedings were instituted.

Accordingly, they argue that reliance on the *Mavrommatis* case is inappropriate and that the Court must determine for itself whether the parties had access to it at the relevant time, proceeding from the fundamental premise that such a determination is to be made at the time of Croatia's Application. The authors of the joint declaration note that although the Court first accepts that jurisdiction must be assessed as of the date of the filing of the act instituting proceedings, it later contradicts itself, proposing that jurisdictional require-

ments may be fulfilled by the time the Court considers its jurisdiction or at the time of the Applicant's submission of its Memorial. The authors of the joint declaration emphasize that the Court's jurisprudence does not support either of these alternative approaches.

The judges joining the declaration also express concern that the approach of the Court ignores the equality between the Applicant and the Respondent in terms of their access to the Court, which they point out is one of the fundamental principles of international justice.

They also note that the Court's position contradicts even the factual situation as presented by the Applicant itself, which in a letter dated 27 May 1999 stated that Serbia and Montenegro lacked access to the Court. In light of the foregoing, they conclude that for the Court now to decide that it has jurisdiction in this case is not only *contra legem* but also contrary to the factual situation presented by the Applicant.

The authors of the joint declaration are also critical of the Court's reasoning with regard to the consistency of its judgments. They note that on at least three occasions, the Court reiterates in respect of decisions taken in previous proceedings (not involving exactly the same parties) that, while such decisions are not *res judicata* under Article 59 of the Statute of the Court, the Court "will not depart from its settled jurisprudence unless it finds very particular reasons to do so" (para. 53; see also paras. 54 and 76). The Court then justifies its current position, which is contrary to that taken in the 2004 proceedings, by reasoning that the Applicant in 2004 did not raise the issue while the Applicant in this case did. The authors of the joint declaration find this unconvincing, emphasizing that access is not a condition which may be satisfied merely upon request by the Applicant, but rather is a fundamental characteristic that arises out of a party's status, and that if Serbia lacked access to the Court in 2004, Croatia absolutely cannot provide it with access in the present case simply by making a request to the Court to that effect.

Judges Ranjeva, Shi, Koroma and Parra-Aranguren conclude, therefore, that since the Respondent in the present case did not fulfil the conditions required to gain access to the Court at the time when the Applicant instituted proceedings in 1999, the Court cannot exercise a jurisdiction to which it is not entitled.

Dissenting opinion of Judge Ranjeva

The judicial nature of the jurisdictional function of the International Court of Justice explains Judge Ranjeva's difficulty in accepting the continuity of solution in the present case, when the majority of the Court has relied on the solution of jurisprudential continuity. The present Judgment calls into question the ironclad rule of jurisdiction—the basis of jurisdiction is consensual—when it relies on the "*Mavrommatis* jurisprudence".

From the historical perspective, the *Mavrommatis* decision was based on one of the cardinal principles of the Versailles Peace Treaty: in respect of jurisdiction *ratione personae*, it was difficult to grant the defeated States (Germany and the Central Powers) rights equal to those of the victor States: the Permanent Court of International Justice might thus have had characteristics of a court of quasi-statutory jurisdiction. If the Court had deliberately based its solution on the prospect of a crisis under Chapter VII, it would not have been unreasonable to uphold the Court's jurisdiction *ratione personae*.

There is no direct basis for the difference in treatment between an applicant and a respondent, because it ultimately jeopardizes equality of access as between them. In a system of statutorily conferred jurisdiction, which is not that of the International Court of Justice, all potential litigants must be given the assurance that there is a court to which they can turn to resolve their disputes, and that they can do so without having to rely on consent. By contrast, in a judicial order founded on consensual jurisdiction, there is no need for a counterpart to Article 35 in respect of the respondent. Once the requirements applicable to the applicant have been met, it is for the participants to establish, by judicial means, the respondent's consent to jurisdiction.

In the present case, the main difficulty concerned the shift from the continuity of the international personality of the SFRY and Serbia to State succession as found by the Court. In contradistinction to the theoretical approach to succession adopted in the Judgment, the problem was confined to considering the question of succession to Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide in the relationship between Croatia and Serbia. The 16 February 1994 letter from Croatia's Permanent Representative to the United Nations, which has received no attention in the Judgment, was an objection to the FRY's claim in its declaration of 27 April 1992 to continuity of personality, and careful consideration should have been given to its significance in regard to Article IX.

It can be seen from an analysis of Croatia's objection that there are various aspects to this document: a rejection of continuity of the personality of the SFRY, acceptance of continuity of treaty obligations and the serving of notice on the FRY to respond to Croatia's offers. In other words, Croatia considers its letter to be effective in the terms it defined, while the rejection of continuity of international personality calls into question the entire organic, institutional dimension in regard to the United Nations. This is the framework governing the fate of Article IX, a clause which is severable from the system of obligations under the Convention on the Prevention and Punishment of the Crime of Genocide. The distinction drawn by Croatia between continuity of treaty obligations and discontinuity of international personality as between the SFRY and Serbia is not questionable *pro ratione temporis*. Thus, there was reason to ascertain whether there was consent to jurisdiction, which did not need to be argued in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* and which could be deduced from a simple, logical judicial finding.

Finally, it was not appropriate to apply the *Mavrommatis* jurisprudence. The present case was initiated by unilateral application, not special agreement; further, in the cited jurisprudence the applicant had sole control over the action needed to cure the defect. Also, the conditions laid down by

the *Mavrommatis* Judgment are not satisfied. This however is a preliminary legal issue.

At all events, had there been a decision finding against jurisdiction, which Judge Ranjeva would have greeted with a sense of relief, given the nature of the International Court of Justice, that would not have exempted Serbia from the obligation to answer under international law for violations of the Convention on the Prevention and Punishment of the Crime of Genocide.

Dissenting opinion of Judge Owada

In his dissenting opinion, Judge Owada concludes that the Court is not competent to entertain the present case submitted by the Republic of Croatia, since the Respondent, the Republic of Serbia, lacked the capacity to participate in the proceedings at the time when the Applicant filed an Application to institute proceedings against it.

Judge Owada first explains the legal significance for the present case of the 2004 Judgments in the cases concerning *Legality of Use of Force* and the 2007 Judgment in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*. In particular, he emphasizes that the 2007 case was bound by a prior express finding on jurisdiction, i.e., the 1996 Judgment in that case, whereas the 2004 Judgments were not. He emphasizes that in the present case, like the 2004 cases, it is clear that no such express finding constituting *res judicata* exists.

Judge Owada next examines the so-called "*Mavrommatis* principle" applied by the present Judgment, characterized by the Applicant to mean that when four substantial elements (one: seisin; two: basis of claim; three: consent to jurisdiction; four: access to the Court) are united at any given time, the order in which this occurred is a pure matter of form and does not affect the Court's jurisdiction. Judge Owada proceeds to examine the eight cases in which the principle has been referred to, either *eo nomine* or by implication. He concludes that:

(*a*) In spite of the generalized formula often quoted from the Judgment in the *Mavrommatis Palestine Concessions* case, the *Mavrommatis* case was decided on a totally different basis, and the present case does not present any legally analogous situation where the so-called *Mavrommatis* principle may have a place of application.

(*b*) Each of the subsequent cases in which this principle has been invoked are all related to the issue of the initial absence of consent to jurisdiction which, allegedly, had vitiated the basis of jurisdiction of the Court but was cured by a subsequent act or event. There has been no case that can justify the principle in its generalized formulation in which the Judgment is claimed to extend to any and all flaws in procedure.

(*c*) The rationale for deviating from the strict application of procedural requirements is diverse in each case and each of the cases where such deviation is accepted by the Court has its own specific rationale and its intrinsic limitations, but in all the cases, the basic problem related to the original absence of consent as the vitiating factor for jurisdiction.

(*d*) There has been no case in the jurisprudence of the Court in which the so-called Mavrommatis principle has been understood to cover any and all "procedural defects" in the proceedings before the Court. The "procedural defects" that have been at issue in those cases have mostly been alleged technical flaws relating to the element of consent in one way or another at the time of the institution of proceedings, and have never involved such issues as the capacity of the parties to appear before the Court.

(*e*) In all the cases where the principle has been applied, what is involved is the issue of assessing the subsequent coming into existence of the consensual nexus of jurisdiction as sufficient for the purpose of constituting the essential condition for the exercise of jurisdiction by the Court.

Judge Owada concludes from his review of the Mavrommatis jurisprudence that flexibility with regard to jurisdictional consent has never been extended to the issue of access to the Court which lies beyond the consent of the parties, and it should not be so extended in the present Judgment.

Finally, Judge Owada addresses the question of whether the fact that the FRY/Serbia is the Respondent in the present case whereas it was the Applicant in the 2004 NATO cases should make a legal difference in the context of the present case. He concludes that it should not, noting that a contrary conclusion would result in unequal treatment of the applicant and the respondent before the Court.

Separate opinion of Judge Tomka

1. Judge Tomka has voted for all but one of the findings of the Court. He felt obliged to vote against paragraph 146 (4) of the Judgment, where the Court found that the second preliminary objection of Serbia, contending that the claims of Croatia based on acts and omissions which took place prior to 27 April 1992 are beyond the jurisdiction of the Court and inadmissible, "does not, in the circumstances of the case, possess an exclusively preliminary character".

2. Judge Tomka first examines the arguments of the Parties on this question. Serbia contends that as the acts occurred before the Federal Republic of Yugoslavia (FRY), the State whose international legal personality it now continues, came into existence as a State, and thus could have become a Contracting Party to the Genocide Convention, are beyond the jurisdiction of the Court and inadmissible. Croatia relies on the Court's 1996 Judgment in the *Bosnia and Herzegovina* v. *Yugoslavia* case, where the Court found that it had jurisdiction over all "relevant facts which have occurred since the beginning of the conflict which took place in Bosnia and Herzegovina". That conflict started in spring 1992, whilst the one in Croatia had already begun in summer 1991.

3. Judge Tomka continues by commenting on certain issues dealt with in the 1996 Judgment and their relevance to the present case. He concurs with the Court's view on the circumstances which distinguish the present case from its 1996 Judgment. He agrees with the Court that in the present case consequences are to be drawn from the fact that the FRY only became a State and a party to the Genocide Convention on 27 April 1992. He then adds that no party raised the issue of the FRY being a party to the Genocide Convention in 1996;

nor did the Court take any position with respect to the exact date on which it became a party. Judge Tomka notes that in 1996, the Court limited itself to the conclusion that the FRY was bound by the Convention on 20 March 1993, the date the Application was filed. He notes that the Court recalled the FRY's statement on 27 April 1992 where it claimed to continue the international legal personality of the SFRY and pledged to "strictly abide by all the commitments" of that State, and its conclusion that the FRY's intention was to remain bound by the SFRY's international obligations.

4. According to Judge Tomka, the Court's conclusion, that "the question of the temporal scope of its jurisdiction is closely bound up with these questions of attribution, presented by Serbia as a matter of admissibility rather than of jurisdiction, and thus has to be examined in the light of these issues" (Judgment, para. 124), is question-begging. He considers that the Court only summarily addresses the issue of the attribution of acts that occurred prior to 27 April 1992 in its Judgment and that, in so doing, the Court also postpones its decision on the objection to its jurisdiction perceived by it as being of a *ratione temporis* character.

5. Judge Tomka continues by recalling Croatia's argument, that the FRY was a successor and not the continuing State of the SFRY, and that Serbia is therefore a "party by succession to the Genocide Convention from the beginning of its existence as a State". He notes that the Court concurred with Croatia's submission on this point (Judgment, para. 117), and determined accordingly that on 27 April 1992, the FRY became a party to the Genocide Convention.

6. Judge Tomka emphasizes that there is no doubt that the Genocide Convention was binding on the SFRY from 12 January 1951, when it entered into force, and that it was continuously applicable in respect of its entire territory. He stresses that there was not a single day during the conflict, which started in 1991 and ended in 1995, when the Convention would not have been applicable in that territory. He explains that this is so because so long as the SFRY continued to exist, it remained party to the Convention and, as its constituent republics gradually seceded, they became parties on the basis of succession with effect from the date when they assumed responsibility for their international relations. There was consequently no hiatus or gap in the protection afforded by the Convention during the armed conflict, although it was to be applied by different States at different periods during the process of the SFRY's dissolution.

7. Judge Tomka considers that the issue before the Court is not the retroactive application of the Convention, but rather, the interpretation of the compromissory clause contained in Article IX of the Convention and the determination of the Court's jurisdiction thereby conferred. On this point, he begins by recalling the arguments of Croatia, which relied upon Article IX of the Convention. Judge Tomka considers that in order to fall within the ambit of Article IX of the Convention, the dispute must be about the interpretation or application of the Convention by the Contracting Parties to it, not by the predecessor State of a Contracting Party to it, nor about its application by an entity which was not the State party to the Convention and only subsequently came into being as a State and became a party to it.

8. Judge Tomka recalls Article 4 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, which provides that the conduct of an organ of a territorial unit of the State is considered as an act of that State and thus engages the international responsibility thereof. He explains that when that State ceases to exist, the issue of succession to responsibility may arise; similarly, when a territorial unit of a predecessor State secedes and becomes an independent State, the issue of the responsibility of the separate State for acts which were committed by the organs of that entity before it established itself as a State may arise. However, he considers that with regard to these two issues, neither of them falls within the jurisdiction of the Court under Article IX of the Genocide Convention.

9. Judge Tomka concludes that the question of consequences to be drawn from the fact that the FRY became a State and a party to the Genocide Convention on 27 April 1992 is a legal question which should be decided at this stage in the proceedings and for the answering of which there is no need of any further information. He emphasizes that the considerable length of the proceedings and the Court's repeated handling of issues relating to the legal status of the FRY and its participation in the Genocide Convention entail that all necessary information has been put before it.

10. As a further concluding point, Judge Tomka highlights that his observations are based on the fact that the FRY (now Serbia) is a successor State and not the continuing State of the SFRY. According to him, this conclusion on the scope of the Court's jurisdiction does not amount to the exclusion of responsibility of those who committed so many serious atrocities during the armed conflict in the territory of Croatia; nor does it prevent the responsibility of the State to which the acts of the perpetrators of such atrocities may be attributed. As there is a fundamental distinction between the acceptance by States of the Court's jurisdiction and the conformity of their acts with international law, he emphasizes that States remain responsible for acts attributable to them which are contrary to international law although such acts may have been committed during the period over which the jurisdiction of the Court does not extend. As a final observation, he adds that whilst a number of persons were indicted by the Prosecutor of the International Criminal Tribunal for the former Yugoslavia for atrocities committed in Croatia, none of them have been charged with the crime of genocide, and in the light of this, wonders how Croatia will establish before the Court, whose procedure is not a criminal one, that the crime of genocide has been perpetrated. However, he considers that this issue is for the merits.

Separate opinion of Judge Abraham

Judge Abraham expresses his agreement with the operative part of the Judgment and with the reasoning by which the Court has rejected Serbia's objection of lack of jurisdiction based on the fact that Serbia was not a party to the Genocide Convention, including Article IX thereof, on the date when the Application was filed.

However, Judge Abraham dissociates himself from the reasoning by which the Judgment rejects the Respondent's argument that it did not possess, on the date when the Application was filed, the capacity to have "access to the Court" pursuant to Article 35 of the Statute.

He takes the view that the lengthy passages devoted to this question in the Judgment, with a view to showing that the Respondent meets the condition of having "access to the Court" for the purposes of this case because of its admission to the United Nations on 1 November 2000, were in fact unnecessary, since the requirements of Article 35 of the Statute do not apply to the respondent in a case, but only to the party that is instituting the proceedings.

This interpretation is based on the text of Article 35, analysis of the *travaux préparatoires*, the previous practice of the Court and, above all, on reasoning derived from the logic and purpose of the text. In particular, to interpret Article 35, as the Judgment appears to do, as applying uniformly to the Applicant and the Respondent, results in the creation of inequality between two States that are both parties to a Convention which includes a compromissory clause, when one of them is a party to the Statute of the Court and the other is not, to the benefit of the latter: the second State could use the compromissory clause at any time by bringing proceedings before the Court and depositing for that purpose the declaration provided for by resolution 9 (1946) of the Security Council, whereas the first State could not implement the same clause of its own volition, since its opponent could simply refuse to deposit the declaration in order to place itself outside the jurisdiction of the Court.

In addition, Judge Abraham expresses his disagreement with the way in which the Court has applied the *Mavrommatis* case law here. While he acknowledges that it is possible in principle to take the view that lack of access to the Court on the date when proceedings are instituted—by a party to which that condition applies—can be remedied during the proceedings where the necessary requirement is met before the Court rules on its jurisdiction, this is with the proviso that at that latter date it should be established that the applicant could, if it so wished, file a new application identical with the previous one in terms of substance which could not meet with any objection regarding the jurisdiction of the Court. What lies behind the *Mavrommatis* case law is a desire for procedural economy. In this instance, that should have led the Court to adjudicate on the effects of the reservation made by Serbia in 2001 to Article IX of the Genocide Convention and to find it invalid, which the Court has declined to do. By arguing as it has done, and by contenting itself with the fact that the condition of "access" was met on 1 November 2000, on which date Serbia was certainly still bound by Article IX of the Genocide Convention, the Court does more than make a reasonable exception to the principle that its jurisdiction must be determined as of the date when the application is filed; it abrogates that principle outright, whilst claiming to uphold it.

Declaration of Judge Bennouna

Judge Bennouna voted in favour of the Court's jurisdiction to entertain Croatia's Application on the merits, in so far as the Federal Republic of Yugoslavia (FRY) has been bound by the Genocide Convention since 1992 and became a Member of the United Nations and a party to the Statute of the Court (as Serbia and Montenegro) on 1 November 2000, even though that occurred after Croatia had instituted the proceedings on 2 July 1999.

The Court, relying on its jurisprudence to arrive at this conclusion, should have pursued its argument further and examined Serbia's accession to the Genocide Convention of 6 March 2001, with a reservation to Article IX, which attributes jurisdiction to the Court. By doing so, the Court would have found that Serbia could not accede to a treaty to which it had already been a party since 1992 and that, as a result, no account should be taken of that accession, nor above all of the reservation that accompanied it. In Judge Bennouna's view, the Court would thus have strengthened the reasoning of the Judgment, which as it is remains incomplete and therefore unsatisfactory.

Dissenting opinion of Judge Skotnikov

In the view of Judge Skotnikov, the Court should have upheld the first preliminary objection submitted by Serbia in so far as it related to the capacity of the Respondent to participate in the proceedings instituted by Croatia. He is critical of the Court's decision to depart from the general rule that the jurisdiction of the Court must be assessed on the date of the institution of the proceedings. He disagrees with the Court's conclusion that Serbia's lack of *jus standi* at the time of the institution of the proceedings by Croatia has been cured by its subsequent admission to the United Nations. Judge Skotnikov notes that the Mavrommatis exception to the above-mentioned general rule, relied upon by the Court, deals exclusively with defects related to consent of the parties. The right of a party to appear before the Court is not a matter of consent and, accordingly, the absence of that right is not a defect capable of being cured by applying the Mavrommatis jurisprudence.

Judge Skotnikov agrees with the Court's conclusion that Serbia was party to the Genocide Convention at the time of filing of the Application. However, this Convention, as the Court established in its *Legality of Use of Force* Judgments, is not a treaty in force in the sense of Article 35, paragraph 2, of the Statute of the Court. Therefore it is not capable of giving access to the Court to a party which is not a Member of the United Nations at the time the proceedings are instituted.

The majority has also, in his opinion, erred in leaving open until the merits stage the question raised by Serbia in its second preliminary objection as to whether the Court has jurisdiction to examine facts or events which occurred prior to 27 April 1992 (the date on which the FRY came into existence). Judge Skotnikov notes that Serbia further contended that, even if there is jurisdiction, it cannot be exercised in respect of the events which occurred prior to that date. This contention represents an objection to admissibility of Croatia's claims. Judge Skotnikov points out that the admissibility question raised by Serbia can become relevant only if the Court has jurisdiction to examine these facts. The question of jurisdiction must be answered by the Court first. Only if the answer is in the affirmative can the Court, in the exercise of its jurisdic-

tion, decide whether it can address the events occurring before the FRY came into existence, including questions related to attribution of responsibility.

The Court explains its reluctance to tackle the issue of jurisdiction as a preliminary one by stating that "in order to be in a position to make any finding on each of these issues [jurisdiction and admissibility], the Court will need to have more elements before it" without, however, indicating what element is lacking in respect of the issue of jurisdiction. The Court's insistence that the issues of jurisdiction and admissibility (the second issue, according to the Court, involves questions of attribution to the Respondent of the facts in the period preceding 27 April 1992) are "inseparable" suggests that the issue of attribution of responsibility could be considered together with the issue of jurisdiction and influence the Court's decision on the latter. But responsibility under the general rules of State responsibility, even if established, cannot mutate into the jurisdiction of the Court, which, unlike State responsibility, is based on consent.

The Court has found that the respondent State acquired the status of party to the Genocide Convention, by a process that is to be regarded as succession, on 27 April 1992, the date on which it came into existence. It follows that the Court cannot have jurisdiction to examine any facts or events which occurred prior to that date.

Separate opinion of *ad hoc* Judge Vukas

The Applicant, the Republic of Croatia, became a Member of the United Nations (UN), and thus party to the Statute of the International Court of Justice, on 22 May 1992. The Respondent, the Republic of Serbia, decided on 27 April 1992, together with the Republic of Montenegro, to establish the "Federal Republic of Yugoslavia" (FRY). This new State, composed of two former Republics of the Socialist Federal Republic of Yugoslavia (SFRY), sought to continue the international personality of Yugoslavia and its membership in the UN. The United Nations was not pleased with this decision. The FRY was thus not allowed to participate in the General Assembly, but it was considered to be a member of the UN, and therefore a party to the Statute of the Court.

The SFRY was a party to the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) from its entry into force on 12 January 1951. After the dissolution of the SFRY, Croatia and the FRY expressed in 1992 their decision to succeed the SFRY as parties to the Genocide Convention (without any reservation to its provisions).

Taking into account the above-mentioned facts, it is clear that Croatia was entitled to institute the proceedings against the FRY on 2 July 1999. Croatia's Application does not only concern the acts and omissions which took place after the establishment of the FRY on 27 April 1992 and there are several reasons for this. First of all, both Croatia and Serbia were under the obligation to prevent and punish the crime of genocide as federal units of the SFRY—a party to the Genocide Convention. Moreover, the provisions of that Convention have for a long time formed a part of general customary international law of a peremptory nature. Finally, many of the acts of genocide in respect of which Croatia instituted the proceedings were initiated as of 1991, but the suffering of the victims continued in the following years.

Dissenting opinion of Judge *ad hoc* Kreća

In the opinion of Judge Kreća the relevant conditions for the jurisdiction of the Court in the present case are not met.

On the date of institution of the proceedings, the Respondent was not a Member of the United Nations as determinative of its *jus standi* in the circumstances surrounding the case. The so-called Mavrommatis principle, based on considerations of judicial economy, is substantially incapable of redressing the lack of *jus standi* of the Respondent as a mandatory requirement of a constitutional nature.

As regards the basis of jurisdiction, Judge Kreća finds that in the relevant point of time the Genocide Convention was not applicable between the Parties. Following its admission to the United Nations on 1 November 2000, the Respondent, acting upon a reminder of the Secretary-General as depositary of multilateral treaties, expressed its consent to be bound by the Convention on 6 March 2001. The 1992 declaration, perceived by the Court in closely related cases as a basis for considering the Respondent a Contracting Party to the Genocide Convention, is, according to Judge Kreća, for a number of reasons incapable of producing such effects.

Judge Kreća cannot concur with the finding of the majority relating to the scope of the jurisdiction of the Court *ratione temporis*. He finds that only a State in existence, bound by an international obligation, may commit, or may be attributed to, an internationally wrongful act that entails international responsibility. The legal existence of the Respondent as a new international legal person different from its hybrid and controversial position during the period 1992 to 2000, started in November 2000 by its admission to membership in the United Nations.

Regarding all three issues included in the objection relating to the submission of certain persons to trial, provision of information on missing citizens and return of cultural property, Judge Kreća is of the opinion that the particular dispute does not fall within the ambit of Article IX of the Genocide Convention.

173. REQUEST FOR INTERPRETATION OF THE JUDGMENT OF 31 MARCH 2004 IN THE CASE CONCERNING *AVENA AND OTHER MEXICAN NATIONALS* (*MEXICO* v. *UNITED STATES OF A/9.6MERICA*) (MEXICO *v.* UNITED STATES OF AMERICA)

Judgment of 19 January 2009

On 19 January 2009, the International Court of Justice rendered its Judgment in the case concerning *the Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico *v.* United States of America) *(Mexico* v. *United States of America).*

The Court was composed as follows: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Koroma, Buergenthal, Owada, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Registrar Couvreur.

*

* *

The operative paragraph (para. 61) of the Judgment reads as follows:

" . . .

The Court,

(1) By eleven votes to one,

Finds that the matters claimed by the United Mexican States to be in issue between the Parties, requiring an interpretation under Article 60 of the Statute, are not matters which have been decided by the Court in its Judgment of 31 March 2004 in the case concerning *Avena and Other Mexican Nationals (Mexico* v. *United States of America)*, including paragraph 153 (9), and thus cannot give rise to the interpretation requested by the United Mexican States;

In favour: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Koroma, Buergenthal, Owada, Tomka, Abraham, Keith, Bennouna, Skotnikov;

Against: Judge Sepúlveda-Amor;

(2) Unanimously,

Finds that the United States of America has breached the obligation incumbent upon it under the Order indicating provisional measures of 16 July 2008, in the case of Mr. José Ernesto Medellín Rojas;

(3) By eleven votes to one,

Reaffirms the continuing binding character of the obligations of the United States of America under paragraph 153 (9) of the Avena Judgment and *takes note* of the undertakings given by the United States of America in these proceedings;

In favour: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Koroma, Buergenthal, Owada, Tomka, Keith, Sepúlveda-Amor, Bennouna, Skotnikov;

Against: Judge Abraham;

(4) By eleven votes to one,

Declines, in these circumstances, the request of the United Mexican States for the Court to order the United States of America to provide guarantees of non-repetition;

In favour: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Koroma, Buergenthal, Owada, Tomka, Abraham, Keith, Bennouna, Skotnikov;

Against: Judge Sepúlveda-Amor;

(5) By eleven votes to one,

Rejects all further submissions of the United Mexican States.

In favour: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Koroma, Buergenthal, Owada, Tomka, Abraham, Keith, Bennouna, Skotnikov;

Against: Judge Sepúlveda-Amor."

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Judges Koroma and Abraham appended declarations to the Judgment of the Court; Judge Sepúlveda-Amor appended a dissenting opinion to the Judgment of the Court.

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History of the proceedings and submissions of the Parties
(paras. 1–10)

The Court recalls that, on 5 June 2008, the United Mexican States (hereinafter "Mexico") filed in the Registry of the Court an Application instituting proceedings against the United States of America (hereinafter "the United States"), whereby, referring to Article 60 of the Statute and Articles 98 and 100 of the Rules of Court, it requests the Court to interpret paragraph 153 (9) of the Judgment delivered by the Court on 31 March 2004 in the case concerning *Avena and Other Mexican Nationals (Mexico* v. *United States of America) (I.C.J. Reports 2004*, p. 12) (hereinafter "the *Avena* Judgment"), which reads as follows:

"153. For these reasons,

The Court, . . .

(9) By fourteen votes to one,

Finds that the appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals referred to in subparagraphs (4), (5), (6) and (7) above, by taking account both of the violation of the rights set forth in Article 36 of the Convention and of paragraphs 138 to 141 of this Judgment".

On 5 June 2008, after filing its Application, Mexico filed in the Registry of the Court a request for the indication of provisional measures in order "to preserve the rights of Mexico and its nationals" pending the Court's judgment in the proceedings on the interpretation of the *Avena* Judgment.

By an Order of 16 July 2008, the Court, having rejected the submission by the United States seeking the dismissal of the Application filed by Mexico (paragraph 80 (I)) and its removal from the Court's General List, indicated the following provisional measures (paragraph 80 (II)):

"(*a*) The United States of America shall take all measures necessary to ensure that Messrs. José Ernesto Medellín Rojas, César Roberto Fierro Reyna, Rubén Ramírez Cárdenas, Humberto Leal García, and Roberto Moreno Ramos are not executed pending judgment on the Request for interpretation submitted by the United Mexican States, unless and until these five Mexican nationals receive review and reconsideration consistent with paragraphs 138 to 141 of the Court's Judgment delivered on 31 March 2004 in the case concerning *Avena and Other Mexican Nationals (Mexico* v. *United States of America)*;

(*b*) The Government of the United States of America shall inform the Court of the measures taken in implementation of this Order."

It also decided that, "until the Court has rendered its judgment on the Request for interpretation, it shall remain seised of the matters" which form the subject of the Order (paragraph 80 (III)).

By letters dated 16 July 2008, the Registrar informed the Parties that the Court, pursuant to Article 98, paragraph 3, of the Rules of Court, had fixed 29 August 2008 as the time-limit for the filing of written observations by the United States on Mexico's Request for interpretation. By a letter dated 1 August 2008, the Agent of the United States, referring to paragraph 80 (II) (b) of the Order of 16 July 2008, informed the Court of the measures which the United States "ha[d] taken and continue[d] to take" to implement that Order. By a letter dated 28 August 2008, the Agent of Mexico, informing the Court of the execution on 5 August 2008 of Mr. José Ernesto Medellín Rojas in the State of Texas, United States of America, and referring to Article 98, paragraph 4 of the Rules of Court, requested the Court to afford Mexico the opportunity of furnishing further written explanations for the purpose, on the one hand, of elaborating on the merits of the Request for interpretation in the light of the written observations which the United States was due to file and, on the other, of "amending its pleading to state a claim based on the violation of the Order of 16 July 2008".

On 29 August 2008, within the time-limit fixed, the United States filed its Written Observations on Mexico's Request for interpretation.

By letters dated 2 September 2008, the Registrar informed the Parties that the Court had decided to afford each of them the opportunity of furnishing further written explanations, pursuant to Article 98, paragraph 4, of the Rules of Court, and had fixed 17 September and 6 October 2008 as the time-limits for the filing by Mexico and the United States respectively of such further explanations. These were filed by each Party within the time-limits thus fixed.

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

"The Government of Mexico asks the Court to adjudge and declare that the obligation incumbent upon the United States under paragraph 153 (9) of the Avena Judgment constitutes an obligation of result as it is clearly stated in the Judgment by the indication that the United States must provide 'review and reconsideration of the convictions and sentences' but leaving it the 'means of its own choosing';

and that, pursuant to the foregoing obligation of result,

1. the United States must take any and all steps necessary to provide the reparation of review and reconsideration mandated by the Avena Judgment; and

2. the United States must take any and all steps necessary to ensure that no Mexican national entitled to review and reconsideration under the Avena Judgment is executed unless and until that review and reconsideration is completed and it is determined that no prejudice resulted from the violation."

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

On behalf of Mexico,

in the further written explanations submitted to the Court on 17 September 2008:

"Based on the foregoing, the Government of Mexico asks the Court to adjudge and declare as follows:

(*a*) That the correct interpretation of the obligation incumbent upon the United States under paragraph 153 (9) of the *Avena* Judgment is that it is an obligation of result as it is clearly stated in the Judgment by the indication that the United States must provide 'review and reconsideration of the convictions and sentences';

and that, pursuant to the interpretation of the foregoing obligation of result,

(1) the United States, acting through all of its competent organs and all its constituent subdivisions, including all branches of government and any official, state or federal, exercising government authority, must take all measures necessary to provide the reparation of review and reconsideration mandated by the *Avena* Judgment in paragraph 153 (9); and

(2) the United States, acting through all its competent organs and all its constituent subdivisions, including all branches of government and any official, state or federal, exercising government authority, must take all measures necessary to ensure that no Mexican national entitled to review and reconsideration under the *Avena* Judgment is executed unless and until that review and reconsideration is completed and it is determined that no prejudice resulted from the violation;

(*b*) That the United States breached the Court's Order of 16 July 2008 and the *Avena* Judgment by executing José Ernesto Medellín Rojas without having provided him review and reconsideration consistent with the terms of the *Avena* Judgment; and

(*c*) That the United States is required to guarantee that no other Mexican national entitled to review and reconsideration under the *Avena* Judgment is executed unless and

until that review and reconsideration is completed and it is determined that no prejudice resulted from the violation."

On behalf of the United States,

in its Written Observations submitted on 29 August 2008:

"On the basis of the facts and arguments set out above, the Government of the United States of America requests that the Court adjudge and declare that the application of the United Mexican States is dismissed, but if the Court shall decline to dismiss the application, that the Court adjudge and declare an interpretation of the *Avena* Judgment in accordance with paragraph 62 above." (Para. 63.)

Paragraph 60 of the Written Observations of the United States includes the following:

"And the United States agrees with Mexico's requested interpretation; it agrees that the *Avena* Judgment imposes an 'obligation of result'. There is thus nothing for the Court to adjudicate, and Mexico's application must be dismissed."

Paragraph 62 of the Written Observations of the United States includes the following:

"the United States requests that the Court interpret the Judgment as Mexico has requested—that is, as follows:

[T]he obligation incumbent upon the United States under paragraph 153 (9) of the *Avena* Judgment constitutes an obligation of result as it is clearly stated in the Judgment by the indication that the United States must provide 'review and reconsideration of the convictions and sentences' but leaving it the 'means of its own choosing'";

in the further written explanations submitted to the Court on 6 October 2008:

"On the basis of the facts and arguments set out above and in the United States' initial Written Observations on the Application for Interpretation, the Government of the United States of America requests that the Court adjudge and declare that the application of the United Mexican States for interpretation of the *Avena* Judgment is dismissed. In the alternative and as subsidiary submissions in the event that the Court should decline to dismiss the application in its entirety, the United States requests that the Court adjudge and declare:

(*a*) that the following supplemental requests by Mexico are dismissed:

(1) that the Court declare that the United States breached the Court's 16 July Order;

(2) that the Court declare that the United States breached the *Avena* Judgment; and

(3) that the Court order the United States to issue a guarantee of non-repetition;

(*b*) an interpretation of the *Avena* Judgment in accordance with paragraph 86 (a) of Mexico's Response to the Written Observations of the United States."

*Request for interpretation of the **Avena** Judgment*

Jurisdiction of the Court in respect of interpretation
(paras. 11–20)

The Court recalls that Mexico's Request for interpretation of paragraph 153 (9) of the Court's Judgment of 31 March 2004 was made by reference to Article 60 of the Statute. That Article provides that "[t]he judgment is final and without appeal. In the event of dispute ['contestation' in the French version] as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party."

The Court points out that its Order of 16 July 2008 on provisional measures "was not made on the basis of prima facie jurisdiction" and notes that it has already stated, in that Order, that "the Court's jurisdiction on the basis of Article 60 of the Statute is not preconditioned by the existence of any other basis of jurisdiction as between the parties to the original case" (Order, para. 44). It also recalls that it has already indicated that "the withdrawal by the United States from the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes since the rendering of the *Avena* Judgment had no bearing on the Court's jurisdiction under Article 60 of the Statute" (*ibid*., para. 44).

The Court notes that, in its Order of 16 July 2008, it had observed in particular that "the Court may entertain a request for interpretation of any judgment rendered by it provided that there is a 'dispute as to the meaning or scope of [the said] judgment'" (*ibid*., para. 46). The Court then indicates that "in the present procedure it is appropriate for the Court to review again whether there does exist a dispute over whether the obligation in paragraph 153 (9) of the *Avena* Judgment is an obligation of result". It states that it "will also at this juncture need to consider whether there is indeed a difference of opinion between the Parties as to whether the obligation in paragraph 153 (9) of the Avena Judgment falls upon all United States federal and state authorities".

Question of the existence of a dispute between the Parties (paras. 21–47)

— No dispute on the nature of the obligation laid down in paragraph 153 (9)
(paras. 21–28)

Having examined the written pleadings of the Parties, the Court finds that there is no dispute between them as to whether paragraph 153 (9) lays down an obligation of result. It observes that "this obligation of result is one which must be met within a reasonable period of time. Even serious efforts of the United States, should they fall short of providing review and reconsideration consistent with paragraphs 138 to 141 of the *Avena* Judgment, would not be regarded as fulfilling this obligation of result."

— Question of the existence of a dispute as to those upon whom the obligation of result specifically falls
(paras. 29–42)

After emphasizing that "[i]t is for the Court itself to decide whether a dispute within the meaning of Article 60 of the Statute does indeed exist (see *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, p. 12)", the Court considers the possibility that the Parties hold different views "as to the meaning and scope of that obligation of result". The Court observes that whether there is a dispute under Article 60 of the Statute, the resolution of which requires an interpretation of the pro-

visions of paragraph 153 (9) of the Avena Judgment, can be perceived in two ways.

On the one hand, it examines a variety of arguments put forward by Mexico which "suggest that there is a difference of perception that would constitute a dispute" as to those upon whom the obligation of result specifically falls. The Court notes in particular that, according to Mexico, the interpretation given by the United States Supreme Court in the *Medellín* v. *Texas* case (*Supreme Court Reporter*, vol. 128, 2008, p. 1346)—namely that the judgments of the International Court of Justice are not, as such, directly applicable in the domestic legal order of the United States—"is inconsistent with the interpretation of the *Avena* Judgment as imposing an obligation of result incumbent on all constituent organs of the United States, including the judiciary".

On the other hand, the Court sets out "factors that suggest, on the contrary, that there is no dispute between the Parties" as to those upon whom the *Avena* Judgment specifically falls. The Court notes firstly "–without necessarily agreeing with certain points made by the Supreme Court in its reasoning regarding international law—that the Supreme Court has stated that the *Avena* Judgment creates an obligation that is binding on the United States. This is so notwithstanding that it has said that the obligation has no direct effect in domestic law, and that it cannot be given effect by a Presidential Memorandum." The Court adds that the United States reiterated in its Written Observations of 29 August 2008 that "the federal government both 'spoke for' and had responsibility for all organs and constituent elements of governmental authority". The Court further notes that "Article 98 (2) of the Rules of Court stipulates that when a party makes a request for interpretation of a judgment, 'the precise point or points in dispute as to the meaning or scope of the judgment shall be indicated'". It observes that Mexico has had the opportunity to indicate the precise points in dispute on several occasions, but "nonetheless remain[s] very non-specific as to what the claimed dispute precisely is". The Court observes finally that "[w]hether in terms of meeting the requirements of Article 98 (2) of the Rules, or more generally, it could be argued that in the end Mexico has not established the existence of any dispute between itself and the United States", and that "Mexico did not specify that the obligation of the United States under the *Avena* Judgment was directly binding upon its organs, subdivisions or officials, although this might be inferred from the arguments it presented".

— Question of the direct effect of the obligation established in paragraph 153 (9) of the Avena Judgment
(paras. 43–47)

In the view of the Court, the Parties' different stated perspectives reveal "different contentions as to whether paragraph 153 (9) . . . envisages that a direct effect is to be given to the obligation contained therein". Be that as it may, the Court considers that "there would be a further obstacle to granting the request of Mexico even if a dispute in the present case were ultimately found to exist within the meaning of Article 60 of the Statute". It notes that "[t]he *Avena* Judgment nowhere lays down or implies that the courts in the United States are required to give direct effect to paragraph 153 (9)"; and the Court observes that, according to its settled jurisprudence, a question which was not decided in an initial Judgment "cannot be submitted to it for interpretation" in this Judgment under Article 60 of the Statute.

The Court adds that "Mexico's argument, as described in paragraph 31 [of the present Judgment], concerns the general question of the effects of a judgment of the Court in the domestic legal order of the States parties to the case in which the judgment was delivered, not the 'meaning or scope' of the *Avena* Judgment, as Article 60 of the Court's Statute requires". It considers that "the question underlying Mexico's Request for interpretation is outside the jurisdiction specifically conferred upon the Court by Article 60. Whether or not there is a dispute, it does not bear on the interpretation of the *Avena* Judgment, in particular of paragraph 153 (9)."

The Court concludes from the above that it "cannot accede to Mexico's Request for interpretation".

However, the Court observes that "considerations of domestic law which have so far hindered the implementation of the obligation incumbent upon the United States, cannot relieve it of its obligation". It points out that "[a] choice of means was allowed to the United States in the implementation of its obligation and, failing success within a reasonable period of time through the means chosen, it must rapidly turn to alternative and effective means of attaining that result".

Additional claims made by Mexico in the context of the proceedings
(paras. 48–60)

The Court then turns to the three additional claims presented by Mexico, which takes the view that by executing Mr. José Ernesto Medellín Rojas on 5 August 2008 without having provided him with the review and reconsideration required under the *Avena* Judgment, the United States has (1) breached the Order indicating provisional measures of 16 July 2008; (2) breached the *Avena* Judgment itself; and (3) must provide guarantees of non-repetition.

On the first point, the Court "finds that the United States did not discharge its obligation under the Court's Order of 16 July 2008, in the case of Mr. José Ernesto Medellín Rojas".

The Court dismisses Mexico's second claim, noting that "the only basis of jurisdiction relied upon for this claim in the present proceedings is Article 60 of the Statute, and . . . that Article does not allow it to consider possible violations of the Judgment which it is called upon to interpret".

Lastly, the Court reiterates that "its *Avena* Judgment remains binding and that the United States continues to be under an obligation fully to implement it"; taking note of the undertakings given by the United States of America in these proceedings, it dismisses the third of the additional claims.

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Declaration of Judge Koroma

In a declaration appended to the Judgment clarifying his understanding as to the application of Article 60 of the Statute

in this case, Judge Koroma expresses the view that there are at least two differences between the Mexican and United States positions that could be considered a "dispute" under the terms of Article 60: the Parties take a different perspective both as to whether the *Avena* Judgment required that the review and reconsideration it ordered be effective, as well as whether the obligations it created are subject to domestic jurisdiction in their implementation.

Referring to the Court's conclusion that "[t]he Parties' different stated perspectives on the existence of a dispute reveal also different contentions as to whether paragraph 153 (9) of the *Avena* Judgment envisages that a direct effect is to be given to the obligation contained therein", he notes that this wording is not entirely clear and interprets it to mean that the request for interpretation is not admissible because the issues in dispute are not within the scope of paragraph 153 (9) of that Judgment.

Judge Koroma then offers an approach by which the Court could have found the Request for interpretation admissible in a manner consistent with its jurisprudence. He observes that, if it were to have done so, the Court in interpreting its Judgment could have concluded that the United States has a choice of means as to how to implement its obligation under the Judgment, but that the efforts to carry out review and reconsideration must be effective in order to be in compliance with the *Avena* Judgment.

He concludes that, by reiterating the obligation of the Respondent in respect of the individuals named in *Avena*, the Court has upheld the object and purpose of Article 60 of the Statute. He emphasizes that while the Court may not be in a position to interpret its *Avena* Judgment, the binding force of that Judgment remains, and certain obligations in that Judgment have not yet been met. Under Article 94 of the Charter—and in this case also fundamental principles of human rights—international law demands nothing less than the full and timely compliance with the *Avena* Judgment for all the Mexican nationals mentioned therein.

Declaration of Judge Abraham

In a declaration appended to the Judgment, Judge Abraham explains that he voted against subparagraph (3) of the operative clause for the reason that the statements therein exceed the scope of the Court's jurisdiction under Article 60 of its Statute, as they do not relate to interpretation of the *Avena* Judgment but to compliance with it.

Dissenting opinion of Judge Sepúlveda-Amor

In his dissenting opinion, Judge Sepúlveda-Amor states that although he is in agreement with most of the reasoning of the Court, he cannot join in some of the Court's conclusions. He believes that the Court has missed an opportunity to settle issues calling for interpretation and to construe the meaning or scope of the *Avena* Judgment. He sets out the following points of disagreement with the Court's Judgment:

1. By refraining from passing judgment on the United States failure to discharge its international obligation to comply with the *Avena* Judgment, the Court has ignored the need to adjudge the consequences of internationally wrongful acts of a State.

2. It is to be regretted that the Court did not find it necessary to determine the legal consequences which flow from the failure of the United States to comply with the Court's Order indicating provisional measures and with the *Avena* Judgment. The international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State. Mexico has shown that the United States has an obligation of result and that, pursuant to such obligation, the United States, acting through any and all organs of the State, must take all necessary measures to provide the *Avena* remedy. The Court decided not to adjudge on the effects of the United States breach of its international obligations.

3. The Court should have reaffirmed the binding force of its *LaGrand* and *Avena* Judgments and the existence of individual rights under Article 36 of the Vienna Convention in order to dispel all doubts that have been raised by federal and state authorities in the executive and judicial branches of government in the United States.

4. It is insufficient to claim that the operative clause of the *Avena* Judgment has binding force if its provisions become legally ineffective in the face of enforcement of the procedural default rule in United States courts. In construing the meaning and scope of paragraph 153 of the *Avena* Judgment, the Court should have considered the underlying reasoning of the Judgment that the procedural default rule represents a judicial obstacle that renders inoperative and dysfunctional the rights embedded in Article 36 of the Vienna Convention.

5. An ongoing dispute exists between Mexico and the United States, not only in the sense of their Article 60 dispute over the interpretation of the obligation imposed by *Avena*, but also in the sense of an Article 38 (1) dispute over several points of law and on the facts.

6. Mexico and the United States have opposing views on the domestic effects of international obligations. The Court could have advanced the development of international law by settling the issues raised by these conflicting interpretations.

7. The Court relies on a misreading of Mexico's position in deciding that a dispute between the Parties does not exist. Mexico does not contend that the failure to comply with the *Avena* obligation is attributable only to the United States federal Executive; Mexico has argued that the definitive determination to deny the judicial review and reconsideration mandated by *Avena* is attributable to the United States Supreme Court. The Parties have a dispute as to the legal consequence of a decision by the United States Supreme Court that an international obligation does not constitute binding federal law without implementing legislation.

174. MARITIME DELIMITATION IN THE BLACK SEA (ROMANIA *v.* UKRAINE)

Judgment of 3 February 2009

On 3 February 2009, the International Court of Justice rendered its Judgment in the case concerning *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine)*.

The Court was composed as follows: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Buergenthal, Owada, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judges *ad hoc* Cot, Oxman; Registrar Couvreur.

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The operative paragraph (para. 219) of the Judgment reads as follows:

" . . .

The Court,

Unanimously,

Decides that starting from Point 1, as agreed by the Parties in Article 1 of the 2003 State Border Régime Treaty, the line of the single maritime boundary delimiting the continental shelf and the exclusive economic zones of Romania and Ukraine in the Black Sea shall follow the 12-nautical-mile arc of the territorial sea of Ukraine around Serpents' Island until Point 2 (with co-ordinates 45° 03' 18.5" N and 30° 09' 24.6" E) where the arc intersects with the line equidistant from Romania's and Ukraine's adjacent coasts. From Point 2 the boundary line shall follow the equidistance line through Points 3 (with co-ordinates 44° 46' 38.7" N and 30° 58' 37.3" E) and 4 (with co-ordinates 44° 44' 13.4" N and 31° 10' 27.7" E) until it reaches Point 5 (with co-ordinates 44° 02' 53.0" N and 31° 24' 35.0" E). From Point 5 the maritime boundary line shall continue along the line equidistant from the opposite coasts of Romania and Ukraine in a southerly direction starting at a geodetic azimuth of 185° 23' 54.5" until it reaches the area where the rights of third States may be affected."

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1. Chronology of the procedure and submissions of the Parties (paras. 1–13)

On 16 September 2004, Romania filed an Application instituting proceedings against Ukraine in respect of a dispute "concern[ing] the establishment of a single maritime boundary between the two States in the Black Sea, thereby delimiting the continental shelf and the exclusive economic zones appertaining to them". In its Application Romania states that on 2 June 1997 Ukraine and itself signed a Treaty on Relations of Co-operation and Good-Neighbourliness, as well as an Additional Agreement, by which the two States committed themselves to finding agreement on the above-mentioned matters. Both instruments entered into force on 22 October 1997. Romania contends that negotiations held since 1998 have been inconclusive.

As a basis for the Court's jurisdiction Romania invokes Article 4 (h) of the Additional Agreement, which provides *inter alia* that the dispute be brought to the International Court of Justice at the request of any of the Parties if unresolved in a reasonable period of time, not later than two years after the initiation of the negotiations.

The Parties disagree on the course of the maritime boundary to be established, and in particular on the role in this respect of Serpents' Island (a maritime feature situated in the north-western part of the Black Sea, approximately 20 nautical miles east of the Danube delta).

Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise its right conferred by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit on the case. Romania chose Mr. Jean-Pierre Cot (France) and Ukraine chose Mr. Bernard H. Oxman (United States of America).

Romania filed its Memorial and Ukraine its Counter-Memorial within the time-limits thus fixed by the Court by an Order of 19 November 2004. By an Order of 30 June 2006, the Court authorized the filing of a Reply by Romania and a Rejoinder by Ukraine and fixed time-limits for the filing of these pleadings. Romania filed its Reply within the time-limit thus fixed. By an Order of 8 June 2007, the Court extended the time-limit for the filing of the Rejoinder by Ukraine. The Rejoinder was duly filed within the time-limit thus extended.

Public hearings were held from 2 to 19 September 2008. At the hearings, a judge put questions to the Parties, to which replies were given orally in accordance with Article 61, paragraph 4, of the Rules of Court. At the oral proceedings, the following submissions were presented by the Parties (see also sketch-map No. 1 appended herewith):

On behalf of the Government of Romania,

at the hearing of 16 September 2008:

"Romania respectfully requests the Court to draw a single maritime boundary dividing the maritime areas of Romania and Ukraine in the Black Sea, having the following description:

(*a*) from Point F, at 45° 05' 21" N, 30° 02' 27" E, on the 12 nm arc surrounding Serpents' Island, to Point X, at 45° 14' 20" N, 30° 29' 12" E;

(*b*) from Point X in a straight segment to Point Y, at 45° 11' 59" N, 30° 49' 16" E;

(*c*) then on the line equidistant between the relevant Romanian and Ukrainian adjacent coasts, from Point Y, passing through Point D, at 45° 12' 10" N, 30° 59' 46" E, to Point T, at 45° 09' 45" N, 31° 08' 40" E;

(*d*) and then on the line median between the relevant Romanian and Ukrainian opposite coasts, from Point T—passing through the points of 44° 35' 00" N, 31° 13' 43" E and of 44° 04' 05" N, 31° 24' 40" E, to Point Z, at 43° 26' 50" N, 31° 20' 10" E."

On behalf of the Government of Ukraine,

at the hearing of 19 September 2008:

"For the reasons given in Ukraine's written and oral pleadings, Ukraine requests the Court to adjudge and declare that the line delimiting the continental shelf and exclusive economic zones between Ukraine and Romania is as follows:

(a) from the point (Point 1) identified in Article 1 of the 2003 Treaty between Ukraine and Romania on the Regime of the Ukrainian-Romanian State Border, having the co-ordinates of 45° 05' 21" N; 30° 02' 27" E, the line runs along a straight line to Point 2, having the co-ordinates of 44° 54' 00" N; 30° 06' 00" E; then

(b) from Point 2, the line runs along an azimuth of 156° to Point 3, having the co-ordinates of 43° 20' 37" N; 31° 05' 39" E; and then continues along the same azimuth until it reaches a point where the interests of third States potentially come into play.

2. General geography
(paras. 14–16)

The Court notes that the maritime area within which the delimitation in the present case is to be carried out is located in the north-western part of the Black Sea. It recalls that, within this area, approximately 20 nautical miles to the east of the Danube delta, is situated a natural feature called Serpents' Island. Serpents' Island is above water at high tide, has a surface area of approximately 0.17 sq km and a circumference of approximately 2,000 m.

3. Preliminary legal issues
(paras. 17–42)

3.1 Subject-matter of the dispute
(paras. 17–19)

The Court indicates that the dispute between Romania and Ukraine concerns the establishment of a single maritime boundary delimiting the continental shelf and exclusive economic zones between the two States in the Black Sea.

3.2 Jurisdiction of the Court and its scope
(paras. 20–30)

The Parties are in agreement that all the conditions for the Court's jurisdiction were satisfied at the time of the filing of the Application and that the Court accordingly has jurisdiction to decide the case. However, they differ as to the exact scope of the jurisdiction conferred upon the Court.

The Court observes that Ukraine is not contending that under international law, as a matter of principle, there cannot be a delimitation line separating the territorial sea of one State from the exclusive economic zone and the continental shelf of another State. In fact, such a line was determined by the Court in its latest Judgment on maritime delimitation (see *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)*, Judgment of 8 October 2007). Ukraine rather relies on the terms of paragraph 4 (h) of the Additional Agreement, which in its view, "suggest[s] that the Parties did not anticipate that the Court would be called upon to delimit an all-purpose maritime boundary along the outer limit of Ukraine's territorial sea" around Serpents' Island.

The wording of paragraph 4 (h) of the Additional Agreement that "the problem of delimitation of the continental shelf and the exclusive economic zones shall be solved by the . . . International Court of Justice", is neutral as to whether these zones must be found on both sides of the delimitation line throughout its length. The Court is of the view that it has to interpret the provision of paragraph 4 (h) of the Additional Agreement conferring jurisdiction on the Court in the light of the object and purpose of that Agreement and its context.

That Agreement was concluded on the same day as the Treaty on Good Neighbourliness and Co-operation between Romania and Ukraine, which in Article 2, paragraph 2, provides:

"The Contracting Parties shall conclude a separate Treaty on the regime of the border between the two states and shall settle the problem of the delimitation of their continental shelf and of economic exclusive zones in the Black Sea on the basis of the principles and procedures agreed upon by an exchange of letters between the ministers of foreign affairs, which shall take place simultaneously with the signature of the Treaty. The understandings included in this exchange of letters shall enter into force simultaneously with the entry into force of this Treaty."

The Additional Agreement specifies the manner in which effect is to be given to the commitment of both Parties stated in Article 2, paragraph 2, of the Treaty on Good Neighbourliness and Co-operation quoted above. The Parties specified, in particular, in paragraph 1 of the Additional Agreement that a Treaty on the régime of the border between the two States should be concluded "not later than 2 years from the date of the entering into force of the Treaty on Good Neighbourliness and Co-operation", which took place on 22 October 1997. In paragraph 4 of the same Agreement, the Parties specified that an Agreement on the delimitation of the continental shelf and the exclusive economic zones in the Black Sea should be negotiated by the Parties. The Court considers that the Parties intended that all boundary issues between them, whether on land or at sea, be resolved in a comprehensive way. Under the narrow interpretation of Ukraine, the Court would not "settle the problem of the delimitation" between the two States were it not to find substantively for Ukraine.

The Court notes that the State Border Régime Treaty was concluded on 17 June 2003, i.e. within six years from the entry into force of the Treaty on Good Neighbourliness and Co-operation, not two as originally contemplated. The 2003 State Border Régime Treaty, in its Article 1, describes the boundary line between the two Parties not only on land but also the line separating their territorial seas, "up to the point of 45° 05' 21" north latitude and 30° 02' 27" east longitude, which is the

meeting point [of Ukraine's territorial sea around Serpents' Island] with the Romanian State border passing on the outer limit of its territorial sea".

No agreement on the delimitation of the continental shelf and exclusive economic zones in the Black Sea was reached. The Parties contemplated in paragraph 4 (h) of the Additional Agreement that, in such circumstances, either of them could request this Court to decide the issue of the delimitation. The Court's judgment will thus substitute for the non-existent agreement between the Parties on the delimitation of the continental shelf and the exclusive economic zones and shall resolve all such matters which have not been settled by the Parties.

In discharging its task, the Court will duly take into account the agreements in force between the Parties relating to the delimitation of their respective territorial seas. The Court has no jurisdiction to delimit the territorial seas of the Parties. Its jurisdiction covers the delimitation of their continental shelf and the exclusive economic zones. However, contrary to what has been suggested by Ukraine, nothing hinders that jurisdiction from being exercised so that a segment of the line may result in a delimitation between, on the one hand, the exclusive economic zone and the continental shelf of one State, and, on the other hand, the territorial sea of the other State at its seaward limit.

3.3 Applicable law
(paras. 31–42)

In deciding what will be a single maritime delimitation line, the Court will duly take into account the agreements in force between the Parties. Whether the Procès-Verbaux concluded between Romania and the USSR in 1949, 1963 and 1974 constitute agreements relating to the delimitation within the meaning of Articles 74, paragraph 4, and 83, paragraph 4, of the United Nations Convention on the Law of the Sea (UNCLOS), depends on the conclusion the Court will reach on Romania's contention that they establish the initial segment of the maritime boundary which the Court has to determine. The Court considers the issue in Section 4.

With respect to the principles listed in subparagraphs 4 (a) to (e) of the Additional Agreement, the Court is of the view that the *chapeau* of that paragraph providing that "[t]he Government of Ukraine and the Government of Romania shall *negotiate* an Agreement on the delimitation of the continental shelf and the exclusive economic zones in the Black Sea, on the basis of the following principles and procedures" (emphasis added), suggests that these principles were intended by the Parties to be taken into account in their negotiations on the maritime delimitation, but do not constitute the law to be applied by the Court. This does not necessarily mean that these principles would *per se* be of no applicability in the present case; they may apply to the extent that they are part of the relevant rules of international law. The Court further notes that the principles listed in the Additional Agreement were drawn up by the Parties in 1997. The entry into force of UNCLOS as between the Parties in 1999 means that the principles of maritime delimitation to be applied by the Court in this case are determined by paragraph 1 of Articles 74 and 83 thereof.

Finally, regarding Romania's declaration, the Court observes that under Article 310 of UNCLOS, a State is not precluded from making declarations and statements when signing, ratifying or acceding to the Convention, provided these do not purport to exclude or modify the legal effect of the provisions of UNCLOS in their application to the State which has made a declaration or statement. The Court will therefore apply the relevant provisions of UNCLOS as interpreted in its jurisprudence, in accordance with Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969. Romania's declaration as such has no bearing on the Court's interpretation.

4. Existing maritime delimitation between the Parties (effect of the Procès-Verbaux of 1949, 1963 and 1974, as well as the 1949 and 1961 Treaties between Romania and the USSR and the 2003 Treaty between Romania and Ukraine)
(paras. 43–76)

The Court notes that the Parties disagree as to whether there already exists an agreed maritime boundary around Serpents' Island for all purposes. They therefore disagree also on the starting point of the delimitation to be effected by the Court. To clarify the issues under discussion, the Court must distinguish between these two different matters: firstly, the determination of the starting point of the delimitation as a function of the land boundary and territorial sea boundary as already determined by the Parties; and secondly, whether there exists an agreed maritime boundary around Serpents' Island and what is the nature of such a boundary, in particular whether it separates the territorial sea of Ukraine from the continental shelf and the exclusive economic zone of Romania, as claimed by the latter and denied by the former.

The Court first notes that the Procès-Verbaux of 1949 resulted from the work of the Joint Soviet-Romanian Border Commission implementing the Protocol to Specify the Line of the State Boundary between the People's Republic of Romania and the Union of Soviet Socialist Republics, signed in Moscow on 4 February 1948 (hereinafter "the 1948 Protocol"). It emerged from these negotiations that this Protocol was primarily aimed at the modification of what had been agreed upon by the 1947 Paris Peace Treaty between the Allied and Associated Powers and Romania, which confirmed that the Soviet-Romanian border was fixed "in accordance with the Soviet-Romanian Agreement of June 28, 1940, and the Soviet-Czechoslovak Agreement of June 29, 1945".

The text of the Peace Treaty has no express provision relating to Serpents' Island. However, the 1948 Protocol stipulated where the national borders between the States should lie as follows:

> "1. The State border between Romania and the [USSR], indicated on the maps annexed to the present Protocol/Annex I and II/, passes as follows:
>
> (*a*) in accordance with Annex I:
>
> [the description of the land boundary between Romania and the USSR];
>
> (*b*) in accordance with Annex II:
>
> along the River Danube, from Pardina to the Black Sea, leaving the islands of Tătaru Mic, Daleru Mic and Mare,

Maican and Limba on the side of the [USSR], and the islands Tătaru Mare, Cernovca and Babina—on the Romanian side;

Serpents' Island, situated in the Black Sea, eastwards from the Danube mouth, is incorporated into the [USSR]."

The Procès-Verbal of the Description of the State Boundary dated 27 September 1949, contains a complete description of the demarcation thus effected in the form of the traversal of the State boundary line from boundary mark No. 1052 to boundary mark No. 1439, covering both the land territory in the national border area and the maritime territory up to Point 1439. It is the description of the border included in this Procès-Verbal, carried forward into later agreements, that is of importance for present purposes.

According to the General Procès-Verbal describing the whole State border line, the boundary continues from a defined point near the end of the river boundary between the two States (Point 1437) for a short distance along the middle of the channel of the river and then roughly south south-easterly in a straight line to a buoy anchored in water (Point 1438), at which point the direction of the boundary line in the Black Sea changes and continues roughly easterly in a straight line for about 12 miles to a beacon (Point 1439), the final point defined with co-ordinates stated by the Commission. It is at the point at which the straight line from Point 1438 intersects with "the exterior margin of the Soviet maritime boundary line, of 12 miles, surrounding Serpents' Island". The document continues with this sentence: "The State boundary line, from border sign No. 1439 (beacon), goes on the exterior margin of the marine boundary zone of 12 miles, leaving Serpents' Island on the side of the USSR."

The border lines in the sketch-map included in the individual Procès-Verbal of border Point 1439 (which includes almost the same expression as that just quoted) uses the same symbols from the river mouth (Point 1437) along the line through the coastal waters to Point 1438 and on to Point 1439 and then beyond on the arc around Serpents' Island, shown for about 5 miles, to the point where the arc ends, at the margin of the sketch-map included in that Procès-Verbal. The expressions "CCCP" and "URSS" are used on the Soviet side and "PHP" and "RPR" on the Romanian side, including the short section of the arc.

Wording almost identical to that in the 1949 Procès-Verbaux relating to the line beyond Point 1439, was included in a 1954 Act, signed by authorized officers of the two countries, relating to the boundary mark No. 1439.

In November 1949 and February 1961, Romania and the USSR concluded treaties on the régime of their border, the latter treaty replacing the former. Both defined the State border between them by reference to the earlier agreements including the demarcation documents of September 1949. In terms of the 1961 Treaty, a further demarcation process was carried out in 1963. While that process involved no modification of the border sign No. 1439 nor any sketch-map of it, the general description of the border includes a passage similar to that in the earlier documents with the change that "Soviet marine boundary zone" is replaced by the "territorial sea of the USSR": "From the border sign No. 1439 (beacon), the State boundary passes on the exterior margin of the 12-mile territorial sea of the USSR, leaving Serpents' Island on the USSR side."

Demarcation negotiations were conducted during the 1970s: in the 1974 general Procès-Verbal, the wording from the general 1963 Procès-Verbal was reprised, while in the 1974 individual Procès-Verbal, the wording reverted to that of the 1949 general Procès-Verbal. The 1974 individual Procès-Verbal included a sketch-map with the same features in terms of the marking of the various sections of the border and the use of the terms "CCCP/URSS" and "PHP/RPR" as were used in the sketch-maps attached to the individual 1949 Procès-Verbal and the individual 1963 Procès-Verbal.

The final treaty in the series is the 2003 State Border Régime Treaty. In the preamble, the Contracting Parties state their desire to develop relations of collaboration on the basis of the principles and provisions in their Treaty on Good Neighbourliness and Co-operation and in the Additional Agreement providing principles and processes for delimiting the continental shelf and exclusive economic zone. The 2003 Treaty in Article 1 describes the State border by reference to the 1961 Romania-USSR Treaty "as well as . . . all the corresponding demarcation documents, the maps of the State border . . . the protocols of the border signs with their draft sketches . . . as well as the documents of verifications of the State border line . . . in force on 16 July, 1990", the date of the adoption of the Declaration on the State Sovereignty of Ukraine. The final part of the description says that the boundary

"continues, from the border sign 1439 (buoy) on the outer limit of Ukraine's territorial waters around the Serpents' Island, up to the point of 45° 05' 21" north latitude and 30° 02' 27" east latitude, which is the meeting point with the Romanian State border passing on the outer limit of its territorial sea. The territorial seas of the Contracting Parties measured from the baselines shall permanently have, at the meeting point of their outer limits, the width of 12 maritime miles."

The Article concludes with these three sentences:

"If objective modifications due to natural phenomena which are not related to human activities and that make it necessary for these co-ordinates to be changed are noticed, the Joint Commission shall conclude new protocols.

The State border line, on its whole length, shall remain unchanged, unless the Contracting Parties agree otherwise.

The elaboration of the new documents on the State border does not represent a revision of the existent border between Romania and Ukraine."

The definition of the boundary no longer includes the passage about the boundary "passing" or "going on" the exterior margin of the maritime zone "from" Point 1439. Rather the boundary continues from that point "up to" the defined point.

In the view of the Court, the argument raised by Romania and based by it on the words "from" and "goes on the exterior margin of the marine boundary zone" cannot support Point X as the endpoint of the agreed boundary. First, none of the contemporaneous maps and sketch-maps arrive anywhere near

Point X. Second, the agreements are about "State borders", an expression which does not easily apply to areas beyond territory, including territorial seas. Third, while, as Ukraine accepts, the 1949 and later agreements do not specify the endpoint and Point 1439 is not the endpoint, the sketch-map which is part of the Procès-Verbal for Point 1439 does indicate where that endpoint might be; a clearer and more authoritative indication of that point appears, if at a slightly different location, in map 134 which is to scale, unlike the sketch-maps; the map is part of the General Procès-Verbal of 1949 and shows border signs 1438 and 1439 and only a short sector of the arc beyond the latter. Finally, while other features on map 134 go all the way to the margin of the map, the point at which the arc ends is short of the margin of it (it is very close to the point where Romania's prospective 12-mile territorial sea would intersect with the 12-mile arc around the island). The gap between the end of the arc on that map and the 2003 co-ordinates is about 250 m.

A major problem with the Romanian thesis is the lack of any support in the 1948–1949 processes and the resulting agreement for a point to the east of Serpents' Island. Apart from the argument based on the words themselves, the only support for a point to the east of the island to be discerned in the contemporary (1949) documentation is provided by the two sketch-maps and map 134. However, they fall a long way short of Romania's Point X; further, they produce very different results from each other, from the sketch-map in the Procès-Verbal for Point 1439 and, most importantly, from the end of the arc which appears in the only relevant map in the 1949 Agreement—map 134.

The Court concludes that in 1949 it was agreed that from the point represented by border sign 1439 the boundary between Romania and the USSR would follow the 12-mile arc around Serpents' Island, without any endpoint being specified. Under Article 1 of the 2003 State Border Régime Treaty the endpoint of the State border between the Parties was fixed at the point of intersection where the territorial sea boundary of Romania meets that of Ukraine. The Court will hereinafter refer to this point as "Point 1".

The Court now turns to the question as to whether there exists an agreed line which divides the territorial sea of Ukraine and the continental shelf and the exclusive economic zone of Romania, as contended by the latter.

A preliminary issue concerns the burden of proof. As the Court has said on a number of occasions, the party asserting a fact as a basis of its claim must establish it (*Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment of 23 May 2008, para. 45; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment of 26 February 2007, para. 204, citing *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101). Ukraine placed particular emphasis on the Court's dictum in the case concerning *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean sea (Nicaragua* v. *Honduras)* that "[t]he establishment of a permanent maritime boundary is a matter of grave importance and agreement is not easily to be presumed" (Judgment of 8 October 2007, para. 253). That dictum, however, is not directly relevant since in that case no written agreement existed and therefore any implicit agreement had to be established as a matter of fact, with the burden of proof lying with the State claiming such an agreement to exist. In the present case, by contrast, the Court has before it the 1949 Agreement and the subsequent agreements. Rather than having to make findings of fact, with one or other party bearing the burden of proof as regards claimed facts, the Court's task is to interpret those agreements. In carrying out that task, the Court must first focus its attention on the terms of those documents including the associated sketch-maps.

The Court notes that Articles 74, paragraph 4, and 83, paragraph 4, of UNCLOS are relevant to Romania's contention that a boundary delimiting the exclusive economic zones and continental shelf beyond Point 1, and extending around Serpents' Island, was established by the 1949 instruments.

Paragraph 4 of Articles 74 and 83 provides that where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone and the continental shelf "shall be determined in accordance with the provisions of that agreement".

The word "agreement" in paragraph 4 (as elsewhere in the Article) refers to an agreement delimiting the exclusive economic zone (Article 74) or the continental shelf (Article 83) referred to in paragraph 1. State practice indicates that the use of a boundary agreed for the delimitation of one maritime zone to delimit another zone is effected by a new agreement. This typically occurs when States agree to apply their continental shelf boundary to the exclusive economic zone. The agreement between Turkey and the USSR applying the continental shelf boundary to the exclusive economic zone is one such example. By the same token, if States intend that their territorial sea boundary limit agreed earlier should later serve also as the delimitation of the continental shelf and/or the exclusive economic zones, they would be expected to conclude a new agreement for this purpose.

The 1949 instruments make no reference to the exclusive economic zone or the continental shelf. Although in 1949 the Truman Proclamation and the claims that it had begun to stimulate were widely known, neither Party claimed a continental shelf in 1949 nor is there any indication in the case file that either was preparing to do so. The International Law Commission (ILC) had yet to begin its work on the law of the sea which ultimately led to the 1958 Convention on the Continental Shelf and widespread acceptance of that concept. The concept of an exclusive economic zone in international law was still some long years away.

The only agreement between the Parties expressly dealing with delimitation of the exclusive economic zone and the continental shelf is the 1997 Additional Agreement. It does not establish a boundary but rather a process for arriving at one, which is reaching its culmination in these proceedings. The detailed provisions regarding factors to be taken into account during the negotiations make no reference to an existing agreement. There was no agreement in 1949 delimiting the

exclusive economic zone or the continental shelf within the meaning of Articles 74 and 83 of UNCLOS.

A further issue that may arise under international law and Article 311, paragraph 2, of UNCLOS is whether the USSR could have renounced in 1949 any rights which it might then or later have had over waters beyond the territorial sea. There is no express language of renunciation in the 1949 Treaty on the part of the USSR apart from its agreement to a State frontier with Romania. The express mention of a State frontier alludes to sovereignty which includes the territorial sea. The question is whether there is an implied prospective renunciation by the USSR, in a geographical sense with respect to the area beyond 12 miles, and in a legal sense with respect to zones not of sovereignty but of functional competence beyond the territorial sea.

Romania proffers a variety of maps by Soviet, Ukrainian and other sources, mostly prepared long after the conclusion of the 1949 instruments. They show hooks or loops around Serpents' Island with varying lengths and markings, all extending beyond the point where the 12-mile territorial seas of the Parties meet. Since in the circumstances there is no question of these maps themselves evidencing a new agreement or an estoppel, the issue is whether any of them evince a correct understanding of the meaning of the 1949 Treaty.

The USSR acquired Serpents' Island in the context of the overall territorial settlement that emerged following the Second World War. A primary USSR objective was to consolidate and stabilize the territorial settlement by treaty with Romania, including the USSR's acquisition of Serpents' Island.

So far as the territorial sea is concerned, the Court notes that a 12-mile zone around Serpents' Island would have been consistent with the 12-mile zone that the USSR was claiming generally for its territorial sea.

This understanding of the effect of the textual references to the arc in the 1949 instruments is set forth in Article 1 of the 2003 State Border Régime Treaty. That Treaty expressly contemplates the possibility of future agreed modifications of the co-ordinates of the territorial sea boundary due to natural phenomena which are not related to human activities, and provides that "[t]he territorial seas of the Contracting Parties measured from the baselines shall permanently have, at the meeting point of their outer limits, the width of 12 maritime miles". Thus, the 12-mile arc around Serpents' Island will never be penetrated by Romania's territorial sea, no matter what changes occur in its coastline or baselines.

The Court observes further that the 12-mile arc around Serpents' Island is shown on a map dealing with the State border; this suggests that that arc represents simply the seaward limit of the territorial sea. Recognition by the USSR in the 1949 instruments that its State border followed the outer limit of its territorial sea around Serpents' Island does not signify that it thereby gave up any entitlements to maritime areas beyond that zone.

The Court concludes that the 1949 instruments related only to the demarcation of the State border between Romania and the USSR, which around Serpents' Island followed the 12-mile limit of the territorial sea. The USSR did not forfeit its entitlement beyond the 12-mile limit of its territorial sea with respect to any other maritime zones. Consequently, there is no agreement in force between Romania and Ukraine delimiting between them the exclusive economic zone and the continental shelf.

5. Relevant coasts
(paras. 77–105)

Having briefly set out the Parties' positions as to their respective relevant coasts (see sketch-maps Nos. 2 and 3), the Court notes that the Parties are in agreement that the whole Romanian coast constitutes the relevant coast for the purposes of delimitation. The first segment of the Romanian coast, from the last point of the river boundary with Ukraine to the Sacalin Peninsula, has a dual characteristic in relation to Ukraine's coast; it is an adjacent coast with regard to the Ukrainian coast lying to the north, and it is an opposite coast to the coast of the Crimean Peninsula. The whole coast of Romania abuts the area to be delimited. Taking the general direction of its coast, the length of the relevant coast of Romania is approximately 248 km (see sketch-map No. 4).

The Court notes that both Parties consider the coast of the Crimean Peninsula between Cape Tarkhankut and Cape Sarych, as well as the Ukrainian coast from their common territorial boundary running for a short distance in a north and subsequently in a north-easterly direction until the Nistru/Dniester Firth (Romania designates this point as Point S) as the relevant Ukrainian coast. Their disagreement concerns the coast extending from this point until Cape Tarkhankut.

The Court, in considering the issue in dispute, would recall two principles underpinning its jurisprudence on this issue: first, that the "land dominates the sea" in such a way that coastal projections in the seaward direction generate maritime claims (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969,* p. 51, para. 96); second, that the coast, in order to be considered as relevant for the purpose of the delimitation, must generate projections which overlap with projections from the coast of the other party. Consequently "the submarine extension of any part of the coast of one Party which, because of its geographic situation, cannot overlap with the extension of the coast of the other, is to be excluded from further consideration by the Court" (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 61, para. 75).

The Court therefore cannot accept Ukraine's contention that the coasts of Karkinits'ka Gulf form part of the relevant coast. The coasts of this gulf face each other and their submarine extension cannot overlap with the extensions of Romania's coast. The coasts of Karkinits'ka Gulf do not project in the area to be delimited. Therefore, these coasts are excluded from further consideration by the Court. The coastline of Yahorlyts'ka Gulf and Dnieper Firth is to be excluded for the same reason.

It is to be noted that the Court has drawn a line at the entrance of Karkinits'ka Gulf from Cape Priboiny (which is the north-western tip of Tarkhankuts'ky Peninsula, slightly

north of Cape Tarkhankut) to the point that marks the eastern end of the portion of the Ukrainian northern coast that faces the area to be delimited. This point (whose co-ordinates are approximately 46° 04' 38'' N and 32° 28' 48'' E) lies at the intersection of the meridian passing through Cape Priboiny with the northern coast of Karkinits'ka Gulf, east of Zaliznyy Port. The Court has found it useful to do so with respect to such a significant feature as Karkinits'ka Gulf, in order to make clear both what coasts will not be under consideration and what waters will not be regarded as falling within the relevant area. However, the Court does not include this line in the calculation of the total length of the Ukrainian relevant coasts, as the line "replaces" the coasts of Karkinits'ka Gulf which, again, do not themselves project on the area to be delimited and thus do not generate any entitlement to the continental shelf and the exclusive economic zone in that area. Consequently, the line does not generate any entitlement.

As for the remaining sectors of the Ukrainian coast between Point S and Cape Tarkhankut, the Court observes that the north-western part of the Black Sea (where the delimitation is to be carried out) in its widest part measures slightly more than 200 nautical miles and its extent from north to south does not exceed 200 nautical miles. As a result of this geographical configuration, Ukraine's south-facing coast generates projections which overlap with the maritime projections of the Romanian coast. Therefore, the Court considers these sectors of Ukraine's coast as relevant coasts (see sketch-map No. 4).

The coast of Serpents' Island is so short that it makes no real difference to the overall length of the relevant coasts of the Parties. The Court will later examine whether Serpents' Island is of relevance for the choice of base points.

The length of the relevant coast of Ukraine is approximately 705 km.

The Court notes that on the basis of its determination of what constitutes the relevant coasts, the ratio for the coastal lengths between Romania and Ukraine is approximately 1:2.8.

The second aspect mentioned by the Court in terms of the role of relevant coasts in the context of the third stage of the delimitation process will be dealt with below in Section 11.

6. Relevant maritime area
(paras. 106–114)

The Court observes that the legal concept of the "relevant area" has to be taken into account as part of the methodology of maritime delimitation.

In the first place, depending on the configuration of the relevant coasts in the general geographical context and the methods for the construction of their seaward projections, the relevant area may include certain maritime spaces and exclude others which are not germane to the case in hand.

Secondly, the relevant area is pertinent to checking disproportionality. This will be done as the final phase of the methodology. The purpose of delimitation is not to apportion equal shares of the area, nor indeed proportional shares. The test of disproportionality is not in itself a method of delimitation. It is rather a means of checking whether the delimitation line arrived at by other means needs adjustment because of a significant disproportionality in the ratios between the maritime areas which would fall to one party or other by virtue of the delimitation line arrived at by other means, and the lengths of their respective coasts.

The Court further observes that for the purposes of this final exercise in the delimitation process the calculation of the relevant area does not purport to be precise and is approximate. The object of delimitation is to achieve a delimitation that is equitable, not an equal apportionment of maritime areas *(North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 22, para. 18; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway), Judgment, I.C.J Reports 1993*, p. 67, para. 64).

The Court notes that the delimitation will occur within the enclosed Black Sea, with Romania being both adjacent to, and opposite Ukraine, and with Bulgaria and Turkey lying to the south. It will stay north of any area where third party interests could become involved.

As for the area in the north disputed by the Parties as a relevant area, as explained above the Court has taken the view that the section of the Ukrainian coast situated to the north of the line running from Point S to Cape Tarkhankut is a relevant coast for the purpose of the delimitation exercise. Accordingly, the area lying immediately south of this coast, but excluding Karkinits'ka Gulf at the mouth of which the Court has drawn a line, falls within the delimitation area.

The Court turns now to the southern limit of the relevant area. The Parties hold different views as to whether the south-western and south-eastern "triangles" should be included in the relevant area (see sketch-map Nos. 2 and 3). The Court notes that in both these triangles the maritime entitlements of Romania and Ukraine overlap. The Court is also aware that in the south-western triangle, as well as in the small area in the western corner of the south-eastern triangle, entitlements of third parties may come into play. However where areas are included solely for the purpose of approximate identification of overlapping entitlements of the Parties to the case, which may be deemed to constitute the relevant area (and which in due course will play a part in the final stage testing for disproportionality), third party entitlements cannot be affected. Third party entitlements would only be relevant if the delimitation between Romania and Ukraine were to affect them.

In light of these considerations, and without prejudice to the position of any third State regarding its entitlements in this area, the Court finds it appropriate in the circumstances of this case to include both the south-western and the south-eastern triangles in its calculation of the relevant area (see sketch-map No. 5).

7. Delimitation methodology
(paras. 115–122)

When called upon to delimit the continental shelf or exclusive economic zones, or to draw a single delimitation line, the Court proceeds in defined stages.

These separate stages, broadly explained in the case concerning *Continental Shelf (Libyan Arab Jamahiriya/Malta) (Judgment, I.C.J. Reports 1985*, p. 46, para. 60), have in recent

decades been specified with precision. First, the Court will establish a provisional delimitation line, using methods that are geometrically objective and also appropriate for the geography of the area in which the delimitation is to take place. So far as delimitation between adjacent coasts is concerned, an equidistance line will be drawn unless there are compelling reasons that make this unfeasible in the particular case (see *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)*, Judgment of 8 October 2007, para. 281). So far as opposite coasts are concerned, the provisional delimitation line will consist of a median line between the two coasts. No legal consequences flow from the use of the terms "median line" and "equidistance line" since the method of delimitation is the same for both.

Equidistance and median lines are to be constructed from the most appropriate points on the coasts of the two States concerned, with particular attention being paid to those protuberant coastal points situated nearest to the area to be delimited. The Court considers elsewhere the extent to which the Court may, when constructing a single-purpose delimitation line, deviate from the base points selected by the parties for their territorial seas. When construction of a provisional equidistance line between adjacent States is called for, the Court will have in mind considerations relating to both parties' coastlines when choosing its own base points for this purpose. The line thus adopted is heavily dependent on the physical geography and the most seaward points of the two coasts.

In keeping with its settled jurisprudence on maritime delimitation, the first stage of the Court's approach is to establish the provisional equidistance line. At this initial stage of the construction of the provisional equidistance line the Court is not yet concerned with any relevant circumstances that may obtain and the line is plotted on strictly geometrical criteria on the basis of objective data.

In the present case the Court thus begins by drawing a provisional equidistance line between the adjacent coasts of Romania and Ukraine, which will then continue as a median line between their opposite coasts.

The course of the final line should result in an equitable solution (Articles 74 and 83 of UNCLOS). Therefore, the Court will at the next, second stage consider whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result *(Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 441, para. 288). The Court has also made clear that when the line to be drawn covers several zones of coincident jurisdictions, "the so-called equitable principles/relevant circumstances method may usefully be applied, as in these maritime zones this method is also suited to achieving an equitable result" *(Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)*, Judgment of 8 October 2007, para. 271).

This is the second part of the delimitation exercise to which the Court will turn, having first established the provisional equidistance line.

Finally, and at a third stage, the Court will verify that the line (a provisional equidistance line which may or may not have been adjusted by taking into account the relevant circumstances) does not, as it stands, lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line. A final check for an equitable outcome entails a confirmation that no great disproportionality of maritime areas is evident by comparison to the ratio of coastal lengths.

This is not to suggest that these respective areas should be proportionate to coastal lengths—as the Court has said "the sharing out of the area is therefore the consequence of the delimitation, not vice versa" *(Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway), Judgment, I.C.J. Reports 1993*, p. 67, para. 64).

8. Establishment of the provisional equidistance line
(paras. 123–154)

8.1 Selection of base points
(paras. 123–149)

In this stage of the delimitation exercise, the Court will identify the appropriate points on the Parties' relevant coast or coasts which mark a significant change in the direction of the coast, in such a way that the geometrical figure formed by the line connecting all these points reflects the general direction of the coastlines. The points thus selected on each coast will have an effect on the provisional equidistance line that takes due account of the geography.

The Court observes that in this instance, the geography shows that the capacity of the coasts to generate overlapping titles indicates the existence of two areas: in one case, the coasts are adjacent; in the other, they are opposite. In practice, the first conclusion which the Court draws from this is that, on the Romanian coast, the significant base points from which the equidistance line and the median line must be established are the same, since this coast is both adjacent and opposite to the Ukrainian coast. The second conclusion is that, as the Ukrainian coast consists of two portions—one adjacent to the Romanian coast, the other opposite to it—the base points to take into account must be defined separately, according to whether the adjacent or opposite portion is concerned. The third conclusion is the identification of a turning-point on the equidistance line where the effects of adjacency give way to those of the coasts on the opposite side, resulting in a change in the direction of the line. Lastly, the Court will need to consider the relevance or otherwise of Serpents' Island in terms of the choice of base points.

On the Romanian coast from the border with Bulgaria, the Court will first consider the Sacalin Peninsula. This is the point at which the direction followed by the Romanian coast from the border between Romania and Bulgaria turns almost perpendicularly towards the north. At this place, the coasts of Romania and Ukraine are opposite one another. The significance of the Sacalin Peninsula in terms of the choice of base points is questioned by Ukraine, which describes it as a spit of sand. However, the Court observes that the peninsula belongs to the landmass and forms part of the Romanian mainland: its permanent uncovering at high tide is not contested. The geomorphological features of the peninsula and its possibly

sandy nature have no bearing on the elements of its physical geography which are relevant for maritime delimitation. For these reasons, the Court considers it appropriate, for the purpose of establishing the provisional equidistance line, to use a base point on the Sacalin Peninsula (44° 50' 28"N and 29° 36' 52"E), which happens to correspond to the point notified by Romania to the United Nations as a base point pursuant to Article 16 of UNCLOS.

The Court will next consider whether any point on the Romanian coast of the Musura Bay may serve as a base point. The southern headland of this bay is the most prominent point of the Romanian coast in the direction of the Crimea and is also situated in the area where the coasts of the two States are adjacent. These two characteristics prompt its selection for the purpose of establishing the provisional equidistance line. However, because of the construction on that southern headland of a 7.5 km-long dyke out to sea, which accordingly extends this feature, it is necessary to choose either the seaward end of the dyke or the end where it adjoins the mainland.

In this respect, the Court observes that the geometrical nature of the first stage of the delimitation exercise leads it to use as base points those which the geography of the coast identifies as a physical reality at the time of the delimitation. That geographical reality covers not only the physical elements produced by geodynamics and the movements of the sea, but also any other material factors that are present.

In light of the fact that the breadth of the exclusive economic zone and the continental shelf is measured from the baselines from which the territorial sea is measured (UNCLOS, Arts. 57 and 76), the Court first has to consider whether the Sulina dyke could be regarded as "permanent harbour works which form an integral part of the harbour system", within the meaning of Article 11 of UNCLOS, which Article the Court recalls concerns the delimitation of the territorial sea. It reads as follows:

> "For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system are regarded as forming part of the coast. Off-shore installations and artificial islands shall not be considered as permanent harbour works."

The permanent nature of the Sulina dyke not having been questioned, the Court considers whether this structure can be described as "harbour works" which form "an integral part of the harbour system". The term "works" denotes a combination of apparatus, structures and facilities installed for a specific purpose. The expression "harbour works" "which form an integral part of the harbour system" is not defined in the Geneva Convention on the Territorial Sea and Contiguous Zone or in UNCLOS; these are generally installations which allow ships to be harboured, maintained or repaired and which permit or facilitate the embarkation and disembarkation of passengers and the loading or unloading of goods.

The Court notes, however, that the functions of a dyke are different from those of a port: in this case, the Sulina dyke may be of use in protecting shipping destined for the mouth of the Danube and for the ports situated there. The difference between a port and a dyke extending seawards has previously been discussed in the *travaux préparatoires* of Article 8 of the Geneva Convention on the Territorial Sea and Contiguous Zone. In 1954, the Special Rapporteur of the International Law Commission (ILC) observed that "dykes used for the protection of the coast constituted a separate problem and did not come under either Article 9 (ports) or Article 10 (roadsteads)". Subsequently, the concept of a "dyke" was no longer used, and reference was made to "jetties" serving to protect coasts from the sea. The first sentence of Article 11 of UNCLOS corresponds, apart from one minor change in the wording, to that of Article 8 of the Convention on the Territorial Sea and Contiguous Zone. The second sentence, providing that "permanent harbour works" shall not include "off-shore installations and artificial islands", is new. The expert at the 1958 Conference stated that "harbour works such as jetties [are regarded] as part of . . . land territory". It should be noted, however, that the ILC included the following comment in its report to the General Assembly:

> "(3) Where such structures are of excessive length (for instance, a jetty extending several kilometres into the sea), it may be asked whether this article [Art. 8] could still be applied . . . As such cases are very rare, the Commission, while wishing to draw attention to the matter, did not deem it necessary to state an opinion." (ILC Yearbook 1956, Vol. II, p. 270.)

In the light of the above, the ILC did not, at the time, intend to define precisely the limit beyond which a dyke, jetty or works would no longer form "an integral part of the harbour system". The Court concludes from this that there are grounds for proceeding on a case-by-case basis, and that the text of Article 11 of UNCLOS and the *travaux préparatoires* do not preclude the possibility of interpreting restrictively the concept of harbour works so as to avoid or mitigate the problem of excessive length identified by the ILC. This may be particularly true where, as here, the question is one of delimitation of areas seaward of the territorial sea.

With regard to the use of the Sulina dyke as a base point for the present delimitation, the Court must consider the relevance of Romania's notification to the United Nations under Article 16 of UNCLOS, in which Romania used the seaward end of the Sulina dyke as a base point for drawing the baseline for its territorial sea. This choice of base points was not contested by Ukraine.

Article 16 provides that "the base lines for measuring the breadth of the territorial sea . . . and the lines of delimitation [of the territorial sea] shall be shown on charts" (paragraph 1) and that "the coastal State shall deposit a copy of each such chart or list with the Secretary-General of the United Nations". Since Article 57 (regarding the breadth of the exclusive economic zone) and Article 76, paragraph 1, (regarding the definition of the continental shelf) of UNCLOS stipulate that these maritime zones can extend to a distance of 200 nautical miles "from the baselines from which the breadth of the territorial sea is measured", the question arises as to whether the same seaward end of the Sulina dyke has to be retained for the purpose of the present delimitation.

The Court observes that the issue of determining the baseline for the purpose of measuring the breadth of the continental shelf and the exclusive economic zone and the issue of

identifying base points for drawing an equidistance/median line for the purpose of delimiting the continental shelf and the exclusive economic zone between adjacent/opposite States are two different issues.

In the first case, the coastal State, in conformity with the provisions of UNCLOS (Articles 7, 9, 10, 12 and 15), may determine the relevant base points. It is nevertheless an exercise which has always an international aspect (see *Fisheries (United Kingdom* v. *Norway), Judgment, I.C.J. Reports 1951*, p. 132). In the second case, the delimitation of the maritime areas involving two or more States, the Court should not base itself solely on the choice of base points made by one of those parties. The Court must, when delimiting the continental shelf and exclusive economic zones, select base points by reference to the physical geography of the relevant coasts.

As for the specific characteristics of the seaward end of the Sulina dyke as a relevant base point for constructing the provisional equidistance line, the Court points out that, irrespective of its length, no convincing evidence has been presented that this dyke serves any direct purpose in port activities. For these reasons, the Court is not satisfied that the seaward end of the Sulina dyke is a proper base point for the purposes of the construction of a provisional equidistance line delimiting the continental shelf and the exclusive economic zones.

On the other hand, while the landward end of the dyke may not be an integral part of the Romanian mainland, it is a fixed point on it. The land at this point is protected from shifts in the coastline due to marine processes. As a relevant base point for the purposes of the first stage of delimitation, it has the advantage, unlike the seaward end of the dyke, of not giving greater importance to an installation than to the physical geography of the landmass.

For these reasons, the Court is of the opinion that the landward end of the Sulina dyke where it joins the Romanian mainland should be used as a base point for the establishment of the provisional equidistance line.

The Court therefore concludes that it will use the Sacalin Peninsula (44° 50' 28" N and 29° 36' 52" E) and the landward end of the Sulina dyke (45° 09' 51.9" N and 29° 43' 14.5" E) as base points on the Romanian coast.

The Court will now turn to identifying the relevant base points on Ukraine's coast, starting with the sector of adjacent coasts.

The Court deems it appropriate in this first sector to use the south-eastern tip of Tsyganka Island on the Ukrainian side, which is the counterpart of the landward end of the Sulina dyke on the Romanian side. Its location is significant, because in this area of adjacency it is the most prominent point on the Ukrainian coast.

In this sector of adjacent coasts, the Court needs also to consider the relevance of the Ukrainian base point situated on the island of Kubansky as a base point for use in constructing the provisional equidistance line. The Court notes that this base point does not produce any effect on the equidistance line plotted by reference to the base point on Tsyganka Island on the Ukrainian coast and the base point on the landward end of the Sulina dyke on the Romanian coast. This base point is therefore to be regarded as irrelevant for the purposes of the present delimitation.

The Court will now consider the base points on the section of Ukraine's coast opposite Romania's coast.

It will start with Cape Tarkhankut, the most seaward point facing Romania's coast on the Crimean coast. The Crimean coastline juts out significantly here, and its configuration makes this cape an appropriate choice as a relevant base point.

Cape Khersones, another point on the Crimean coast where the land protrudes into the sea, also juts out markedly, though less so than Cape Tarkhankut. This configuration is sufficient to justify choosing Cape Khersones as a relevant base point.

The Court therefore concludes that it will use Tsyganka Island (45° 13' 23.1" N and 29° 45' 33.1" E), Cape Tarkhankut (45° 20' 50" N and 32° 29' 43" E) and Cape Khersones (44° 35' 04" N and 33° 22' 48" E) as base points on the Ukrainian coast.

Serpents' Island calls for specific attention in the determination of the provisional equidistance line. In connection with the selection of base points, the Court observes that there have been instances when coastal islands have been considered part of a State's coast, in particular when a coast is made up of a cluster of fringe islands. Thus in one maritime delimitation arbitration, an international tribunal placed base points lying on the low water line of certain fringe islands considered to constitute part of the very coastline of one of the parties (*Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation)*, 17 December 1999, *RIAA*, Vol. XXII (2001), pp. 367–368, paras. 139–146). However, Serpents' Island, lying alone and some 20 nautical miles away from the mainland, is not one of a cluster of fringe islands constituting "the coast" of Ukraine.

To count Serpents' Island as a relevant part of the coast would amount to grafting an extraneous element onto Ukraine's coastline; the consequence would be a judicial refashioning of geography, which neither the law nor practice of maritime delimitation authorizes. The Court is thus of the view that Serpents' Island cannot be taken to form part of Ukraine's coastal configuration (cf. the islet of Filfla in the case concerning *Continental Shelf (Libyan Arab Jamahiriya/ Malta), Judgment, I.C.J. Reports 1985*, p. 13).

For this reason, the Court considers it inappropriate to select any base points on Serpents' Island for the construction of a provisional equidistance line between the coasts of Romania and Ukraine.

8.2 Construction of the provisional equidistance line
(paras. 150–154)

The Court recalls that the base points which must be used in constructing the provisional equidistance line are those situated on the Sacalin Peninsula and the landward end of the Sulina dyke on the Romanian coast, and Tsyganka Island, Cape Tarkhankut and Cape Khersones on the Ukrainian coast.

In its initial segment the provisional equidistance line between the Romanian and Ukrainian adjacent coasts is controlled by base points located on the landward end of the Sulina dyke on the Romanian coast and south-eastern

tip of Tsyganka Island on the Ukrainian coast. It runs in a south-easterly direction, from a point lying midway between these two base points, until Point A (with co-ordinates 44° 46' 38.7" N and 30° 58' 37.3" E) where it becomes affected by a base point located on the Sacalin Peninsula on the Romanian coast. At Point A the equidistance line slightly changes direction and continues to Point B (with co-ordinates 44° 44' 13.4" N and 31° 10' 27.7" E) where it becomes affected by the base point located on Cape Tarkhankut on Ukraine's opposite coasts. At Point B the equidistance line turns south-south-east and continues to Point C (with co-ordinates 44° 02' 53.0" N and 31° 24' 35.0" E), calculated with reference to base points on the Sacalin Peninsula on the Romanian coast and Capes Tarkhankut and Khersones on the Ukrainian coast. From Point C the equidistance line, starting at an azimuth of 185° 23' 54.5", runs in a southerly direction. This line remains governed by the base points on the Sacalin Peninsula on the Romanian coast and Cape Khersones on the Ukrainian coast.

(For the construction of the equidistance line see sketch-maps Nos. 6 and 7.)

9. Relevant circumstances
(paras. 155–204)

As the Court indicated, once the provisional equidistance line has been drawn, it shall "then [consider] whether there are factors calling for the adjustment or shifting of that line in order to achieve an 'equitable result'" *(Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 441, para. 288). Such factors have usually been referred to in the jurisprudence of the Court, since the *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* cases, as the relevant circumstances *(Judgment, I.C.J. Reports 1969*, p. 53, para. 53). Their function is to verify that the provisional equidistance line, drawn by the geometrical method from the determined base points on the coasts of the Parties is not, in light of the particular circumstances of the case, perceived as inequitable. If such would be the case, the Court should adjust the line in order to achieve the "equitable solution" as required by Articles 74, paragraph 1, and 83, paragraph 1, of UNCLOS.

The Parties suggested and discussed several factors which they consider as the possible relevant circumstances of the case. They arrive at different conclusions. Romania argues that its provisional equidistance line achieves the equitable result and thus does not require any adjustment. Ukraine, on the other hand, submits that there are relevant circumstances which call for the adjustment of its provisional equidistance line "by moving the provisional line closer to the Romanian coast".

Before addressing the relevant circumstances referred to by the Parties, the Court wishes to recall that the provisional equidistance line it has drawn in Section 8 above does not coincide with the provisional lines drawn either by Ukraine or Romania. Therefore, it is this line, drawn by the Court, and not by Romania or Ukraine, which will be in the focus of the Court's attention when analysing what the Parties consider to be the relevant circumstances of the case.

9.1 Disproportion between lengths of coasts
(paras. 158–168)

The Court observes that the respective length of coasts can play no role in identifying the equidistance line which has been provisionally established. Delimitation is a function which is different from the apportionment of resources or areas (see *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 22, para. 18). There is no principle of proportionality as such which bears on the initial establishment of the provisional equidistance line.

Where disparities in the lengths of coasts are particularly marked, the Court may choose to treat that fact of geography as a relevant circumstance that would require some adjustments to the provisional equidistance line to be made.

In the case concerning *Land and Maritime Boundary between Cameroon and Nigeria*, the Court acknowledged "that a *substantial* difference in the lengths of the parties' respective coastlines may be a factor to be taken into consideration in order to adjust or shift the provisional delimitation line" (*Judgment, I.C.J. Report 2002,* p. 446, para. 301; emphasis added), although it found that in the circumstances there was no reason to shift the equidistance line.

In the case concerning *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway)*, the Court found that the disparity between the lengths of the coasts of Jan Mayen and Greenland (approximately 1:9) constituted a "special circumstance" requiring modification of the provisional median line, by moving it closer to the coast of Jan Mayen, to avoid inequitable results for both the continental shelf and the fisheries zone. The Court stated that:

> "It should, however, be made clear that taking account of the disparity of coastal lengths does not mean a direct and mathematical application of the relationship between the length of the coastal front of eastern Greenland and that of Jan Mayen." (*Judgment, I.C.J. Reports 1993*, p. 69, para. 69.)

Then it recalled its observation from *the Continental Shelf (Libyan Arab Jamahiriya/Malta)* case:

> "If such a use of proportionality were right, it is difficult indeed to see what room would be left for any other consideration; for it would be at once the principle of entitlement to continental shelf rights and also the method of putting that principle into operation. Its weakness as a basis of argument, however, is that the use of proportionality as a method in its own right is wanting of support in the practice of States, in the public expression of their views at (in particular) the Third United Nations Conference on the Law of the Sea, or in the jurisprudence." (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985,* p. 45, para. 58.)

In the latter case, the Court was of the view that the difference in the lengths of the relevant coasts of Malta and Libya (being in ratio 1:8) "is so *great* as to justify the adjustment of the median line" (*ibid*., p. 50, para. 68; emphasis added). The Court added that "the degree of such adjustment does not depend upon a mathematical operation and remains to be examined" (*ibid*.).

The Court further notes that in the *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/ United States of America)* case, the Chamber considered that "in certain circumstances, the appropriate consequences may be drawn from any *inequalities* in the extent of the coasts of two States into the same area of delimitation" (*Judgment, I.C.J. Reports 1984*, p. 313, para. 157; emphasis added). However, it must be kept in mind that the Chamber did so in the context of discussing what could be "the *equitable* criteria that may be taken into consideration for an international maritime delimitation" (*ibid*., p. 312, para. 157; emphasis added). It then further elaborated on this point by stating

"that to take into account the extent of the respective coasts of the Parties concerned does not in itself constitute either a criterion serving as a direct basis for a delimitation, or a method that can be used to implement such delimitation. The Chamber recognizes that this concept is put forward mainly as a means of checking whether a provisional delimitation established initially on the basis of other criteria, and by the use of a method which has nothing to do with that concept, can or cannot be considered satisfactory in relation to certain geographical features of the specific case, and whether it is reasonable or otherwise to correct it accordingly. The Chamber's views on this subject may be summed up by observing that a maritime delimitation can certainly not be established by a direct division of the area in dispute proportional to the respective lengths of the coasts belonging to the parties in the relevant area, but it is equally certain that a *substantial* disproportion to the lengths of those coasts that resulted from a delimitation effected on a different basis would constitute a circumstance calling for an appropriate correction." (*Ibid*., p. 323, para. 185; emphasis added.)

In the present case, however, the Court sees no such particularly marked disparities between the relevant coasts of Ukraine and Romania that would require it to adjust the provisional equidistance line at this juncture. Although there is doubtless a difference in the length of the relevant coasts of the Parties, the Court recalls that it previously excluded the coast of Karkinits'ka Gulf (measuring some 278 km) from further consideration. The Court further notes that it cannot disregard the fact that a good portion of the Ukrainian coast, which it considers as relevant, projects into the same area as other segments of the Ukrainian coast, thus strengthening but not spatially expanding the Ukrainian entitlement.

9.2 The enclosed nature of the Black Sea and the delimitations already effected in the region
(paras. 169–178)

The Court recalls that it has intimated earlier, when it briefly described the delimitation methodology, that it would establish a provisional equidistance line. This choice was not dictated by the fact that in all the delimitation agreements concerning the Black Sea this method was used.

Two delimitation agreements concerning the Black Sea were brought to the attention of the Court. The first agreement, the Agreement concerning the Delimitation of the Continental Shelf in the Black Sea, was concluded between Turkey and the USSR on 23 June 1978. Some eight years later, they agreed, through an Exchange of Notes dated 23 December 1986 and 6 February 1987, that the continental shelf boundary agreed in their 1978 Agreement would also constitute the boundary between their exclusive economic zones. The westernmost segment of the line, between two points with co-ordinates 43° 20' 43" N and 32° 00' 00" E and co-ordinates 43° 26' 59" N and 31° 20' 48" E, respectively, remained undefined and to be settled subsequently at a convenient time. After the dissolution of the USSR at the end of 1991, the 1978 Agreement and the Agreement reached through the Exchange of Notes remained in force not only for the Russian Federation, as the State continuing the international legal personality of the former USSR, but also the successor States of the USSR bordering the Black Sea, Ukraine being one of them.

The second agreement is the Agreement between Turkey and Bulgaria on the determination of the boundary in the mouth area of the Rezovska/Mutludere River and delimitation of the maritime areas between the two States in the Black Sea, signed on 4 December 1997. The drawing of the delimitation line of the continental shelf and the exclusive economic zone further to the north-east direction, between geographical point 43° 19' 54" N and 31° 06' 33" E and geographical point 43° 26' 49" N and 31° 20' 43" E, was left open for subsequent negotiations at a suitable time.

The Court will bear in mind the agreed maritime delimitations between Turkey and Bulgaria, as well as between Turkey and Ukraine, when considering the endpoint of the single maritime boundary it is asked to draw in the present case (see Section 10 below).

The Court nevertheless considers that, in the light of the above-mentioned delimitation agreements and the enclosed nature of the Black Sea, no adjustment to the equidistance line as provisionally drawn is called for.

9.3 The presence of Serpents' Island in the area of delimitation
(para. 179–188)

In determining the maritime boundary line, in default of any delimitation agreement within the meaning of UNCLOS Articles 74 and 83, the Court may, should relevant circumstances so suggest, adjust the provisional equidistance line to ensure an equitable result. In this phase the Court may be called upon to decide whether this line should be adjusted because of the presence of small islands in its vicinity. As the jurisprudence has indicated, the Court may on occasion decide not to take account of very small islands or decide not to give them their full potential entitlement to maritime zones, should such an approach have a disproportionate effect on the delimitation line under consideration (see *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 48, para. 64; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 104, para. 219; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)*, Judgment of 8 October 2007, paras. 302 *et seq*.).

The Court recalls that it has already determined that Serpents' Island cannot serve as a base point for the construction of the provisional equidistance line between the coasts of the

Parties, that it has drawn in the first stage of this delimitation process, since it does not form part of the general configuration of the coast. The Court must now, at the second stage of the delimitation, ascertain whether the presence of Serpents' Island in the maritime delimitation area constitutes a relevant circumstance calling for an adjustment of the provisional equidistance line.

With respect to the geography of the north-western part of the Black Sea, the Court has taken due regard of the fact that Ukraine's coast lies on the west, north and east of this area. The Court notes that all of the areas subject to delimitation in this case are located in the exclusive economic zone and the continental shelf generated by the mainland coasts of the Parties and are moreover within 200 nautical miles of Ukraine's mainland coast. The Court observes that Serpents' Island is situated approximately 20 nautical miles to the east of Ukraine's mainland coast in the area of the Danube delta. Given this geographical configuration and in the context of the delimitation with Romania, any continental shelf and exclusive economic zone entitlements possibly generated by Serpents' Island could not project further than the entitlements generated by Ukraine's mainland coast because of the southern limit of the delimitation area as identified by the Court (see sketch-map No. 5). Further, any possible entitlements generated by Serpents' Island in an eastward direction are fully subsumed by the entitlements generated by the western and eastern mainland coasts of Ukraine itself. The Court also notes that Ukraine itself, even though it considered Serpents' Island to fall under Article 121, paragraph 2, of UNCLOS, did not extend the relevant area beyond the limit generated by its mainland coast, as a consequence of the presence of Serpents' Island in the area of delimitation (see sketch-map No. 3).

In the light of these factors, the Court concludes that the presence of Serpents' Island does not call for an adjustment of the provisional equidistance line.

In view of the above the Court does not need to consider whether Serpents' Island falls under paragraphs 2 or 3 of Article 121 of UNCLOS nor their relevance to this case.

The Court further recalls that a 12-nautical-mile territorial sea was attributed to Serpents' Island pursuant to agreements between the Parties. It concludes that, in the context of the present case, Serpents' Island should have no effect on the delimitation in this case, other than that stemming from the role of the 12-nautical-mile arc of its territorial sea.

9.4 The conduct of the Parties (oil and gas concessions, fishing activities and naval patrols)
(paras. 189–198)

The Court recalls that it had earlier concluded that there is no agreement in force between the Parties delimiting the continental shelf and the exclusive economic zones of the Parties.

It further notes that Ukraine is not relying on State activities in order to prove a tacit agreement or *modus vivendi* between the Parties on the line which would separate their respective exclusive economic zones and continental shelves. It rather refers to State activities in order to undermine the line claimed by Romania.

The Court does not see, in the circumstances of the present case, any particular role for the State activities invoked above in this maritime delimitation. As the Arbitral Tribunal in the case between Barbados and Trinidad and Tobago observed, "[r]esource-related criteria have been treated more cautiously by the decisions of international courts and tribunals, which have not generally applied this factor as a relevant circumstance" (*Award of 11 April 2006, RIAA*,Vol. XXVII, p. 214, para. 241). With respect to fisheries, the Court adds that no evidence has been submitted to it by Ukraine that any delimitation line other than that claimed by it would be "likely to entail catastrophic repercussions for the livelihood and economic well-being of the population" (*Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports* 1984, p. 342, para. 237).

Since the Court does not consider that the above-mentioned State activities constitute a relevant circumstance in the present case, the issue of critical date discussed by the Parties does not require a response from the Court.

9.5 Any cutting off effect
(paras. 199–201)

The Court observes that the delimitation lines proposed by the Parties, in particular their first segments, each significantly curtail the entitlement of the other Party to the continental shelf and the exclusive economic zone. The Romanian line obstructs the entitlement of Ukraine generated by its coast adjacent to that of Romania, the entitlement further strengthened by the northern coast of Ukraine. At the same time, the Ukrainian line restricts the entitlement of Romania generated by its coast, in particular its first sector between the Sulina dyke and the Sacalin Peninsula.

By contrast, the provisional equidistance line drawn by the Court avoids such a drawback as it allows the adjacent coasts of the Parties to produce their effects, in terms of maritime entitlements, in a reasonable and mutually balanced way. That being so, the Court sees no reason to adjust the provisional equidistance line on this ground.

9.6 The security considerations of the Parties
(paras. 202–204)

The Court confines itself to two observations. First, the legitimate security considerations of the parties may play a role in determining the final delimitation line (see *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 42, para. 51). Second, in the present case however, the provisional equidistance line it has drawn substantially differs from the lines drawn either by Romania or Ukraine. The provisional equidistance line determined by the Court fully respects the legitimate security interests of either Party. Therefore, there is no need to adjust the line on the basis of this consideration.

10. The line of delimitation
(paras. 205–209)

The Court takes note of the fact that Article 1 of the 2003 State Border Régime Treaty situates the meeting point of the territorial seas of the Parties at 45° 05' 21" N and 30° 02' 27" E. This suffices for the fixing of the starting-point.

Romania and Ukraine have both indicated, in considerable detail, the course that their respective delimitation lines would then follow beyond the point fixed by Article 1 of the 2003 State Border Régime Treaty (see sketch-map No. 1).

The delimitation line decided by the Court, for which neither the seaward end of the Sulina dyke nor Serpents' Island is taken as a base point, begins at Point 1 and follows the 12-nautical-mile arc around Serpents' Island until it intersects with the line equidistant from Romania's and Ukraine's adjacent coasts, as defined above; from there, it follows that line until it becomes affected by base points on the opposite coasts of Romania and Ukraine. From this turning point the delimitation line runs along the line equidistant from Romania's and Ukraine's opposite coasts.

The Court considers that the delimitation line follows the equidistance line in a southerly direction until the point beyond which the interests of third States may be affected.

11. The disproportionality test
(paras. 210–216)

The Court now turns to check that the result thus far arrived at, so far as the envisaged delimitation line is concerned, does not lead to any significant disproportionality by reference to the respective coastal lengths and the apportionment of areas that ensue. This Court agrees with the observation that

> "it is disproportion rather than any general principle of proportionality which is the relevant criterion or factor . . . there can never be a question of completely refashioning nature . . . it is rather a question of remedying the disproportionality and inequitable effects produced by particular geographical configurations or features" (*Anglo-French Continental Shelf Case, RIAA*, Vol. XVIII, p. 58, para. 101).

The continental shelf and exclusive economic zone allocations are not to be assigned in proportion to length of respective coastlines. Rather, the Court will check, *ex post facto*, on the equitableness of the delimitation line it has constructed (*Delimitation of the maritime boundary between Guinea and Guinea-Bissau, RIAA*, Vol. XIX, paras. 94–95).

This checking can only be approximate. Diverse techniques have in the past been used for assessing coastal lengths, with no clear requirements of international law having been shown as to whether the real coastline should be followed, or baselines used, or whether or not coasts relating to internal waters should be excluded.

The Court cannot but observe that various tribunals, and the Court itself, have drawn different conclusions over the years as to what disparity in coastal lengths would constitute a significant disproportionality which suggested the delimitation line was inequitable, and still required adjustment. This remains in each case a matter for the Court's appreciation, which it will exercise by reference to the overall geography of the area.

In the present case the Court has measured the coasts according to their general direction. It has not used baselines suggested by the Parties for this measurement. Coastlines alongside waters lying behind gulfs or deep inlets have not been included for this purpose. These measurements are necessarily approximate given that the purpose of this final stage is to make sure there is no significant disproportionality.

It suffices for this third stage for the Court to note that the ratio of the respective coastal lengths for Romania and Ukraine, measured as described above, is approximately 1:2.8 and the ratio of the relevant area between Romania and Ukraine is approximately 1:2.1.

The Court is not of the view that this suggests that the line as constructed, and checked carefully for any relevant circumstances that might have warranted adjustment, requires any alteration.

12. The maritime boundary delimiting the continental shelf and exclusive economic zones
(paras. 217–218)

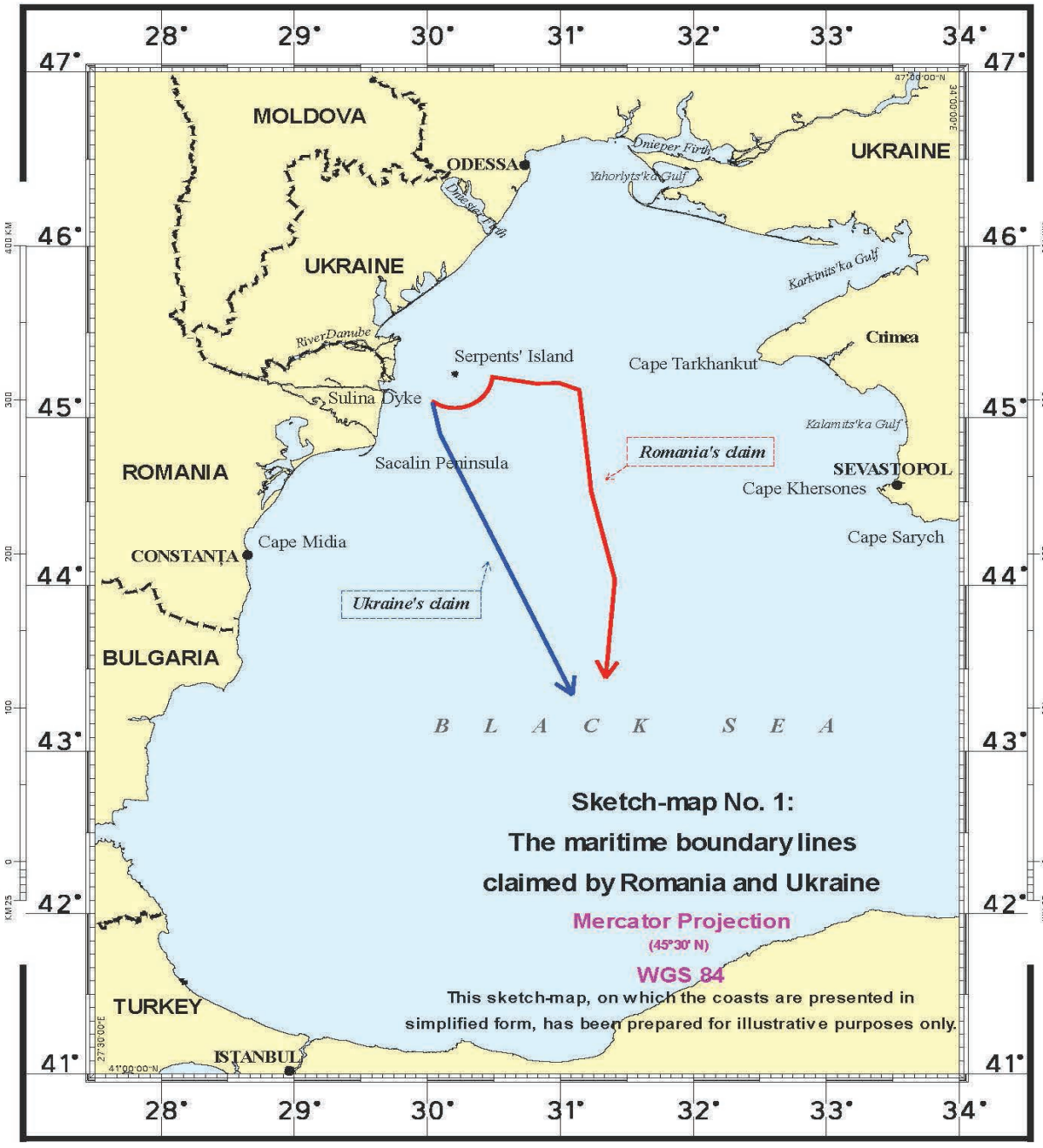
The Court observes that a maritime boundary delimiting the continental shelf and exclusive economic zones is not to be assimilated to a State boundary separating territories of States. The former defines the limits of maritime zones where under international law coastal States have certain sovereign rights for defined purposes. The latter defines the territorial limits of State sovereignty. Consequently, the Court considers that no confusion as to the nature of the maritime boundary delimiting the exclusive economic zone and the continental shelf arises and will thus employ this term.

The line of the maritime boundary established by the Court begins at Point 1, the point of intersection of the outer limit of the territorial sea of Romania with the territorial sea of Ukraine around Serpents' Island as stipulated in Article 1 of the 2003 State Border Régime Treaty. From Point 1 it follows the arc of the 12-nautical-mile territorial sea of Serpents' Island until the arc intersects at Point 2, with co-ordinates 45° 03' 18.5" N and 30° 09' 24.6" E, with a line equidistant from the adjacent coasts of Romania and Ukraine, plotted by reference to base points located on the landward end of the Sulina dyke and the south-eastern tip of Tsyganka Island. The maritime boundary from Point 2 continues along the equidistance line in a south-easterly direction until Point 3, with co-ordinates 44° 46' 38.7" N and 30° 58' 37.3" E (Point A of the provisional equidistance line), where the equidistance line becomes affected by a base point located on the Sacalin Peninsula.

From Point 3 the maritime boundary follows the equidistance line in a south-easterly direction to Point 4, with co-ordinates 44° 44' 13.4" N and 31° 10' 27.7" E (Point B of the provisional equidistance line), where the equidistance line becomes affected by the base point located on Cape Tarkhankut on Ukraine's opposite coast and turns south-south-east. From Point 4 the boundary traces the line equidistant from the opposite coasts of Romania and Ukraine until Point 5, with co-ordinates 44° 02' 53.0" N and 31° 24' 35.0" E) (Point C of the provisional equidistance line), which is controlled by base points on the Sacalin Peninsula on the Romanian coast and Capes Tarkhankut and Khersones on the Ukrainian coast, from where it continues along the equidistance line in a southerly direction starting at a geodetic azimuth of 185° 23' 54.5" until the maritime boundary reaches the area where the rights of third States may be affected (see sketch-maps Nos. 8 and 9).

The geographical co-ordinates for Points 2, 3, 4 and 5 of the single maritime boundary set out in this paragraph and in the operative clause are given by reference to WGS 84 datum.

Annex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Dniester Firth
UKRAINE
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River Danube
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Serpents' Island
Cape Tarkhankut
Sulina Dyke
Kalamits'ka Gulf
Romania's claim
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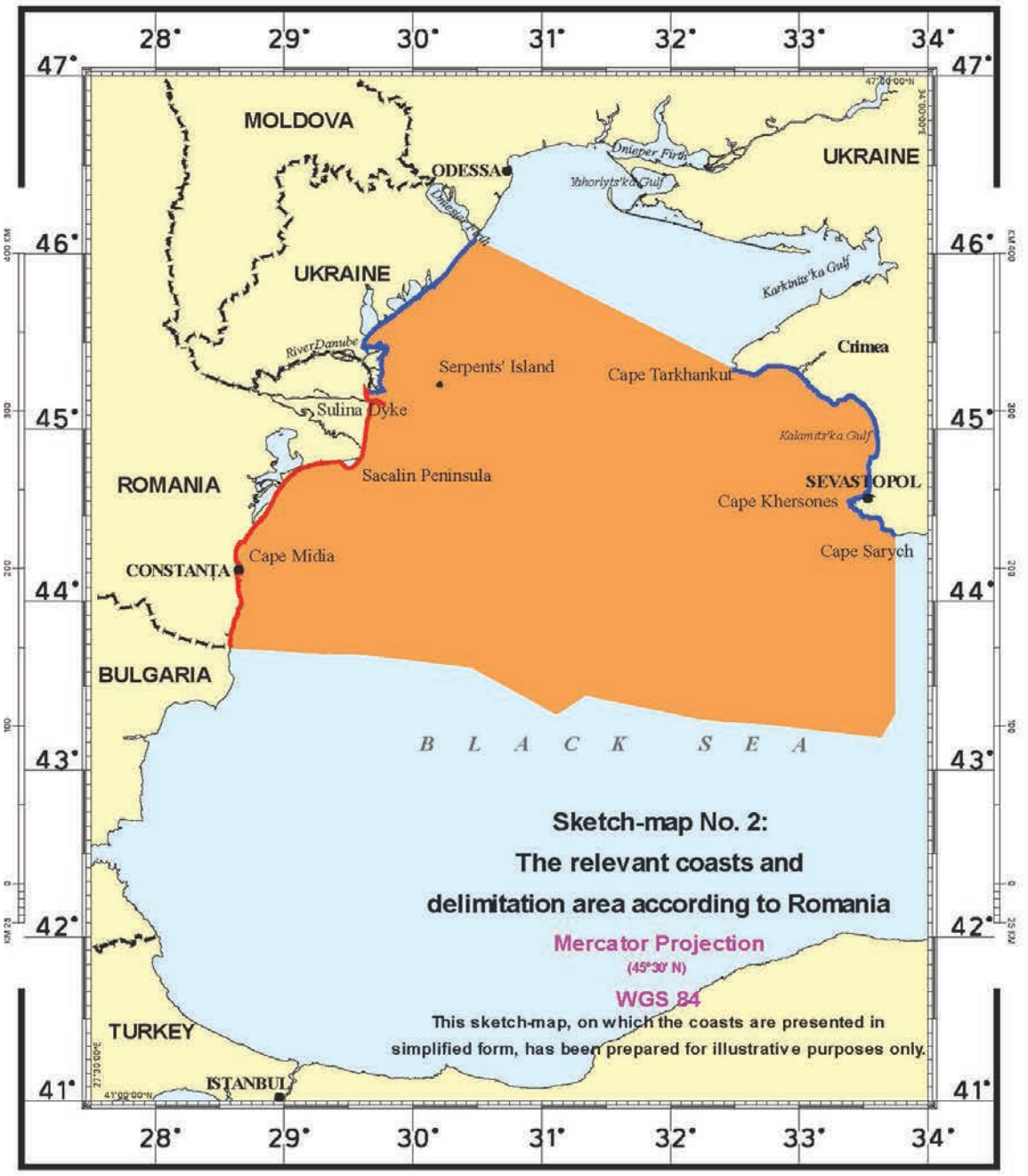
Sacalin Peninsula
SEVASTOPOL
Cape Khersones
Cape Midia
Cape Sarych
CONSTANȚA
Ukraine's claim
BULGARIA
B L A C K S E A
TURKEY
ISTANBUL
Sketch-map No. 1:
The maritime boundary lines
claimed by Romania and Ukraine
Mercator Projection
(45°30' N)
WGS 84
This sketch-map, on which the coasts are presented in
simplified form, has been prepared for illustrative purposes only.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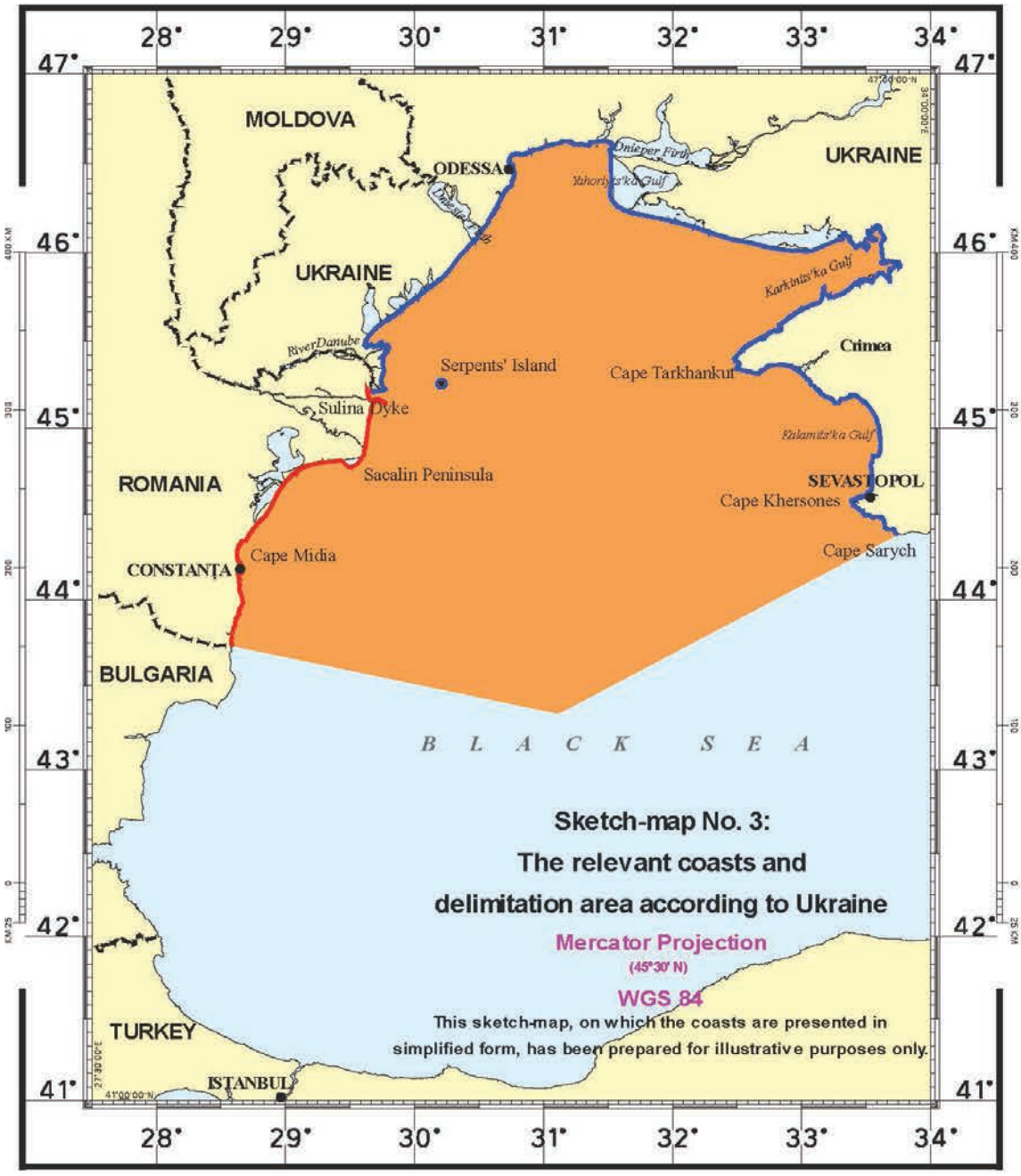
Cape Khersones
Cape Sarych
CONSTANȚA
Cape Midia
BULGARIA
B L A C K S E A
TURKEY
ISTANBUL
Sketch-map No. 2:
The relevant coasts and
delimitation area according to Romania
Mercator Projection
(45°30' N)
WGS 84
This sketch-map, on which the coasts are presented in
simplified form, has been prepared for illustrative purposes only.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Karkinits'ka Gulf
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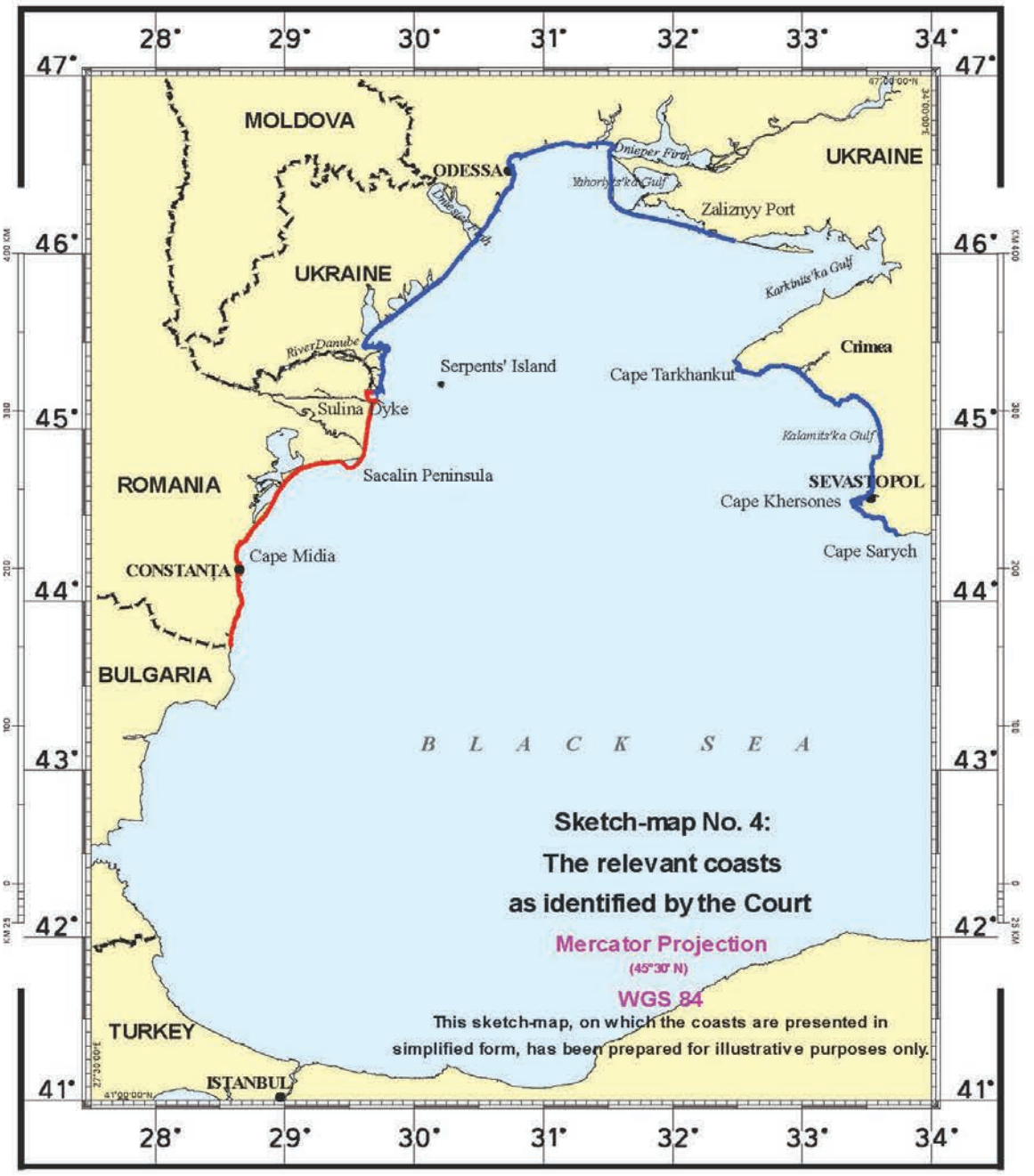
Cape Tarkhankut
Crimea
Sulina Dyke
Sacalin Peninsula
Kalamita'ka Gulf
ROMANIA
SEVASTOPOL
Cape Khersones
CONSTANȚA
Cape Midia
Cape Sarych
BULGARIA
B L A C K S E A
TURKEY
ISTANBUL
Sketch-map No. 3:
The relevant coasts and
delimitation area according to Ukraine
Mercator Projection
(45°30' N)
WGS 84
This sketch-map, on which the coasts are presented in
simplified form, has been prepared for illustrative purposes only.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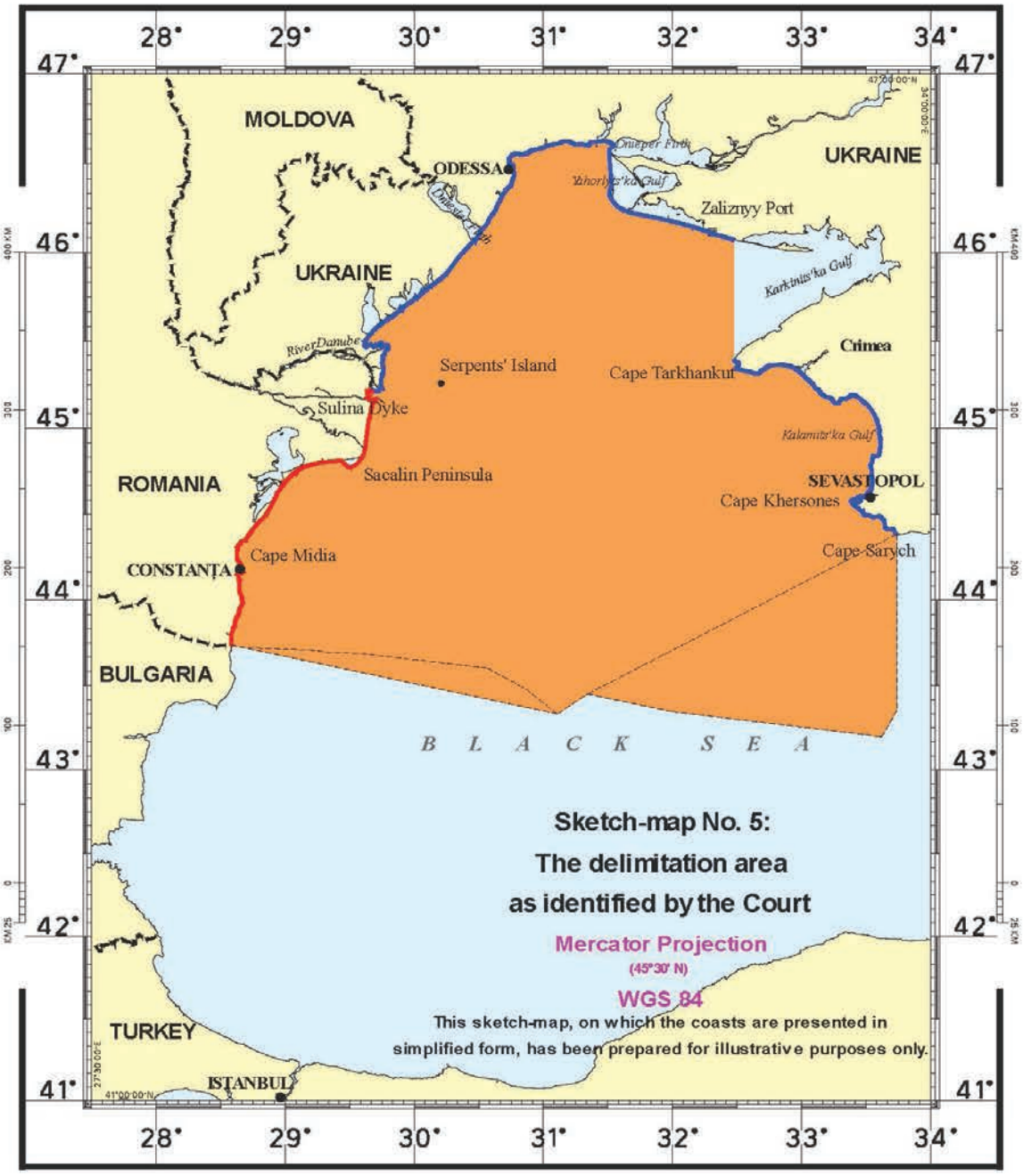
SEVASTOPOL
Cape Khersones
Cape Sarych
CONSTANȚA
Cape Midia
BULGARIA
B L A C K S E A
TURKEY
ISTANBUL
Sketch-map No. 4:
The relevant coasts
as identified by the Court
Mercator Projection
(45°30' N)
WGS 84
This sketch-map, on which the coasts are presented in
simplified form, has been prepared for illustrative purposes only.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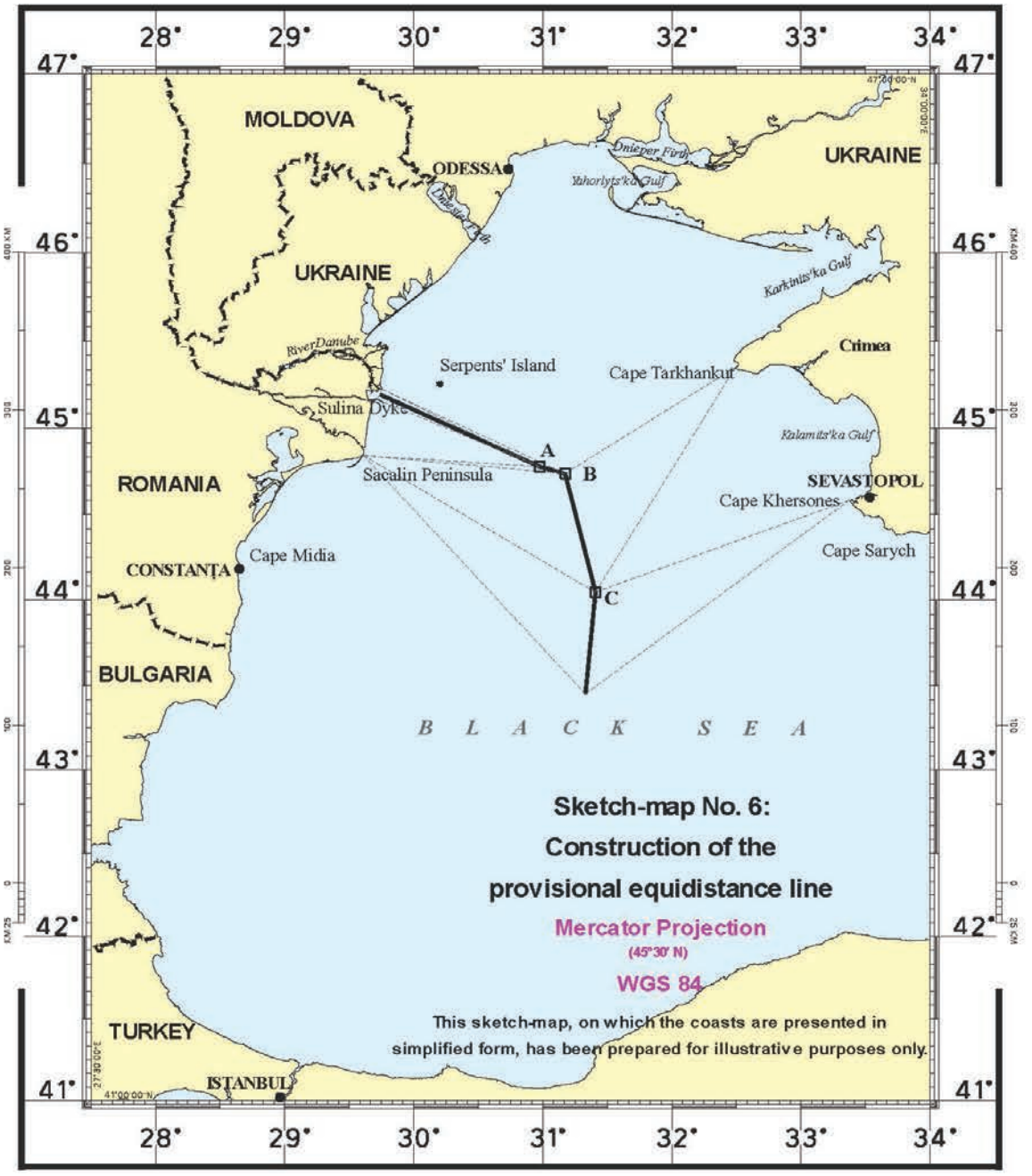
Yahorlyts'ka Gulf
Zaliznyy Port
Karkinits'ka Gulf
Crimea
Cape Tarkhankut
River Danube
Serpents' Island
Sulina Dyke
Sacalin Peninsula
ROMANIA
Kalamits'ka Gulf
SEVASTOPOL
Cape Khersones
Cape Sarych
CONSTANȚA
Cape Midia
BULGARIA
B L A C K S E A
TURKEY
ISTANBUL
Sketch-map No. 5:
The delimitation area
as identified by the Court
Mercator Projection
(45°30' N)
WGS 84
This sketch-map, on which the coasts are presented in
simplified form, has been prepared for illustrative purposes only.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Dniester R.
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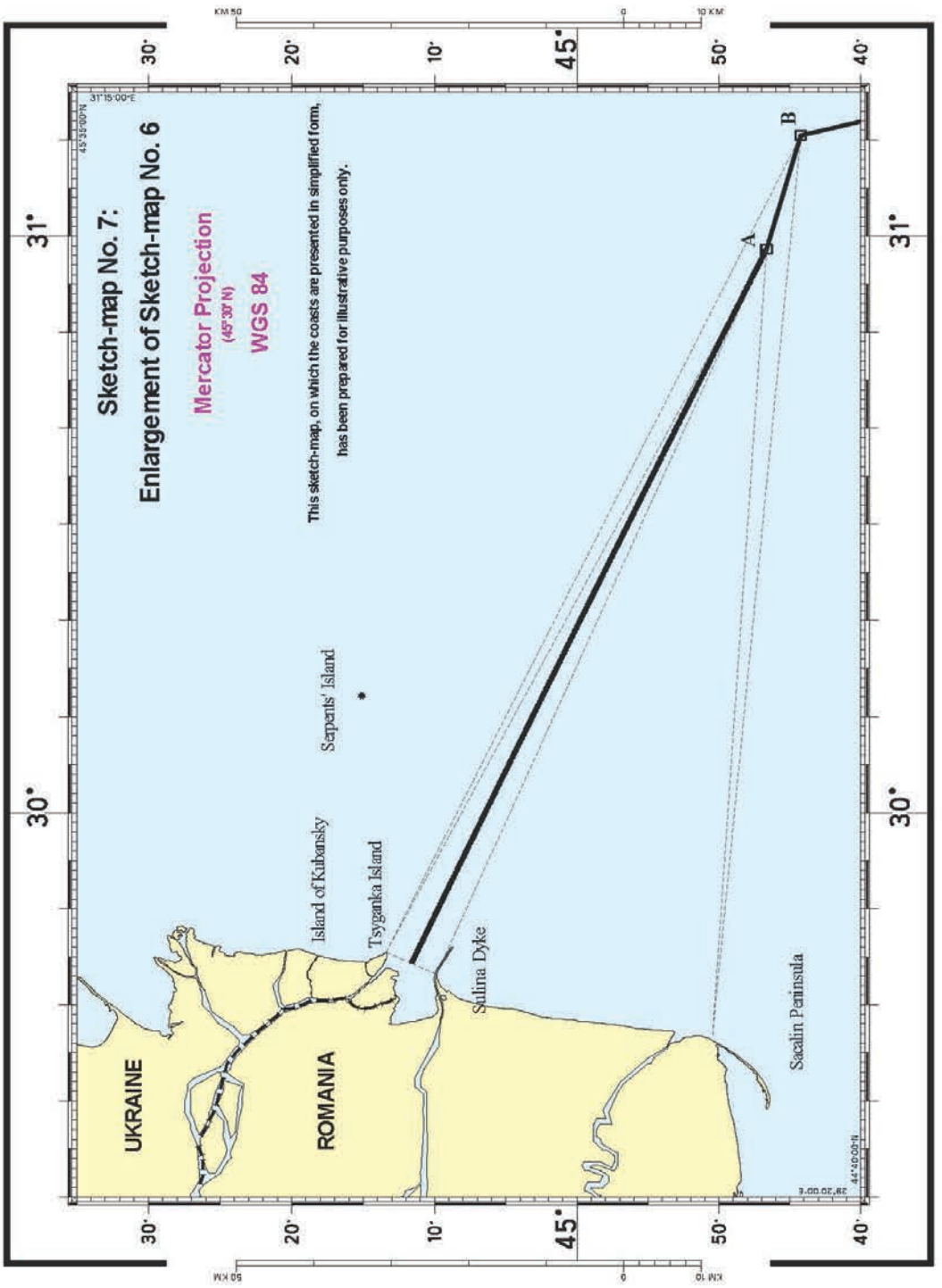
Karkinits'ka Gulf
River Danube
Crimea
Serpents' Island
Cape Tarkhankut
Sulina Dyke
Kalamits'ka Gulf
A
B
ROMANIA
Sacalin Peninsula
SEVASTOPOL
Cape Khersones
Cape Midia
Cape Sarych
CONSTANȚA
C
BULGARIA
B L A C K S E A
Sketch-map No. 6:
Construction of the
provisional equidistance line
Mercator Projection
(45°30' N)
WGS 84
This sketch-map, on which the coasts are presented in
simplified form, has been prepared for illustrative purposes only.
TURKEY
ISTANBUL


Sketch-map No. 7:
Enlargement of Sketch-map No. 6
Mercator Projection
(45°30' N)
WGS 84
This sketch-map, on which the coasts are presented in simplified form, has been prepared for illustrative purposes only.
UKRAINE
ROMANIA
Island of Kubansky
Tsyganka Island
Serpents' Island
Sulina Dyke
Sacalin Peninsula
A
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30°
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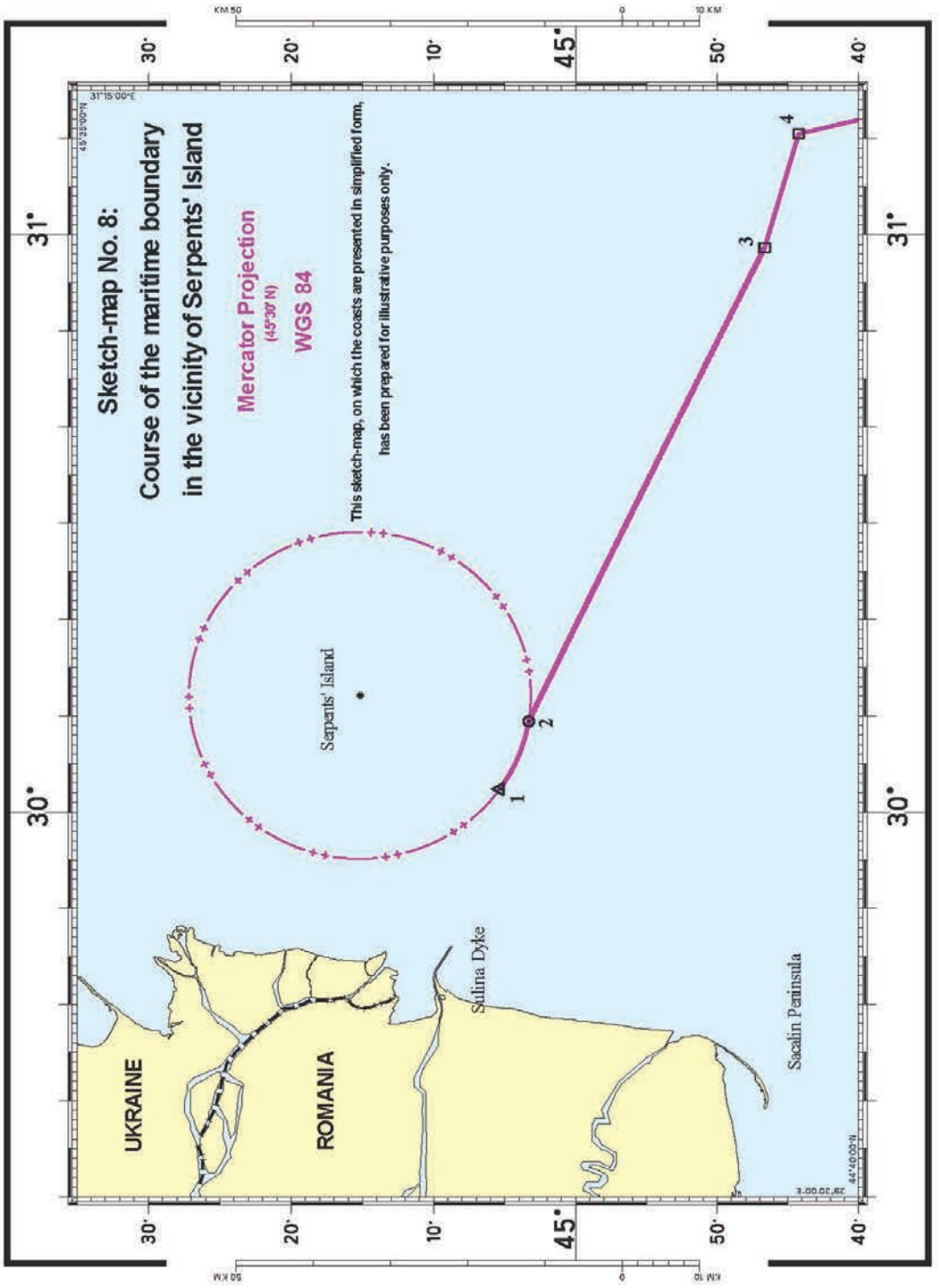
30'
20'
10'
50'
40'


Sketch-map No. 8:
Course of the maritime boundary
in the vicinity of Serpents' Island
Mercator Projection
(45°30' N)
WGS 84
This sketch-map, on which the coasts are presented in simplified form,
has been prepared for illustrative purposes only.
Serpents' Island
UKRAINE
ROMANIA
Sulina Dyke
Sacalin Peninsula
1
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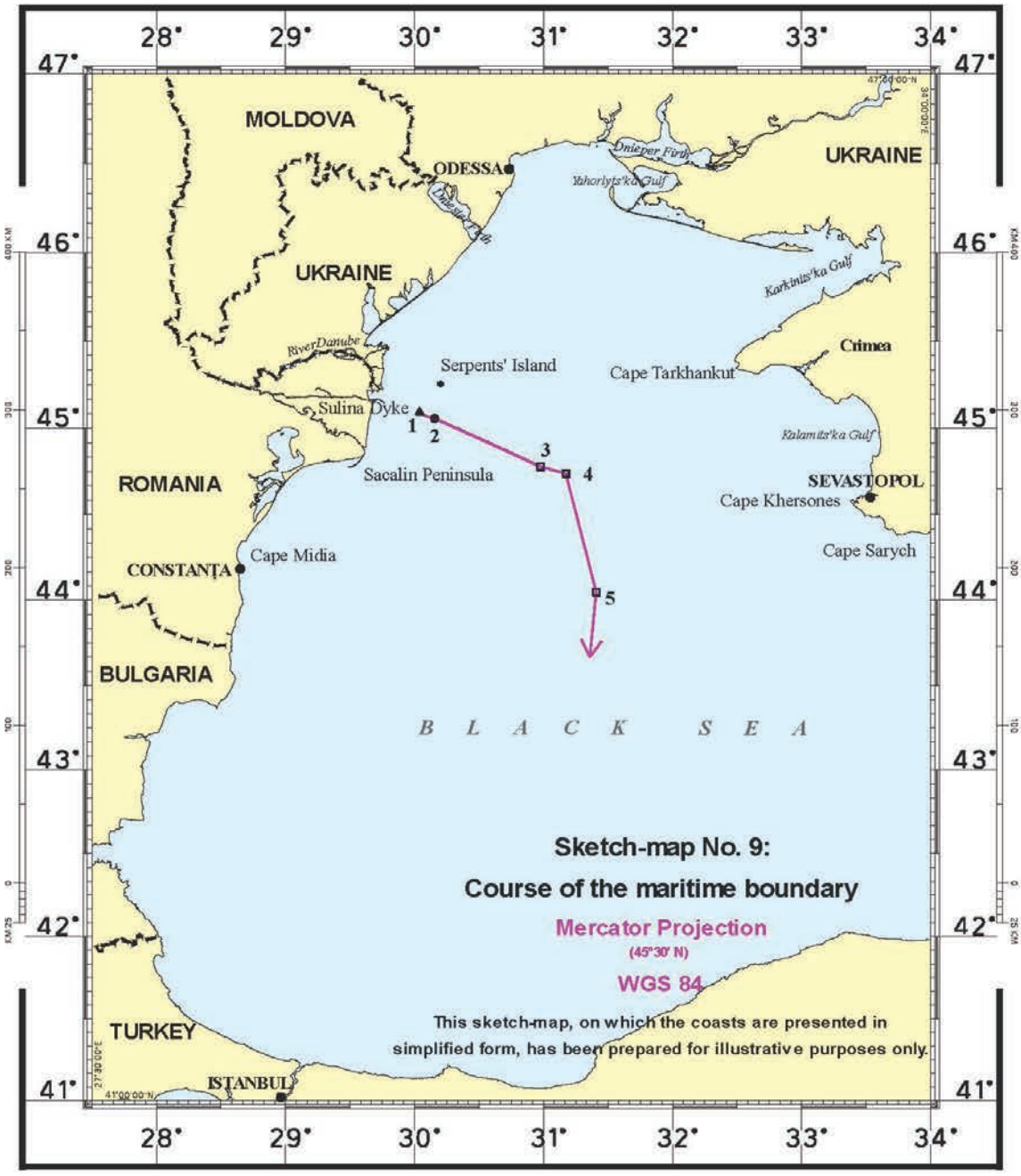
KM 10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Dnieper Firth
Yahorlyts'ka Gulf
Dniester Firth
Karkinits'ka Gulf
River Danube
Serpents' Island
Cape Tarkhankut
Crimea
Sulina Dyke
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ROMANIA
Sacalin Peninsula
SEVASTOPOL
Cape Khersones
Cape Sarych
CONSTANȚA
Cape Midia
BULGARIA
B L A C K S E A
Sketch-map No. 9:
Course of the maritime boundary
Mercator Projection
(45°30' N)
WGS 84
This sketch-map, on which the coasts are presented in simplified form, has been prepared for illustrative purposes only.
TURKEY
ISTANBUL

175. QUESTIONS RELATING TO THE OBLIGATION TO PROSECUTE OR EXTRADITE (BELGIUM *v.* SENEGAL) (REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES)

Order of 28 May 2009

On 28 May 2009, the International Court of Justice delivered its Order regarding the request for the indication of provisional measures submitted by Belgium in the case concerning *Questions relating to the Obligation to Prosecute or Extradite* (*Belgium* v. *Senegal)*. The Court found that the circumstances, as they presented themselves to the Court, were not such as to require the exercise of its power to indicate provisional measures.

The Court was composed as follows: President Owada; Judges Shi, Koroma, Al-Khasawneh, Simma, Abraham, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood; Judges *ad hoc* Sur, Kirsch; Registrar Couvreur.

*

* *

The operative paragraph (para. 76) of the Order reads as follows:

" . . .

The Court,

By thirteen votes to one,

Finds that the circumstances, as they now present themselves to the Court, are not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures.

IN FAVOUR: President Owada; Judges Shi, Koroma, Al-Khasawneh, Simma, Abraham, Sepúlveda-Amor, Bennouna, Skotnikov, Yusuf, Greenwood; Judges *ad hoc* Sur, Kirsch;

AGAINST: Judge Cançado Trindade."

*

* *

Judges Koroma and Yusuf appended a joint declaration to the Order of the Court; Judges Al-Khasawneh and Skotnikov appended a joint separate opinion to the Order of the Court; Judge Cançado Trindade appended a dissenting opinion to the Order of the Court; Judge *ad hoc* Sur appended a separate opinion to the Order of the Court.

*

* *

Application and request for the indication of provisional measures

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

The Court observes that, in its Application, as a basis for the jurisdiction of the Court, Belgium refers to the declarations made under Article 36, paragraph 2, of the Statute, by Belgium on 17 June 1958 and by Senegal on 2 December 1985, and to Article 30, paragraph 1, of the Convention against Torture, which provides that: any dispute between two or more States parties concerning the interpretation or application of the Convention "which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court."

Belgium maintains that Senegal, where Mr. Habré has resided since 1990, has taken no action on its repeated requests to see the former President of Chad prosecuted in Senegal, failing his extradition to Belgium, for acts characterized as including crimes of torture and crimes against humanity, allegedly perpetrated during his presidency between 7 June 1982 and 1 December 1990. Belgium refers to complaints filed in Senegal in 2000 against Mr. Habré by seven natural persons and one legal person, to complaints filed with the Belgian judicial authorities between 30 November 2000 and 11 December 2001 by a Belgian national of Chadian origin and by Chadian nationals, and to an international arrest warrant issued against Mr. Habré by the Belgian investigating judge responsible for the case. Belgium notes that the complaints filed in Senegal were dismissed by the *Chambre d'accusation* of the Dakar Court of Appeal on 4 July 2000 on the grounds that "crimes against humanity" did not form part of Senegalese criminal law and, with regard to the crime of torture, that Senegalese law did not allow a Senegalese court to exercise jurisdiction in respect of acts committed abroad by an alien.

At the end of its Application, Belgium requests the Court to adjudge and declare that:

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

– Belgium's claim is admissible;

– the Republic of Senegal is obliged to bring criminal proceedings against Mr. H. Habré for acts including crimes

of torture and crimes against humanity which are alleged against him as perpetrator, co-perpetrator or accomplice;

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

and reserves the right to revise or supplement the terms of the Application.

The Court recalls that, on 19 February 2009, having filed its Application, Belgium submitted a Request for the indication of provisional measures, invoking Article 41 of the Statute of the Court and Articles 73 to 75 of the Rules of Court. In the Request, Belgium refers to the same bases of jurisdiction of the Court relied on in its Application and asks the Court "to indicate, pending a final judgment on the merits, provisional measures requiring Senegal to take all the steps within its power to keep Mr. H. Habré under the control and surveillance of the judicial authorities of Senegal so that the rules of international law with which Belgium requests compliance may be correctly applied".

Belgium states that "[a]t present, Mr. H. Habré is under house arrest in Dakar, but it transpires from an interview which the President of Senegal, A. Wade, gave to *Radio France Internationale* that Senegal could lift his house arrest if it fails to find the budget which it regards as necessary in order to hold the trial of Mr. H. Habré". According to Belgium, in such an event, it would be easy for Mr. Habré to leave Senegal and avoid any prosecution, thereby causing irreparable prejudice to the right conferred on Belgium by international law to bring criminal proceedings against him. It further maintains that this would violate Senegal's obligation to prosecute Mr. Habré for the crimes under international law which are alleged against him, failing his extradition.

In its first round of oral observations, Belgium also referred to certain recent statements by President Wade which, according to Belgium, indicated that if Senegal did not have available to it the funds required to organize the trial of Mr. Habré, it could at any time abandon its prosecution of him, cease monitoring him or transfer him to another State.

The Court notes that, in its first round of oral observations, Senegal asserted that, since 2005, it had been willing, as declared by President Wade, to try Mr. Habré in the Senegalese courts and thus to comply with its obligations under international law. Senegal further maintained that, as the conditions required for the indication of provisional measures were not fulfilled in the present case, Belgium's request for such measures to be indicated was unfounded. It added that the indication of the measures sought by Belgium would prejudge the merits and deprive Senegal of the rights it held under international rules, in particular the Convention against Torture.

The Respondent also stated that, following Belgium's request for the extradition of Mr. Habré, he had been arrested and placed in custody on 15 November 2005 pending extradition, but that the *Chambre d'accusation* of the Dakar Court of Appeal had held that it was without jurisdiction over the request for Mr. Habré's extradition, on the grounds that he enjoyed immunity from jurisdiction by virtue of having been Head of State at the time the acts occurred. Senegal stated that on 23 December 2005 it had informed Belgium of this decision, which put an end to the extradition proceedings. Senegal explained that, in these circumstances, it had sought the support of the African Union and seised it of the matter and that, on 2 July 2006, the Heads of State and Government of the African Union had given Senegal a mandate to prosecute and try Mr. Habré.

Senegal maintained that no legal dispute existed between the Parties on the interpretation or application of an international legal rule and, in particular, of the rules set forth in the Convention against Torture.

The Court observes that, in its second round of oral observations, Belgium stated that the dispute between itself and Senegal concerned, first, the question of whether the obligation to try Mr. Habré derived from the mandate given to Senegal by the African Union and, secondly, whether Senegal had already fulfilled its obligations under the provisions of the Convention against Torture by passing on the case to the African Union.

The Court recalls that, in response to a question put by a Member of the Court at the hearings, the Applicant indicated that a solemn declaration made before the Court by the Agent of Senegal, in the name of his Government, could be sufficient for Belgium to consider that its Request for the indication of provisional measures had no further raison d'être, provided that such a declaration would be clear and unconditional, and that it would guarantee that all the necessary measures would be taken by Senegal to ensure that Mr. Habré did not leave Senegalese territory before the Court delivered its final Judgment. Belgium also expressed the wish that the Court include any such declaration in the operative part of its Order.

The Court notes that, in its second round of oral observations, Senegal maintained that its obligation to prosecute Mr. Habré derived from the provisions of the Convention against Torture, not from the mandate given by the African Union, and it concluded that the lack of a dispute between the Parties was therefore manifest. Senegal further pointed out that the statements made to the media by President Wade did not demonstrate the existence of any real or serious risk that Mr. Habré might evade Senegalese justice. In addition, in response to a question put by a Member of the Court at the hearings, the Respondent solemnly declared that it would not allow Mr. Habré to leave its territory while the present case was pending before the Court.

Reasoning of the Court

Prima facie *jurisdiction*

The Court begins by recalling that, when dealing with a request for the indication of provisional measures, there is no need for it, 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, but that it may only indicate those measures if the provisions relied on by the Applicant appear, prima facie, to afford a basis on which its jurisdiction could be founded. Given that Belgium is seeking to found the jurisdiction of the Court on Article 30 of the Convention against Torture and on the declarations made by

the two States pursuant to Article 36, paragraph 2, of the Statute, the Court deemed it necessary to endeavour to establish whether the compromissory clause under the Convention, or the declarations relied upon, did indeed confer upon it prima facie jurisdiction to rule on the merits, enabling it to indicate provisional measures if it considered that the circumstances so required.

- Dispute

The Court observes that both Belgium and Senegal are parties to the Convention against Torture. Considering that the first condition required to be met in order for the Court's jurisdiction to be established on this basis is the existence of a "dispute between two or more States Parties concerning the interpretation or application of this Convention", it falls to the Court at this stage in the proceedings first to establish whether prima facie such a dispute existed on the date the Application was filed.

The Court points out that, following the judgment of the Dakar Court of Appeal bringing to an end the proceedings on Mr. Habré's extradition to Belgium, Senegal seised the African Union and informed Belgium of this in a Note Verbale dated 23 December 2005, to which Belgium responded by Note Verbale dated 11 January 2006, disputing whether Senegal could comply with the obligations under the Convention against Torture by referring a matter covered by that Convention to an international organization. Belgium argued that Senegal was not fulfilling its obligations under the Convention against Torture, in particular Article 7, by failing to prosecute Mr. Habré, in default of extraditing him to Belgium, to answer for the acts of torture alleged against him. Senegal considered that it has taken measures in order to fulfill the said obligations and reaffirmed its will to continue the ongoing process so as to assume in full its obligations as a State party to the Convention against Torture. The Court finds in view of the foregoing that it appears prima facie that a dispute as to the interpretation and application of the Convention existed between the Parties on the date the Application was filed.

The Court next turns to the question of whether the Application subsequently ceased to have any object as a result of the disappearance of the dispute which had existed at the time of filing, specifically in light of the fact that Senegal acknowledged in the course of the hearings that a State party to the Convention against Torture cannot fulfill the obligations there under by the mere act of referring the matter to an international organization. The Court observes that the Parties nevertheless seem to continue to differ on other questions relating to the interpretation or application of the Convention against Torture, such as that of the time frame within which the obligations under Article 7 must be fulfilled or that of the circumstances (financial, legal or other difficulties) which might be relevant in considering whether or not a failure to fulfill those obligations has occurred. The Court further observes that the Parties seem to continue to hold differing views as to how Senegal should fulfill its treaty obligations. It finds in consequence that it appears that prima facie a dispute of the kind contemplated by Article 30 of the Convention against Torture continues to exist between the Parties, even if the scope of that dispute may have changed since the Application was filed.

- Procedural conditions

The Court also points out that Article 30 of the Convention against Torture requires, first, that any dispute submitted to the Court should be such as "cannot be settled through negotiation". The Court considers that, at the stage of considering prima facie jurisdiction, it is sufficient for it to find that an attempt has been made by Belgium to negotiate. The Court is of the view that the diplomatic correspondence, in particular the Note Verbale of 11 January 2006, whereby Belgium wished to submit certain clarifications to the Government of Senegal "within the framework of the negotiation procedure covered by Article 30 of the Convention against Torture . . .", shows that Belgium attempted to resolve the said dispute by negotiation and that it cannot be concluded that the negotiations thus proposed had the effect of resolving the dispute. The Court thus concludes that the requirement that the dispute is one which "cannot be settled through negotiation" must be regarded as having been satisfied prima facie.

The Court next observes that the Convention provides, secondly, that a dispute between States parties which has not been settled through negotiation shall, at the request of one of them, be submitted to arbitration, and that it may be referred to the Court only if the parties are unable to agree on the organization of such arbitration within six months from the date when it was requested. The Court considers the Note Verbale of 20 June 2006 to contain an explicit offer from Belgium to Senegal to have recourse to arbitration, pursuant to Article 30, paragraph 1, of the Convention against Torture, in order to settle the dispute concerning the application of the Convention in the case of Mr. Habré. The Court points out that, at this stage of the proceedings, it is sufficient for it to note that, even supposing that the said Note Verbale never reached its addressee, Belgium's Note Verbale of 8 May 2007 explicitly refers to it and it has been confirmed that this second Note was communicated to Senegal and received by it more than six months before the date of referral to the Court, i.e., 19 February 2009.

The Court concludes from the foregoing that it has prima facie jurisdiction under Article 30 of the Convention against Torture to entertain the case, which it considers sufficient to enable it to indicate the provisional measures requested by Belgium, if the circumstances so require. The Court consequently finds that there is no need to ascertain, at this stage, whether the second basis of jurisdiction asserted by Belgium, the declarations made by the Parties pursuant to Article 36, paragraph 2, of the Statute, might also, prima facie, afford a basis on which the Court's jurisdiction could be founded.

Link between the right protected and the measures requested

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 of the parties pending its decision and that it follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by the Court to belong either to the

Applicant or to the Respondent. It also recalls that a link must therefore be established between the provisional measures requested and the rights which are the subject of the proceedings before the Court as to the merits of the case. The Court further states that its power to indicate provisional measures should be exercised only if the rights asserted by a party appear at least plausible.

The Court observes that the provisional measures requested in the current proceedings are aimed at ensuring that Senegal takes all necessary measures in its power to keep Mr. Habré under the surveillance and control of the Senegalese authorities until the Court has given its final decision. It notes that the possible departure of Mr. Habré from Senegalese territory would be likely to affect the rights which might be adjudged to belong to Belgium on the merits.

Moreover, even though the Court does not need at this stage to establish definitively the existence of the rights claimed by Belgium or to consider Belgium's capacity to assert them, the Court observes that these rights are grounded in a possible interpretation of the Convention against Torture and therefore appear to be plausible. The Court concludes from the foregoing that, from this perspective as well, the provisional measures requested may be indicated if the circumstances so require.

Risk of irreparable prejudice and urgency

The Court recalls that its power to indicate provisional measures 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 the rights in dispute before the Court has given its final decision.

The Court observes that Belgium makes reference to recent interviews given by the President of Senegal, Mr. Abdoulaye Wade, to *Radio France Internationale*, the Spanish newspaper *Público*, the French newspaper *La Croix* and *Agence France Presse*, in which the President indicated that he did not intend to keep Mr. Habré in Senegal indefinitely if the funding needed to organize his trial was not provided by the international community. According to Belgium, Senegal could therefore lift Mr. Habré's house arrest.

The Court notes that the statements concerning the possibility of Mr. Habré leaving Senegal were made by the Senegalese Head of State and could therefore have given rise to some concern on the part of Belgium. The Court further observes that the Co-Agent of Belgium asserted at the hearings, in response to the same question put by a Member of the Court, that a "clear and unconditional" solemn declaration given by the Agent of Senegal, in the name of his Government, could be sufficient for Belgium to consider that its Request for the indication of provisional measures no longer had any object.

The Court observes that, according to Senegal, the statement made by President Wade to *Radio France Internationale*, on the basis of which Belgium requests provisional measures, has been taken out of context and "has been attributed a meaning . . . which it manifestly did not have".

The Court points out that Senegal has repeatedly affirmed that it has no intention of lifting the effective control and surveillance measures imposed on Mr. Habré and has stated in particular that Mr. Habré does not possess a valid travel document and that his surveillance is carried out by an elite unit of the Senegalese military forces and that the measures which it has already implemented are consistent with the provisions of the Convention and identical to the provisional measures requested by Belgium.

The Court recalls that Senegal has stated that the negotiations with the European Union and the African Union, aimed at obtaining the funds needed for the prosecution of Mr. Habré, are proceeding well. It notes that Senegal asserted on several occasions at the hearings that it was not contemplating lifting the surveillance and control imposed on the person of Mr. Habré either before or after the funds pledged by the international community were made available to it for the organization of the judicial proceedings. The Court quotes the Co-Agent of Senegal, who, at the end of the hearings, solemnly declared, in response to a question put by a Member of the Court, the following:

> "Senegal will not allow Mr. Habré to leave Senegal while the present case is pending before the Court. Senegal has not the intention to allow Mr. Habré to leave the territory while the present case is pending before the Court."

Conclusion

Taking note of the assurances given by Senegal, the Court finds that the risk of irreparable prejudice to the rights claimed by Belgium is not apparent on the date of this Order and concludes from the foregoing that there does not exist, in the circumstances of the present case, any urgency to justify the indication of provisional measures by the Court.

Having rejected Belgium's Request for the indication of provisional measures, the Court makes clear 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 Belgium and Senegal to submit arguments in respect of those questions. It adds that the present decision also leaves unaffected Belgium's right to submit in future a fresh request for the indication of provisional measures, under Article 75, paragraph 3, of the Rules of Court, based on new facts.

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Joint declaration of Judges Koroma and Yusuf

In their joint declaration, Judges Koroma and Yusuf make clear that, while they have voted in favour of the Order, they nevertheless decided to append a declaration to emphasize that both Parties have acknowledged that impunity is no longer allowed under international law, irrespective of the status of the individual, and that Senegal is making efforts to ensure that impunity does not prevail in this particular case. The judges also wish to draw attention to the efforts against impunity made by the African Union, which has recognized that the case against Mr. Hissène Habré falls within its competence.

The authors of the joint declaration note that the present case between Belgium and Senegal concerns Senegal's obligation, under conventional and customary international law, to extradite or prosecute (*aut dedere aut judicare*) the former President of Chad, Mr. Hissène Habré, for crimes he is alleged to have committed or ordered while President. They recall that the primary conventional authority cited by Belgium for this obligation is Article 7, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984. They recall the terms of the relief sought by Belgium in its Request for the indication of provisional measures: that the Court, pending a final judgment on the merits, require Senegal "to take all the steps within its power to keep Mr. H. Habré under the control and surveillance of the judicial authorities of Senegal so that the rules of international law with which Belgium requests compliance may be correctly applied".

Judges Koroma and Yusuf note that the purpose of provisional measures is to preserve the respective rights of the parties pending the decision of the Court, in order to ensure that irreparable prejudice is not caused to rights which are the subject of dispute in judicial proceedings. They point out that Senegal, on several occasions during the oral proceedings, declared before the Court that it would not release Mr. Habré pending the resolution of the case. In the view of Judges Koroma and Yusuf, these declarations preserve the rights of the Parties and ensure against the risk of irreparable prejudice in exactly the same way as would an order indicating provisional measures, and the purpose of Belgium's request has thus been served. They conclude that the Court should have simply acknowledged the declarations by Senegal and declared that, as a result, the request for the indication of provisional measures had ceased to have any object.

Joint separate opinion of Judges Al-Khasawneh and Skotnikov

Judge Al-Khasawneh and Judge Skotnikov have voted in favour of the Court's decision not to indicate the provisional measures requested by Belgium. However, they do not concur with the Court's finding to the effect that the conditions required for the purposes of the indication of provisional measures, in terms of establishing prima facie jurisdiction or assessing whether the Application has become moot, have been met. They point out that the Court accepted the fact that the dispute, as framed by Belgium, in the light of the explanations given by the Parties as to their respective positions, does not continue to exist, even on a prima facie basis (Order, paragraph 48). These explanations, at the very least, should have lead the Court to make a finding that its prima facie jurisdiction to pronounce on the merits of the case could not be established, since there are very serious doubts as to the existence of a dispute at the time of the filing of the Application. This finding would have allowed the case brought by Belgium to continue. Alternatively, and even more convincingly, the Court could have concluded that, given the explanation by the Parties, no dispute exists and therefore the Application has been rendered moot. Instead, the Court came to what is, in the view of the two judges, an implausible conclusion that "the Parties nonetheless seem to continue to differ on other questions relating to the interpretation or application of the Convention against Torture" (Order, paragraph 48) and went on to offer such "other questions" which have never been identified by Belgium as forming part of a dispute and which consequently have never been addressed as such by Senegal.

Judge Al-Khasawneh and Judge Skotnikov recall that the Court has had occasion to point out, "[w]hether there exists an international dispute is a matter for objective determination" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74). Indeed, it is a duty of the Court to make such a determination. It is expected from the Court that in doing so, even on a prima facie basis, it will be diligent and precise. They do not think that the Court's determination in this case meets such an obvious requirement.

In conclusion, Judge Al-Khasawneh and Judge Skotnikov express their hope that the fact that this case remains before the Court will not deter possible contributors from providing assistance to Senegal in organizing Mr. Habré's trial.

Dissenting opinion of Judge Cançado Trindade

Judge Cançado Trindade dissents from the decision of the majority of the Court, and sustains that the circumstances of the present case fully meet the preconditions for the indication by the Court of provisional measures, which should have been ordered. He points out, first of all, that precautionary measures were transposed onto the international legal procedure to safeguard the effectiveness of the jurisdictional function itself, particularly in face of an imminence of irreparable damage and in order to secure the realization of justice. Provisional measures, though indicated on the basis of prima facie, rather than substantial, evidence, are necessarily binding. This is the first case brought before the ICJ on the basis of the United Nations Convention against Torture (Article 30), and the Court found that it had prima facie jurisdiction thereunder. However, the Order it issued, in his view, does not reflect all the points which are relevant to the proper consideration of the issues raised by the request.

He observes that the Court has lately been faced with situations, such as the one in the present case, illustrative of the overcoming of the strictly inter-State dimension in the acknowledgment of the rights to be preserved by means of provisional measures (e.g., orders indicated in order to avoid the aggravation of situations causing harm to the rights of the human person). The right herein invoked corresponds to the duties set for in the Convention against Torture, which find expression in the principle of universal jurisdiction (*aut dedere aut judicare*): the corresponding right to be preserved is the right to the realization of justice.

Judge Cançado Trindade recalls that, in the hearings, both Parties, Belgium and Senegal, saw it fit to recall the atrocities of the Habré régime (1982–1990) in Chad, with thousands of victims of grave violations of human rights and of international humanitarian law,—as reported by the Chadian Truth Commission in 1992—, including the systematic practice of torture, in violation of an absolute prohibition of *jus cogens*. Although the inter-State case originated later, with legal actions pursued by the victims, in Senegal and Belgium, as

from 2000, it cannot be disconnected from their origins disclosing the human tragedy which occurred in Chad during the Habré régime. In 2006, the United Nations Committee against Torture issued a provisional measure in a case brought by a group of those victims, and the African Union mandated Senegal to prosecute and try Mr. H. Habré "on behalf of Africa", by a competent Senegalese court. To this effect, Senegal amended its Penal Code and its Code of Criminal Procedure, in early 2007. The case was also the object of attention before the United Nations Human Rights Council, and by the United Nations High Commissioner for Human Rights.

Notwithstanding all that,—Judge Cançado Trindade adds —, impunity has prevailed to date, almost two decades after the reported occurrence of the facts. The surviving victims are still in search of justice, and many of them have passed away in the course of their search. The prerequisites for the indication of provisional measures, are clearly established in the present case. There is urgency, related to measures to be promptly taken to preserve, and comply with, the right to the realization of justice. And there is imminence of further irreparable harm; the ongoing and prolonged impunity amounts to a continuing situation of irreparable harm to those who have not found justice in their lifetime. *Aut judicare* forbids undue delays; justice delayed is justice denied.

To Judge Cançado Trindade, the Court's decision not to indicate provisional measures can thus be severely questioned. Moreover, even if the ICJ was not satisfied with the arguments advanced by the Parties, it is not bound by them; as master of its own jurisdiction, it is entitled by its Rules (Article 75 (1) and (2)) to indicate provisional measures *motu proprio*, even if they are distinct from the ones requested. The home surveillance of Mr. H. Habré in Senegal is only one aspect of the case; there persist other aspects, deserving of closer attention by the Court, such as the alleged high costs of holding the trial of Mr. H. Habré, added to pre-trial measures still to be taken, and the lack of definition of the time still to be consumed before that trial takes place.

Judge Cançado Trindade concludes that the Court should thus have indicated provisional measures, requesting the Parties to report periodically to it on measures taken to bring promptly Mr. H. Habré to trial in Senegal. This would have been in keeping with the relevance and nature of the right to be preserved,—the right to the realization of justice—, and the corresponding obligations *erga omnes partes* under the Convention against Torture, which are obligations of result and not only of conduct or behaviour. Had the Court done so, it would have set up an important, if not historical, precedent, in support of the principle of universal jurisdiction, and would have taken upon itself the role of guarantor of the collective guarantee of the United Nations Convention against Torture.

Separate opinion of Judge *ad hoc* Sur

In his separate opinion appended to the Order, Judge Sur recalls some fundamental principles regarding the position of a judge *ad hoc*. His duty is to attain the independence and objectivity of the other judges on the Bench. He must also ensure that the arguments of the Party which chose him are properly taken into consideration, even if they are not acted upon.

While expressing his agreement with the operative clause of the Order, Judge Sur regrets the fact that the Court did not analyse the shift in the content of Belgium's Request for the indication of provisional measures, whereby the control to be imposed by the "judicial authorities of Senegal" was replaced by that to be imposed by the "Senegalese authorities". Judicial control is only possible in Senegalese law on the basis of an indictment, whereas control by the "Senegalese authorities" means an administrative measure of control and surveillance. Thus Belgium's final request amounted to asking for the continuation of the administrative control already imposed on Mr. Habré, whereas the initial claim implied the need for Senegal to take a new judicial measure. Judge Sur is of the opinion that, on this point, the Parties should have been given a full account of the arguments which they used.

Judge Sur then considers the method used by the Court to examine the conditions necessary for the exercise of its power to indicate provisional measures. He notes that the Court carefully and cautiously considers its jurisdiction and the admissibility of the Request prima facie in order to take full account of the consent of States to its jurisdiction. But he wonders whether it would not be more satisfactory for the Court and Parties alike to replace the current practice, based on a positive demonstration of its prima facie jurisdiction and of prima facie admissibility, by a negative demonstration, whereby it is not manifestly lacking jurisdiction and the Request is not manifestly inadmissible. The Court could thus concentrate on assessing the circumstances requiring, or not, the indication of provisional measures, that is to say the urgency, the relevance of the rights to be preserved and the risk of irreparable prejudice. Such a change in its jurisprudence would even be more closely in line with Article 41 of the Statute of the Court which grants it the power to indicate independently provisional measures to preserve the rights of either Party should the circumstances so require.

Without touching on the merits, Judge Sur finally considers the question of the existence of a dispute between the Parties at the time of the decision concerning the Order. In his view, Belgium and Senegal agree that the Convention against Torture obliges the States which are parties to it to establish their criminal jurisdiction and prosecute persons accused of the offences for which it provides, or, failing that, to extradite them. Further, Belgium has obtained satisfaction on its demands given the repeated declarations by Senegal that it will proceed as soon as possible with a trial of Mr. Habré for all the crimes alleged against him and the legal measures which it has taken to that end. Thus, at the date of this Order, there no longer exists any dispute between the Parties, and the Court should have dismissed Belgium's Request as groundless.

176. DISPUTE REGARDING NAVIGATIONAL AND RELATED RIGHTS (COSTA RICA *v.* NICARAGUA)

Judgment of 13 July 2009

The International Court of Justice, on 13 July 2009, rendered its Judgment in the case concerning the *Dispute Regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)*.

The Court was composed as follows: President Owada; Judges Shi, Koroma, Al-Khasawneh, Buergenthal, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood; Judge *ad hoc* Guillaume; Registrar Couvreur.

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The operative paragraph (para. 156) of the Judgment reads as follows:

" . . .

The Court,

(1) As regards Costa Rica's navigational rights on the San Juan river under the 1858 Treaty, in that part where navigation is common,

(a) Unanimously,

Finds that Costa Rica has the right of free navigation on the San Juan river for purposes of commerce;

(b) Unanimously,

Finds that the right of navigation for purposes of commerce enjoyed by Costa Rica includes the transport of passengers;

(c) Unanimously,

Finds that the right of navigation for purposes of commerce enjoyed by Costa Rica includes the transport of tourists;

(d) By nine votes to five,

Finds that persons travelling on the San Juan river on board Costa Rican vessels exercising Costa Rica's right of free navigation are not required to obtain Nicaraguan visas;

In favour: President Owada; Judges Shi, Buergenthal, Abraham, Keith, Bennouna, Cançado Trindade, Yusuf, Greenwood;

Against: Judges Koroma, Al-Khasawneh, Sepúlveda-Amor, Skotnikov; Judge *ad hoc* Guillaume;

(e) Unanimously,

Finds that persons travelling on the San Juan river on board Costa Rican vessels exercising Costa Rica's right of free navigation are not required to purchase Nicaraguan tourist cards;

(f) By thirteen votes to one,

Finds that the inhabitants of the Costa Rican bank of the San Juan river have the right to navigate on the river between the riparian communities for the purposes of the essential needs of everyday life which require expeditious transportation;

In favour: President Owada; Judges Shi, Koroma, Al-Khasawneh, Buergenthal, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood;

Against: Judge *ad hoc* Guillaume;

(g) By twelve votes to two,

Finds that Costa Rica has the right of navigation on the San Juan river with official vessels used solely, in specific situations, to provide essential services for the inhabitants of the riparian areas where expeditious transportation is a condition for meeting the inhabitants' requirements;

In favour: President Owada; Judges Shi, Koroma, Al-Khasawneh, Buergenthal, Abraham, Keith, Sepúlveda-Amor, Bennouna, Cançado Trindade, Yusuf, Greenwood;

Against: Judge Skotnikov; Judge *ad hoc* Guillaume;

(h) Unanimously,

Finds that Costa Rica does not have the right of navigation on the San Juan river with vessels carrying out police functions;

(i) Unanimously,

Finds that Costa Rica does not have the right of navigation on the San Juan river for the purposes of the exchange of personnel of the police border posts along the right bank of the river and of the re-supply of these posts, with official equipment, including service arms and ammunition;

(2) As regards Nicaragua's right to regulate navigation on the San Juan river, in that part where navigation is common,

(a) Unanimously,

Finds that Nicaragua has the right to require Costa Rican vessels and their passengers to stop at the first and last Nicaraguan post on their route along the San Juan river;

(b) Unanimously,

Finds that Nicaragua has the right to require persons travelling on the San Juan river to carry a passport or an identity document;

(c) Unanimously,

Finds that Nicaragua has the right to issue departure clearance certificates to Costa Rican vessels exercising Costa Rica's right of free navigation but does not have the right to request the payment of a charge for the issuance of such certificates;

(d) Unanimously,

Finds that Nicaragua has the right to impose timetables for navigation on vessels navigating on the San Juan river;

(e) Unanimously,

Finds that Nicaragua has the right to require Costa Rican vessels fitted with masts or turrets to display the Nicaraguan flag;

(3) As regards subsistence fishing,

By thirteen votes to one,

Finds that fishing by the inhabitants of the Costa Rican bank of the San Juan river for subsistence purposes from that bank is to be respected by Nicaragua as a customary right;

In favour: President Owada; Judges Shi, Koroma, Al-Khasawneh, Buergenthal, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood; Judge *ad hoc* Guillaume;

Against: Judge Sepúlveda-Amor;

(4) As regards Nicaragua's compliance with its international obligations under the 1858 Treaty,

(a) By nine votes to five,

Finds that Nicaragua is not acting in accordance with its obligations under the 1858 Treaty when it requires persons travelling on the San Juan river on board Costa Rican vessels exercising Costa Rica's right of free navigation to obtain Nicaraguan visas;

In favour: President Owada; Judges Shi, Buergenthal, Abraham, Keith, Bennouna, Cançado Trindade, Yusuf, Greenwood;

Against: Judges Koroma, Al-Khasawneh, Sepúlveda-Amor, Skotnikov; Judge *ad hoc* Guillaume;

(b) Unanimously,

Finds that Nicaragua is not acting in accordance with its obligations under the 1858 Treaty when it requires persons travelling on the San Juan river on board Costa Rican vessels exercising Costa Rica's right of free navigation to purchase Nicaraguan tourist cards;

(c) Unanimously,

Finds that Nicaragua is not acting in accordance with its obligations under the 1858 Treaty when it requires the operators of vessels exercising Costa Rica's right of free navigation to pay charges for departure clearance certificates;

(5) Unanimously,

Rejects all other submissions presented by Costa Rica and Nicaragua.

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Judges Sepúlveda-Amor and Skotnikov appended separate opinions to the Judgment of the Court; Judge *ad hoc* Guillaume appended a declaration to the Judgment of the Court.

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The Court begins by recalling that, on 29 September 2005, the Republic of Costa Rica (hereinafter "Costa Rica") filed in the Registry of the Court an Application instituting proceedings against the Republic of Nicaragua (hereinafter "Nicaragua") with regard to a "dispute concerning navigational and related rights of Costa Rica on the San Juan River".

The Court observes that, in its Application, 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 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. Costa Rica also seeks to found the jurisdiction of the Court on the Tovar-Caldera Agreement signed between the Parties on 26 September 2002. In addition, Costa Rica invokes as a basis of the Court's jurisdiction the provisions of Article XXXI of the American Treaty on Pacific Settlement, officially designated, according to Article LX thereof, as the "Pact of Bogotá".

The Court notes that in its final submissions, Costa Rica requests the Court to adjudge and declare that Nicaragua is in breach of its international obligations in denying to Costa Rica the free exercise of its rights of navigation and associated rights on the San Juan river. In particular, Costa Rica requests the Court to adjudge and declare that,

"by its conduct, the Republic of Nicaragua has violated:

(*a*) the obligation to allow all Costa Rican vessels and their passengers to navigate freely on the San Juan for purposes of commerce, including communication and the transportation of passengers and tourism;

(*b*) the obligation not to impose any charges or fees on Costa Rican vessels and their passengers for navigating on the River;

(*c*) the obligation not to require persons exercising the right of free navigation on the River to carry passports or obtain Nicaraguan visas;

(*d*) the obligation not to require Costa Rican vessels and their passengers to stop at any Nicaraguan post along the River;

(*e*) the obligation not to impose other impediments on the exercise of the right of free navigation, including timetables for navigation and conditions relating to flags;

(*f*) the obligation to allow Costa Rican vessels and their passengers while engaged in such navigation to land on any part of the bank where navigation is common without paying any charges, unless expressly agreed by both Governments;

(*g*) the obligation to allow Costa Rican official vessels the right to navigate the San Juan, including for the purposes of re-supply and exchange of personnel of the border posts along the right bank of the River with their official equipment, including service arms and ammunition, and for the purposes of protection as established in the relevant instruments, and in particular the Second article of the Cleveland Award;

(*h*) the obligation to facilitate and expedite traffic on the San Juan, within the terms of the Treaty of 15 April 1858

and its interpretation by the Cleveland Award of 1888, in accordance with Article 1 of the bilateral Agreement of 9 January 1956;

(*i*) the obligation to permit riparians of the Costa Rican bank to fish in the River for subsistence purposes."

Further, Costa Rica requests the Court to adjudge and declare that by reason of the above violations,

"Nicaragua is obliged:

(*a*) immediately to cease all the breaches of obligations which have a continuing character;

(*b*) to make reparation to Costa Rica for all injuries caused to Costa Rica by the breaches of Nicaragua's obligations referred to above, in the form of the restoration of the situation prior to the Nicaraguan breaches and compensation in an amount to be determined in a separate phase of these proceedings; and

(*c*) to give appropriate assurances and guarantees that it shall not repeat its unlawful conduct, in such form as the Court may order."

Costa Rica also requests the Court to reject Nicaragua's request for a declaration.

In its final submissions, Nicaragua requests the Court to adjudge and declare that the requests presented by Costa Rica

"are rejected in general, and in particular, on the following bases:

(*a*) either because there is no breach of the provisions of the Treaty of Limits of 15 April 1858 or any other international obligation of Nicaragua;

(*b*) or, as appropriate, because the obligation breach of which is alleged, is not an obligation under the provisions of the Treaty of Limits of 15 April 1858 or under general international law."

Moreover Nicaragua requests the Court to make a formal declaration on the issues raised in its Counter-Memorial and its Rejoinder, and as reiterated at the hearings:

"(i) Costa Rica is obliged to comply with the regulations for navigation (and landing) in the San Juan imposed by Nicaraguan authorities in particular related to matters of health and security;

(ii) Costa Rica has to pay for any special services provided by Nicaragua in the use of the San Juan either for navigation or landing on the Nicaraguan banks;

(iii) Costa Rica has to comply with all reasonable charges for modern improvements in the navigation of the river with respect to its situation in 1858;

(iv) revenue service boats may only be used during and with special reference to actual transit of the merchandise authorized by Treaty;

(v) Nicaragua has the right to dredge the San Juan in order to return the flow of water to that obtaining in 1858 even if this affects the flow of water to other present day recipients of this flow such as the Colorado River."

Reasoning of the Court

i. Geographical and historical context and origin of the dispute

Referring to the geographical and historical context of the case, the Court notes that the Governments of Costa Rica and Nicaragua reached agreement on 15 April 1858 on a Treaty of Limits, which was ratified by Costa Rica on 16 April 1858 and by Nicaragua on 26 April 1858. The 1858 Treaty of Limits fixed the course of the boundary between Costa Rica and Nicaragua from the Pacific Ocean to the Caribbean Sea. Between a point three English miles from Castillo Viejo, a town in Nicaraguan territory, and the Caribbean Sea, the Treaty fixed the boundary along the right bank of the San Juan river. It established Nicaragua's dominion and sovereign jurisdiction over the waters of the San Juan river, but at the same time affirmed Costa Rica's navigational rights "con objetos de comercio" on the lower course of the river.

Following challenges by Nicaragua on various occasions to the validity of the 1858 Treaty, the Parties submitted the question to arbitration by the President of the United States. The Parties agreed in addition that if the 1858 Treaty were found to be valid, President Cleveland should also decide whether Costa Rica could navigate the San Juan river with vessels of war or of the revenue service. In his Award rendered on 22 March 1888, President Cleveland held that the 1858 Treaty was valid. He further stated, with reference to Article VI of the 1858 Treaty, that Costa Rica did not have the right of navigation on the River San Juan with vessels of war, but that it could navigate with such vessels of the Revenue Service as may be connected to navigation "for the purposes of commerce".

On 5 August 1914, Nicaragua signed a treaty with the United States (the Chamorro-Bryan Treaty) which granted the United States perpetual and "exclusive proprietary rights" for the construction and maintenance of an inter-oceanic canal through the San Juan river. On 24 March 1916 Costa Rica filed a case against Nicaragua before the Central American Court of Justice claiming that Nicaragua had breached its obligation to consult with Costa Rica prior to entering into any canalization project in accordance with Article VIII of the 1858 Treaty. On 30 September 1916, the Central American Court of Justice ruled that, by not consulting Costa Rica, Nicaragua had violated the rights guaranteed to the latter by the 1858 Treaty of Limits and the 1888 Cleveland Award.

On 9 January 1956 Costa Rica and Nicaragua concluded an Agreement (the Fournier-Sevilla Agreement) according to the terms of which the parties agreed to facilitate and expedite traffic in particular through the San Juan river and agreed to co-operate to safeguard the common border.

In the 1980s various incidents started to occur relating to the navigational régime of the San Juan river. During that period Nicaragua introduced certain restrictions on Costa Rican navigation on the San Juan river which it justified as temporary, exceptional measures to protect Nicaragua's national security in the context of an armed conflict. Some of the restrictions were suspended when Costa Rica protested. During the mid-1990s further measures were introduced by Nicaragua, including the charging of fees for passengers travelling on Costa Rican vessels navigating on the San Juan

river and the requirement for Costa Rican vessels to stop at Nicaraguan Army posts along the river.

In July 1998 further disagreements between the Parties regarding the extent of Costa Rica's navigational rights on the San Juan river led to the adoption by Nicaragua of certain measures. In particular, on 14 July 1998, Nicaragua prohibited the navigation of Costa Rican vessels that transported members of Costa Rica's police force. On 30 July 1998, the Nicaraguan Minister of Defence and the Costa Rican Minister of Public Security signed a document, known as the Cuadra-Lizano Joint Communiqué. The text allowed for Costa Rican armed police vessels to navigate on the river to re-supply their boundary posts on the Costa Rican side, provided that the Costa Rican agents in those vessels only carried their service arms and prior notice was given to the Nicaraguan authorities, which could decide on whether the Costa Rican vessels should be accompanied by a Nicaraguan escort. On 11 August 1998, Nicaragua declared that it considered the Cuadra-Lizano Joint Communiqué to be legally null and void. Costa Rica did not accept this unilateral declaration. Differences regarding the navigational régime on the San Juan river persisted between the Parties.

On 24 October 2001, Nicaragua made a reservation to its declaration accepting the jurisdiction of the Court, according to which it would no longer accept the jurisdiction of the Court in regard to "any matter or claim based on interpretations of treaties or arbitral awards that were signed and ratified or made, respectively, prior to 31 December 1901". Under the Tovar-Caldera Agreement, signed by the Parties on 26 September 2002, Nicaragua agreed to a three year moratorium with regard to the reservation it had made in 2001 to its declaration accepting the jurisdiction of the Court. For its part, Costa Rica agreed that during the same three year period it would not initiate any action before the International Court of Justice nor before any other authority on any matter or protest mentioned in treaties or agreements currently in force between both countries.

Once the agreed three year period had elapsed without the Parties having been able to settle their differences, Costa Rica, on 29 September 2005, instituted proceedings before the Court against Nicaragua with regard to its disputed navigational and related rights on the San Juan river. Nicaragua has not raised any objections to the jurisdiction of the Court to entertain the case.

II. Costa Rica's right of free navigation on the San Juan River

The Court recalls that the Parties agree that Costa Rica possesses a right of free navigation on the section of the San Juan river where the right bank, i.e., the Costa Rican side, marks the border between the two States by virtue of the Treaty of Limits concluded between them on 15 April 1858. While it is not contested that the section of the river thus defined belongs to Nicaragua, since the border lies on the Costa Rican bank, with Costa Rica possessing a right of free navigation, the Parties differ both as to the legal basis of that right and, above all, as to its precise extent, in other words as to the types of navigation which it covers.

1. The legal basis of the right of free navigation

The Court observes that it does not consider that it is required to take a position in this case on whether and to what extent there exists, in customary international law, a régime applicable to navigation on "international rivers", either of universal scope or of a regional nature covering the geographical area in which the San Juan is situated. Nor does it consider, as a result, that it is required to settle the question of whether the San Juan falls into the category of "international rivers", as Costa Rica maintains, or is a national river which includes an international element, that being the argument of Nicaragua. For the Court, the 1858 Treaty of Limits completely defines the rules applicable to the section of the San Juan river that is in dispute in respect of navigation. Interpreted in the light of the other treaty provisions in force between the Parties, and in accordance with the arbitral or judicial decisions rendered on it, that Treaty is sufficient to settle the question of the extent of Costa Rica's right of free navigation.

The Court points out that the main provision which founds Costa Rica's right of free navigation is contained in Article VI of the 1858 Treaty. This has been the focus of the arguments exchanged between the Parties as to the extent of the right of navigation on the San Juan. Article VI, after conferring on Nicaragua full and exclusive sovereignty ("exclusivamente el dominio y sumo imperio") over the whole of the San Juan, grants Costa Rica, on the section of the river which follows the border between the two States, a perpetual right ("los derechos perpetuos") of free navigation "con objetos de comercio", according to the terms of the Spanish version of the Treaty, which is the only authoritative one. In addition, Article VI gives vessels of both riparian countries the right to land freely on either bank without being subject to any taxes ("ninguna clase de impuestos"), unless agreed by both Governments.

The Court notes that other provisions of the 1858 Treaty, though of less importance for the purposes of the present case, are not without relevance as regards the right of navigation on the river. This applies in particular to Article IV, which obliges Costa Rica to contribute to the security of the river "for the part that belongs to her of the banks", to Article VIII, which obliges Nicaragua to consult Costa Rica before entering into any agreements with a third State for canalization or transit on the river, and of course to Article II, which establishes the border as the Costa Rican bank on the section of the river which is at issue in this dispute.

In the opinion of the Court, besides the 1858 Treaty, mention should be made, among the treaty instruments likely to have an effect on determining the right of navigation on the river and the conditions for exercising it, of the agreement concluded on 9 January 1956 between the two States (known as the Fournier-Sevilla Agreement), whereby the Parties agreed to collaborate to the best of their ability, in particular in order to facilitate and expedite traffic on the San Juan in accordance with the 1858 Treaty and the Arbitral Award made by President Cleveland in 1888.

The above-mentioned treaty instruments must be understood in the light of two important decisions which settled differences that emerged between the Parties in determining their respective rights and obligations: the Arbitral Award

made by the President of the United States on 22 March 1888 (known as the Cleveland Award); and the decision rendered, on the application of Costa Rica, by the Central American Court of Justice on 30 September 1916.

The first of these two decisions settled several questions concerning the interpretation of the 1858 Treaty which divided the Parties in that case; the second found that Nicaragua, by concluding an agreement with the United States permitting the construction and maintenance of an inter-oceanic canal through the San Juan river, had disregarded Costa Rica's right under Article VIII of that Treaty to be consulted before the conclusion of any agreement of that nature.

Although neither of these decisions directly settles the questions that are now before the Court, they contain certain indications which it will be necessary to take into account for the purposes of the present case.

2. The extent of the right of free navigation attributed to Costa Rica

The Court observes that the Parties disagree considerably over the definition of the field of application of the right of free navigation attributed to Costa Rica, i.e., as to the types of navigation which are covered by the "perpetual right" granted to Costa Rica by the 1858 Treaty. Their difference essentially concerns the interpretation of the words "libre navegación . . . con objetos de comercio" in Article VI of the Treaty of Limits; this brings with it a major disagreement as to the definition of the activities covered by the right in question and of those which, not being thus covered, are subject to Nicaragua's sovereign power to authorize and regulate as it sees fit any activity that takes place on its territory, of which the river forms part.

(a) The meaning and scope of the expression "libre navegación . . . con objetos de comercio"

The Court first gives the Spanish version of Article VI of the Treaty of Limits, together with its own translation of this provision into English, leaving aside the phrase which divides the Parties.

The English translation of Article VI reads as follows:

"The Republic of Nicaragua shall have exclusive dominium and imperium over the waters of the San Juan river from its origin in the lake to its mouth at the Atlantic Ocean; the Republic of Costa Rica shall however have a perpetual right of free navigation on the said waters between the mouth of the river and a point located three English miles below Castillo Viejo, [con objetos de comercio], whether with Nicaragua or with the interior of Costa Rica by the rivers San Carlos or Sarapiquí or any other waterway starting from the section of the bank of the San Juan established as belonging to that Republic. The vessels of both countries may land indiscriminately on either bank of the section of the river where navigation is common, without paying any taxes, unless agreed by both Governments."

The Court notes that the Parties' disagreement is greatest on the meaning of the words "con objetos de comercio". For Nicaragua, the Spanish version of this expression, which is the only authoritative one, must be translated into French as "avec des marchandises de commerce" and into English as "with articles of trade"; in other words, the "objetos" in question here are objects in the concrete and material sense of the term. Consequently, the freedom of navigation guaranteed to Costa Rica by Article VI relates only to the transport of goods intended to be sold in a commercial exchange. For Costa Rica, on the contrary, the expression means in French "à des fins de commerce" and in English "for the purposes of commerce"; the "objetos" in the original text are therefore said to be objects in the abstract sense of ends and purposes. Consequently, according to Costa Rica, the freedom of navigation given to it by the Treaty must be attributed the broadest possible scope, and in any event encompasses not only the transport of goods but also the transport of passengers, including tourists.

(i) Preliminary observations

The Court points out that, in the first place, it is for it to interpret the provisions of a treaty in the present case. It will do so in terms of customary international law on the subject, as reflected in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties, as the Court has stated on several occasions (see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, pp. 109–110, para. 160; see also *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, pp. 21–22, para. 41).

Consequently, neither the circumstance that Nicaragua is not a party to the Vienna

Convention on the Law of Treaties nor the fact that the treaty which is to be interpreted here considerably pre-dates the drafting of the said Convention has the effect of preventing the Court from referring to the principles of interpretation set forth in Articles 31 and 32 of the Vienna Convention.

In the second place, the Court is not convinced by Nicaragua's argument that Costa Rica's right of free navigation should be interpreted narrowly because it represents a limitation of the sovereignty over the river conferred by the Treaty on Nicaragua, that being the most important principle set forth by Article VI.

For the Court, while it is certainly true that limitations of the sovereignty of a State over its territory are not to be presumed, this does not mean that treaty provisions establishing such limitations, such as those that are in issue in the present case, should for this reason be interpreted a priori in a restrictive way. A treaty provision which has the purpose of limiting the sovereign powers of a State must be interpreted like any other provision of a treaty, i.e., in accordance with the intentions of its authors as reflected by the text of the treaty and the other relevant factors in terms of interpretation.

In this respect, the Court notes that a simple reading of Article VI shows that the Parties did not intend to establish any hierarchy as between Nicaragua's sovereignty over the river and Costa Rica's right of free navigation, characterized as "perpetual", with each of these affirmations counter-balancing the other. Nicaragua's sovereignty is affirmed only to the extent that it does not prejudice the substance of Costa Rica's right of free navigation in its domain, the establishment

of which is precisely the point at issue; the right of free navigation, albeit "perpetual", is granted only on condition that it does not prejudice the key prerogatives of territorial sovereignty.

The Court concludes that there are thus no grounds for supposing, *a priori*, that the words "libre navegación . . . con objetos de comercio" should be given a specially restrictive interpretation, any more than an extensive one.

Lastly, the Court observes that none of the points under examination in this case was settled by the Cleveland Award of 1888 or by the decision of the Central American Court of Justice of 1916. Each of the Parties has sought to use these previous decisions as an argument to support its own case. However, these attempts do not convince the Court one way or the other.

The Cleveland Award confined itself to settling the questions of interpretation which the Parties had expressly submitted to the arbitrator. Those questions did not concern the meaning of the words "con objetos de comercio"; it is therefore futile to seek in the Award the answer to a question that was not put before the arbitrator. Consequently, while the Award declares that Costa Rica does not have the right, under the Treaty, to navigate on the San Juan with vessels of war, whereas it does have the right to do so with vessels of its revenue service, there is nothing to be inferred from this with regard to vessels belonging to the State and not falling into either of those two categories. Likewise, while the arbitrator used the words "for the purposes of commerce" and placed them in quotation marks, it may be supposed that this was simply because that was the English translation of the words "con objetos de comercio" which both Parties had supplied to the arbitrator, who did not wish, in his interpretation of the Treaty, to go beyond the questions which had been put before him.

As for the decision of the Central American Court of Justice of 1916, however important this might be, its operative part was based only on the application of the express provisions of Article VIII of the Treaty, which are not at issue in the present case.

(ii) The meaning of the phrase "con objetos"

The Court observes that the Spanish word "objetos" can, depending on its context, have either of the two meanings put forward. Having examined the context here, the Court is of the view that the interpretation advocated by Nicaragua cannot be upheld. The main reason for this is that ascribing the meaning "with goods" or "with articles" to the phrase "con objetos" results in rendering meaningless the entire sentence in which the phrase appears. By contrast, Costa Rica's interpretation of the words "con objetos" allows the entire sentence to be given coherent meaning.

The Court adds that this finding is supported by three additional arguments which all point to the same conclusion.

First, "objetos" is used in another article of the 1858 Treaty, Article VIII, in which context it can only have the abstract meaning of "purposes" or "subjects": "Nicaragua se compromete á no concluir otro (contrato) sobre los expresados objetos . . ." ("Nicaragua engages not to conclude any other contract for those purposes . . ."). It is reasonable to infer that the Parties tended to understand "objetos" in its abstract sense, or, at least, that this meaning was familiar to them in their treaty practice.

Second, a further indication may be deduced from the "Cañas-Martinez" Peace Treaty signed by the Parties on 8 December 1857 but which was never ratified and hence did not enter into force. On the question of navigation on the San Juan, this instrument, replaced by the 1858 Treaty of Limits, which repeats some of the earlier provisions, included the expression "artículos de comercio", which undoubtedly translates as "articles" or "goods" of commerce. This would tend to show that when the Parties at the time wished to refer to physical property giving rise to commercial transactions, they used a term other than "objetos de comercio", a term having the advantage of being unambiguous.

Finally, the Court also considers it significant that in 1887, when the two Parties each submitted an English translation of the 1858 Treaty to President Cleveland for use in the arbitration proceedings he was asked to conduct, even though their translations were not identical on all points, they did use the same phrase to render the original "con objetos de comercio": "for the purposes of commerce".

It is therefore the meaning of "for the purposes of commerce" that is accepted by the Court.

(iii) The meaning of the word "commerce"

The Court then examines the meaning of the word "commerce" in the context of Article VI. In Nicaragua's view, for purposes of the Treaty, "commerce" covers solely the purchase and sale of merchandise, of physical goods, and excludes all services, such as passenger transport. It argues that even if the phrase is translated as "for the purposes of commerce", the result is the same, because in 1858 the word "commerce" necessarily meant trade in goods and did not extend to services, the inclusion of services being a very recent development. Nicaragua contends that it is important to give the words used in the Treaty the meaning they had at the time the Treaty was concluded, not their current meaning, which can be quite different, because this is the only way to remain true to the intent of the drafters of the Treaty; and determining that intent is the main task in the work of interpretation.

Costa Rica argues that "commerce" as used in the Treaty takes in any activity in pursuit of commercial purposes and includes, inter alia, the transport of passengers, tourists among them, as well as of goods. For the Applicant, "commerce" includes movement and contact between inhabitants of the villages on the Costa Rican bank of the San Juan river, and the use of the river for purposes of navigation by Costa Rican public officials providing the local population with essential services, in areas such as health, education and security.

The Court finds that it can subscribe to neither the particularly broad interpretation advocated by Costa Rica nor the excessively narrow one put forward by Nicaragua.

In respect of the first, the Court observes that, were it to be accepted, the result would be to bring within the ambit of "navigation for the purposes of commerce" all, or virtually all,

forms of navigation on the river. If that had been the intent of the parties to the Treaty, it would be difficult to see why they went to the trouble of specifying that the right of free navigation was guaranteed "for the purposes of commerce", given that this language would have had virtually no effect.

In respect of the narrow interpretation advanced by Nicaragua, the Court notes that it is supported mainly by two arguments: the first is based on the Respondent's interpretation of the phrase "con objetos", which has just been rejected; the second is based on the assertion that "commerce" should be given the narrow meaning it had when the Treaty was entered into. The Court does not agree with this second argument.

It is true that the terms used in a treaty must be interpreted in light of what is determined to have been the parties' common intention, which is, by definition, contemporaneous with the treaty's conclusion. That may lead a court seised of a dispute, or the parties themselves, when they seek to determine the meaning of a treaty for purposes of good-faith compliance with it, to ascertain the meaning a term had when the treaty was drafted, since doing so can shed light on the parties' common intention. The Court has so proceeded in certain cases requiring it to interpret a term whose meaning had evolved since the conclusion of the treaty at issue, and in those cases the Court adhered to the original meaning (to this effect, see, for example, the Judgment of 27 August 1952 in the case concerning *Rights of Nationals of the United States of America in Morocco (France v. United States of America) (I.C.J. Reports 1952*, p. 176), on the question of the meaning of "dispute" in the context of a treaty concluded in 1836, the Court having determined the meaning of this term in Morocco when the treaty was concluded; the Judgment of 13 December 1999 in the case concerning *Kasikili/Sedudu Island (Botswana/Namibia) (I.C.J. Reports 1999 (II)*, p. 1062, para. 25) in respect of the meaning of "centre of the main channel" and "thalweg" when the Anglo-German Agreement of 1890 was concluded).

For the Court, however, this does not signify that, where a term's meaning is no longer the same as it was at the date of conclusion, no account should ever be taken of its meaning at the time when the treaty is to be interpreted for purposes of applying it.

On the one hand, the subsequent practice of the parties, within the meaning of

Article 31 (3) *(b)* of the Vienna Convention, can result in a departure from the original intent on the basis of a tacit agreement between the parties. On the other hand, there are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used—or some of them—a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law. In such instances it is indeed in order to respect the parties' common intention at the time the treaty was concluded, not to depart from it, that account should be taken of the meaning acquired by the terms in question upon each occasion on which the treaty is to be applied.

Thus, where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is "of continuing duration", the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning. For the Court, this is so in the present case in respect of the term "comercio" as used in Article VI of the 1858 Treaty. First, this is a generic term, referring to a class of activity. Second, the 1858 Treaty was entered into for an unlimited duration; from the outset it was intended to create a legal régime characterized by its perpetuity.

The Court concludes from this that the terms by which the extent of Costa Rica's right of free navigation has been defined, including in particular the term "comercio", must be understood to have the meaning they bear on each occasion on which the Treaty is to be applied, and not necessarily their original meaning. Thus, even assuming that the notion of "commerce" does not have the same meaning today as it did in the mid-nineteenth century, it is the present meaning which must be accepted for purposes of applying the Treaty.

Accordingly, the Court finds that the right of free navigation in question applies to the transport of persons as well as the transport of goods, as the activity of transporting persons can be commercial in nature nowadays. This is the case if the carrier engages in the activity for profit-making purposes. The Court sees no persuasive reason to exclude the transport of tourists from this category.

(b) The activities covered by the right of free navigation belonging to Costa Rica

(i) Private navigation

The Court considers that two types of private navigation are certainly covered by the right of free navigation pursuant to Article VI of the 1858 Treaty: the navigation of vessels carrying goods intended for commercial transactions; and that of vessels carrying passengers who pay a price other than a token price in exchange for the service thus provided.

The Court is further of the opinion that it cannot have been the intention of the authors of the 1858 Treaty to deprive the inhabitants of the Costa Rican bank of the river, where that bank constitutes the boundary between the two States, of the right to use the river to the extent necessary to meet their essential requirements, even for activities of a non-commercial nature, given the geography of the area. While choosing, in Article II of the Treaty, to fix the boundary on the river bank, the parties must be presumed, in view of the historical background to the conclusion of this Treaty and of the Treaty's object and purpose as defined by the Preamble and Article I, to have intended to preserve for the Costa Ricans living on that bank a minimal right of navigation for the purposes of continuing to live a normal life in the villages along the river. The Court considers that while such a right cannot be derived from the express language of Article VI, it can be inferred from the provisions of the Treaty as a whole and, in particular, the manner in which the boundary is fixed.

(ii) "Official vessels"

For the Court, it is clear that the 1858 Treaty does not establish, in its Article VI, any special régime for "official" (or

"public") vessels. The only criterion provided for by Article VI is based not on the public or private ownership of the vessel but on the purpose of navigation: either it is undertaken for the "purposes of commerce" and benefits from the freedom established; or it is undertaken for purposes other than "commerce" and it does not.

The Court is of the opinion that, as a general rule, the navigation of Costa Rican vessels for the purposes of public order activities and public services with no object of financial gain, in particular police vessels, lies outside the scope of Article VI of the 1858 Treaty, with the exception of revenue service vessels, the question of which was settled by the 1888 arbitration.

Moreover, the Court considers that, in any event, Costa Rica has not proved its assertion that river transport is the only means to supply its police posts located along the river bank or to carry out the relief of the personnel stationed in them.

Nonetheless, the Court is of the opinion that the reasons given above with regard to private vessels which navigate the river in order to meet the essential requirements of the population living on the river bank, where expeditious transportation is a condition for meeting those requirements, are also valid for certain Costa Rican official vessels which in specific situations are used solely for the purpose of providing that population with what it needs in order to meet the necessities of daily life.

III. Nicaragua's power of regulation of navigation

1. General observations

The Court observes that, in their written pleadings, the Parties disagreed about the extent or even the very existence of the power of Nicaragua to regulate the use of the river so far as Costa Rica was concerned. In the course of the oral proceedings that difference of positions largely disappeared. However, the Parties continue to disagree on the extent of the regulatory power of Nicaragua and on certain measures which Nicaragua has adopted and continues to apply. In particular, they disagree whether Nicaragua is obliged to notify Costa Rica about the regulations it has made or to consult Costa Rica in advance about proposed regulations.

(a) Characteristics

The Court is of the view that Nicaragua has the power to regulate the exercise by Costa Rica of its right to freedom of navigation under the 1858 Treaty. According to the Court, that power is not unlimited**,** being tempered by the rights and obligations of the Parties. A regulation in the present case is to have the following characteristics:

(1) it must only subject the activity to certain rules without rendering impossible or substantially impeding the exercise of the right of free navigation;

(2) it must be consistent with the terms of the Treaty, such as the prohibition on the unilateral imposition of certain taxes in Article VI;

(3) it must have a legitimate purpose, such as safety of navigation, crime prevention and public safety and border control;

(4) it must not be discriminatory and in matters such as timetabling must apply to Nicaraguan vessels if it applies to Costa Rican ones;

(5) it must not be unreasonable, which means that its negative impact on the exercise of the right in question must not be manifestly excessive when measured against the protection afforded to the purpose invoked.

(b) Notification

The Court now turns to the question whether Nicaragua has a legal obligation to notify Costa Rica of the measures it adopts to regulate navigation on the river, or to give notice and consult with Costa Rica prior to the adoption by Nicaragua of such measures.

Although the 1858 Treaty imposes no express general obligation on either of the Parties to notify the other about measures it is taking relating to navigation on the river, the Court sees three factors as together imposing an obligation of notification of regulations in the circumstances of this case.

The first is to be found in the 1956 Agreement under which the Parties agreed to collaborate in order to facilitate traffic on the San Juan river and those transport services which may be provided to the territory of one Party by enterprises which are nationals of the other. The second lies in the very subject-matter of the regulations: navigation on a river in which two States have rights, the one as sovereign, the other to freedom of navigation. Such a requirement arises from the practical necessities of navigation on such a waterway. The third factor lies in the very nature of regulation. If the regulation is to subject the activity in question to rules, those undertaking that activity must be informed of those rules.

The Court concludes that Nicaragua is under an obligation to notify Costa Rica of the regulations which it makes regarding the navigational regime on the San Juan river. That obligation does not however extend to notice or consultation prior to the adoption by Nicaragua of such regulations.

2. The legality of the specific Nicaraguan measures challenged by Costa Rica

(a) Requirement to stop and identification

So far as the lawfulness of the obligation requiring Costa Rican vessels to stop at any Nicaraguan post along the river, and requiring their passengers to carry passports, the Court is of the opinion that Nicaragua, as sovereign, has the right to know the identity of those entering its territory and also to know that they have left. In its view the power to require the production of a passport or identity document of some kind is a legitimate part of the exercise of such a power. The Court notes that Nicaragua also has related responsibilities in respect of law enforcement and environmental protection. To that extent, the Nicaraguan requirement that vessels stop on entering the river and leaving it and that they be subject to search is lawful. The Court cannot, however, see any legal justification for a general requirement that vessels continuing along the San Juan river, for example, from the San Carlos river to the Colorado river, stop at any intermediate point.

Accordingly, the Court concludes that Costa Rica's challenge to the requirement that vessels stop and their crew

members and passengers register and carry identity documents fails.

(b) Departure clearance certificates

The Court considers that the purposes invoked by Nicaragua, i.e., navigational safety, environmental protection and criminal law enforcement, are legitimate ones. Further, the requirement for departure clearance certificates does not appear to have imposed any significant impediment on the exercise of Costa Rica's freedom of navigation.

For the Court, the question may also be asked whether in terms of the earlier practice the inspection and certification should be undertaken by the State of nationality of the boat operators, on the analogy of maritime navigation. There is however no suggestion from Costa Rica that it would be in a position to take up this responsibility. Nor does it point to a single case where navigation has been impeded by an arbitrary refusal of a certificate.

Accordingly Costa Rica's claim that Costa Rican vessels need not obtain departure clearance certificates cannot be upheld.

(c) Visas and tourist cards

The Court observes at the outset that a distinction must be drawn between requiring visas and requiring tourist cards. The power of a State to issue or refuse visas is a practical expression of the prerogative which each State has to control entry by non-nationals into its territory.

For the Court, the requirement that passengers on Costa Rican vessels exercising freedom of navigation, other than riparians and certain Costa Rican merchants, have visas issued to them raises the question of who is entitled to and who may benefit from the right of freedom of navigation for commercial purposes stated in Article VI of the 1858 Treaty. Under Article VI of the Treaty the titleholder of the right of free navigation is Costa Rica. Owners and operators of Costa Rican vessels benefit from that right when navigating on the San Juan river for commercial purposes. Passengers on vessels exercising Costa Rica's right of free navigation also benefit from that right, even if such passengers are not Costa Rican nationals.

The Court recalls that the power of a State to issue or refuse a visa entails discretion. However in the present case Nicaragua may not impose a visa requirement on those persons who may benefit from Costa Rica's right of free navigation. If that benefit is denied, the freedom of navigation would be hindered. In these circumstances, the Court is of the opinion that an imposition of a visa requirement is a breach of the right under Article VI of the Treaty.

The Court observes that in fact the number of tourists travelling on the river in Costa Rican vessels has increased in the period these requirements have been in force. Further, Costa Rica has provided no evidence of arbitrary refusals of visas to tourists and Nicaragua points out that it does not require nationals from countries which are the source of most of the tourists visiting the San Juan to obtain visas. Furthermore, it makes exceptions for residents of Costa Rican riparian communities and Costa Rican merchants who regularly use the river. This, however, does not affect the legal situation thus stated.

The Court concludes that Nicaragua may not require persons travelling on Costa Rican vessels which are exercising their freedom of navigation on the river to obtain visas. It would of course be another matter were they wishing to enter the land territory of Nicaragua from the river or to travel up the river beyond its shared part towards Lake Nicaragua.

Given that Nicaragua has the right to know the identity of those wishing to enter the river, for reasons, among others, of law enforcement and environmental protection, the Court is of the view that one measure which it may properly take to protect such interests is to refuse entry to a particular person for good reasons relating to that purpose. If such an action was justified in terms of the relevant purpose, no breach of the freedom would be involved.

With regard to the requirement by Nicaragua that tourist cards be obtained, this does not appear to be intended to facilitate its control over entry into the San Juan river. In the course of the proceedings Nicaragua did no more than give some factual information about the operation of the tourist cards and the exemptions already mentioned. It referred to no legitimate purpose as justification for imposing this requirement. The requirement that passengers wishing to travel on Costa Rican vessels which are exercising Costa Rica's freedom of navigation on the river must first purchase tourist cards is inconsistent with that right to freedom of navigation. The Court accordingly concludes that Nicaragua may not require persons travelling on Costa Rican vessels which are exercising Costa Rica's freedom of navigation on the river to purchase a tourist card.

(d) Charges

In the Court's view, the 1858 Treaty confers a right on the vessels of each Party to land on the bank of the other and provides that the exercise of that particular right is not to be the subject of an impost or tax. Just as the exercise of the right of navigation on the river is to be free and not the subject of any payment, so is stopping on the other bank.

As the Court understands the situation, Costa Rica does not challenge the right of Nicaragua to inspect vessels on the river for safety, environmental and law enforcement reasons. In the Court's opinion, that right would in any event be an aspect of Nicaraguan sovereignty over the river. But those actions of policing by the sovereign do not include the provision of any service to boat operators, and the payment must thus, in these circumstances, be seen as unlawful. Accordingly, Costa Rica's claim in respect of the charge for the departure clearance certificate for those Costa Rican vessels which exercise the right of free navigation on the river must be upheld.

(e) Timetabling

The Court recalls that the exercise of a power to regulate may legitimately include placing limits on the activity in question. The limited evidence before the Court does not demonstrate any extensive use of the river for night time navigation. The Court thus infers that the interference with Costa Rica's freedom to navigate caused by the prohibition of night time navigation imposed by Nicaragua is limited and does not amount to an unlawful impediment to that freedom, particularly when the purposes of the regulation are considered.

(f) Flags

The Court considers that Nicaragua, which has sovereignty over the San Juan river, may, in the exercise of its sovereign powers, require Costa Rican vessels fitted with masts or turrets navigating on the river to fly its flag. This requirement cannot in any respect be considered an impediment to the exercise of the freedom of navigation of Costa Rican vessels under the 1858 Treaty. The Court observes, moreover, that it has not been presented with any evidence that Costa Rican vessels have been prevented from navigation on the San Juan river as a result of Nicaragua's flag requirement. Accordingly, in the view of the Court, Costa Rica's claim that Nicaragua has violated its obligation not to impose impediments on the exercise of the right of free navigation by establishing conditions relating to flags cannot be upheld.

(g) Conclusion

It follows from the above that Nicaragua has exercised its powers of regulation regarding the matters discussed under subsections (a), (b), (e) and (f) above in conformity with the 1858 Treaty; but that it is not acting in conformity with the obligations under the 1858 Treaty when it implements measures requiring visas and tourist cards and the payment of charges in respect of vessels, boat operators and their passengers exercising the freedom of navigation.

IV. Subsistence fishing

With regard to Nicaragua's argument that Costa Rica's claim relating to subsistence fishing is inadmissible on the grounds that Costa Rica failed to include, even implicitly, the claim in its Application, the Court notes that the alleged interferences by Nicaragua with the claimed right of subsistence fishing post-date the filing of the Application. As to Nicaragua's second argument that the claim does not arise directly out of the subject-matter of the Application, the Court considers that in the circumstances of this case, given the relationship between the riparians and the river and the terms of the Application, there is a sufficiently close connection between the claim relating to subsistence fishing and the Application, in which Costa Rica, in addition to the 1858 Treaty, invoked "other applicable rules and principles of international law". In addition, the Court observes that, as appears from the arguments on the merits which the Respondent has presented in the two rounds of written pleadings and in two rounds of oral hearings, Nicaragua has not been disadvantaged by Costa Rica's failure to give notice in the Application. Similarly, in terms of its responsibility for the due administration of justice, the Court does not consider itself to have been disadvantaged in its understanding of the issues by the lack of explicit reference to the claim in respect of fisheries in the Application. Accordingly, the Court finds that Nicaragua's objection to admissibility cannot be upheld.

In its consideration of the merits of Costa Rica's claim regarding subsistence fishing rights, the Court recalls that the Parties are agreed that all that is in dispute is fishing by Costa Rican riparians for subsistence purposes. There is no question of commercial or sport fishing. The Court also notes that the Parties have not attempted to define subsistence fishing (except by those exclusions) nor have they asked the Court to provide a definition. Leaving aside for the moment the issue of fishing in the river from boats, a point to which the Court will return, the Parties agree that the practice of subsistence fishing is long established. They disagree however whether the practice has become binding on Nicaragua thereby entitling the riparians as a matter of customary right to engage in subsistence fishing from the bank. The Court observes that the practice, by its very nature, especially given the remoteness of the area and the small, thinly spread population, is not likely to be documented in any formal way in any official record.

For the Court, the failure of Nicaragua to deny the existence of a right arising from the practice which had continued undisturbed and unquestioned over a very long period, is particularly significant. The Court accordingly concludes that Costa Rica has a customary right. That right would be subject to any Nicaraguan regulatory measures relating to fishing adopted for proper purposes, particularly for the protection of resources and the environment.

The Court does not however consider that the customary right extends to fishing from vessels on the river. There is only limited and recent evidence of such a practice. Moreover that evidence is principally of the rejection of such fishing by the Nicaraguan authorities. Accordingly, the Court concludes that fishing by the inhabitants of the Costa Rican bank of the San Juan river for subsistence purposes from that bank is to be respected by Nicaragua as a customary right.

V. The claims made by the Parties in their final submissions

1. The claims of Costa Rica

The Court declares that it will uphold, in the operative part of this Judgment, elements of the claim by Costa Rica for it to adjudge that Nicaragua has violated a certain number of obligations incumbent upon it with respect to Costa Rica to the extent that they correspond to the preceding reasoning and will dismiss the others. With regard to Costa Rica's submission that the Court should order Nicaragua to cease all the breaches of its obligations which have a continuing character, the Court considers that the obligation for the State concerned to put an end to such violations derives directly from the finding establishing their existence. As to Costa Rica's submission for the Court to adjudge that Nicaragua should make reparation to Costa Rica for the injury caused to it by the breaches identified, in the form of the restoration of the prior situation and compensation in an amount to be determined at a later stage, the Court recalls that the cessation of a violation of a continuing character and the consequent restoration of the legal situation constitute a form of reparation for the injured State. It refuses to uphold the claim for compensation. Concerning the submission by Costa Rica for the Court to require Nicaragua to give assurances and guarantees that it will not repeat its unlawful conduct, the Court notes that, as a general rule, there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed. It thus refuses to uphold this claim.

2. The claims of Nicaragua

The Court will uphold, in the operative part of this Judgment, the submission by Nicaragua for the Court to dismiss all of the claims of Costa Rica to the extent that it corresponds to the reasoning set out in the present Judgment in respect of Costa Rica's claims. As to Nicaragua's submission for the Court to make a formal declaration, the Court is, inter alia, of the opinion that the reasoning of the present Judgment is sufficient to respond to Nicaragua's wish that Costa Rica's obligations towards it should be stated by the Court.

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Separate opinion of Judge Sepúlveda-Amor

In his separate opinion, Judge Sepúlveda-Amor declares that while he is in agreement with most of the findings in the operative part of the Judgment, he does not share the view that the imposition of visa requirements by Nicaragua on persons travelling on the San Juan river on board Costa Rican vessels exercising Costa Rica's right of free navigation would be contrary to Nicaragua's obligations under the 1858 Treaty. He further considers that the Court's reasoning as regards Costa Rica's claim relating to subsistence fishing should have been based on a different legal foundation.

As regards the question of the legality of visa requirements enacted by Nicaragua,

Judge Sepúlveda-Amor is of the opinion that the Court has failed to take account of Nicaragua's legitimate interest in border and immigration control and to clarify accordingly the extent of Nicaragua's regulatory powers to that effect.

Judge Sepúlveda-Amor notes that the finding is not consistent with the Court's observations made in previous paragraphs of the Judgment, namely that Nicaragua as the sovereign State has the "primary responsibility for assessing the need for regulation", that Costa Rica has the burden of proof in respect of claims regarding the unreasonableness of Nicaragua's regulations, and that such claims need to be based on "[c]oncrete and specific facts" (paragraph 101). Judge Sepúlveda-Amor observes that, while the Court has followed this line of reasoning when examining the requirements to stop and identify, to obtain departure clearance certificates and to fly the Nicaraguan flag, it has adopted a different approach with respect to the visa requirement. According to Judge Sepúlveda-Amor, Costa Rica has presented no evidence to support its contention that the visa requirements imposed by Nicaragua do not serve a legitimate purpose, are unreasonable or discriminatory and substantially impede the exercise of its right of free navigation, in violation of the conditions established in paragraph 87 of the Judgment. He notes that, on the contrary, evidence provided by Nicaragua shows that tourism on the San Juan river has considerably increased in the period since these requirements have been in force.

Judge Sepúlveda-Amor further believes that the prohibition to enact any visa requirements may involve a risk for Nicaragua's public safety and is contrary to the principle stated in the Judgment that "[t]he power of a State to issue or refuse visas is a practical expression of the prerogative which each State has to control entry by non-nationals into its territory" (paragraph 113). Moreover, he indicates that Nicaragua would be in a position to challenge the Court's finding by invoking certain provisions of multilateral conventions, such as the American Convention on Human Rights and the International Covenant on Civil and Political Rights, as a legal basis for the imposition of a visa requirement for persons travelling on the San Juan river.

With regard to the legal basis of Costa Rica's right to subsistence fishing, Judge Sepúlveda-Amor observes that the Court's reasoning contradicts its previous jurisprudence on the recognition of rules of customary international law since, in his view, the clearly established requirements of practice and *opinio juris* are not fulfilled in the present case. According to Judge Sepúlveda-Amor, Nicaragua's lack of protest to the undocumented practice of subsistence fishing on the San Juan river cannot be interpreted as a conviction on the part of Nicaragua that it is conforming to a legal obligation to respect the said practice, especially in the light of the fact that Costa Rica has never claimed the existence of a customary right of subsistence fishing until the submission of its Memorial. Judge Sepúlveda-Amor further notes that, in any event, the practice of a local community of riparians cannot be equated with State practice.

Judge Sepúlveda-Amor considers that the Court could have recognized Costa Rica's claim of subsistence fishing on a more solid legal foundation, namely by having recourse to the principle of acquired or vested rights, as applied in a number of previous decisions, or by recognizing the binding character of the legal commitment undertaken by Nicaragua during the oral proceedings before the Court that it "has absolutely no intention of preventing Costa Rican residents from engaging in subsistence fishing" (CR 2009/5, p. 27, para. 48), in accordance with the Court's case-law on unilateral acts.

Separate opinion of Judge Skotnikov

Judge Skotnikov voted in favour of most of the operative paragraphs of the Judgment. However, he does not share the Court's reasoning on a number of key points and disagrees with some of its conclusions.

He agrees that Costa Rica's right of free navigation under the 1858 Treaty of Limits should not automatically be interpreted restrictively on the grounds that it represents a limitation of the sovereignty over the San Juan river conferred by that Treaty on Nicaragua. However, as was established by the Court's jurisprudence, the restrictive interpretation is in order in case of doubt. In these circumstances, the Court should have examined the intentions of the Parties at the time of the conclusion of the Treaty, taking full account of the well-established principle that limitations on the sovereignty of a State are not to be presumed.

No evidence submitted by the Parties showed that Nicaragua and Costa Rica intended at the time the Treaty was concluded to give an evolving meaning to the word "commerce". Accordingly, the Court's presumption should have been that Nicaragua was unlikely to have intended to act against its own interest by granting Costa Rica navigational rights which were not in line with the contemporaneous meaning of the term "comercio" and which would evolve and expand over time along with the meaning of that term.

In Judge Skotnikov's view, the subsequent practice in the application of the Treaty suggests that the Parties have established an agreement regarding its interpretation. Costa Rican-operated tourism on the San Juan river has been present for at least a decade, and to a substantial degree. Nicaragua has not only engaged in a consistent practice of allowing tourist navigation by Costa Rican operators, but has also subjected it to its regulations. This can be seen as recognition by Nicaragua that Costa Rica acted as of right. The common view of the Parties to that effect can be inferred from the Agreement of Understanding on the Tourist Activity, signed on 5 June 1994. Accordingly, Costa Rica has a right under the 1858 Treaty to transport tourists—that is, passengers who pay a price for the service provided. This right of Costa Rica necessarily extends to the transport of all other passengers who pay a price to the carriers.

Judge Skotnikov notes that, according to the Judgment, the Parties must be presumed to have intended to preserve for riparians living on the Costa Rican bank of the San Juan river a minimal right of navigation to meet their essential requirements; therefore such a right can be inferred from the provisions of the Treaty as a whole. Furthermore, for the same reasons, it can be inferred from the Treaty that Costa Rica has the right of navigation on the San Juan with official vessels (including police vessels) that provide the riparian population with what it needs in order to meet the necessities of daily life.

Judge Skotnikov is not convinced that any navigational rights have been established by the 1858 Treaty other than in its Article VI—the only article dealing with the issue of navigation.

Although he disagrees with the majority that the riparians on the Costa Rican bank have a right under the Treaty to navigate on the San Juan river, he is of the view that the Treaty left unaffected the practice of riparians to travel on the river to meet the requirements of their daily life. This is to be continued and respected by Nicaragua.

He sees no justification for the Court's finding that Costa Rica has the right, albeit limited, to navigate with official vessels to provide services for the riparian communities. It is clear that Costa Rica has certain needs calling for use of the San Juan river for non-commercial purposes by public vessels. However, these needs do not translate into rights. The Parties should reach an arrangement on the subject on their own terms. It is not for the Court to do so on their behalf.

Judge Skotnikov emphasizes that the 1858 Treaty cannot be interpreted as affording to non-Nicaraguans exemption from Nicaragua's visa régime, by virtue of Costa Rica's right to freely navigate the San Juan river. Imposing a visa requirement on tourists or passengers travelling on Costa Rican vessels is within Nicaragua's regulatory rights under the 1858 Treaty. It derives from Nicaragua's exclusive *dominium* and *imperium* over the waters of the San Juan river. As the Court itself states, the power of a State to issue or refuse visas is a practical expression of the very broad prerogative which each State has to control entry by non-nationals into its territory. This remains true, according to the Court's jurisprudence, even in cases where freedom of transit exists. The visa requirement is consistent with Costa Rica's right to free navigation for commercial purposes. Should it be true that Costa Rica's freedom of navigation is hindered by the visa requirement, then it would follow that Nicaragua is breaching its own freedom of navigation by maintaining this requirement in respect of passengers on Nicaraguan boats. The Nicaraguan visa regulation applies to non-Nicaraguans irrespective of the nationality of the carrier. This alone, in his view, should have been reason enough for the Court to uphold Nicaragua's position on the subject.

Judge Skotnikov notes that the legal nature of the regulation requiring Costa Rica's vessels to fly the Nicaraguan flag remains unclear. There is no reference in the Judgment to any evidence of State practice supporting Nicaragua's contentions. However, Judge Skotnikov believes that Costa Rica could have accepted Nicaragua's request as a matter of courtesy.

Finally, in his view, the 1858 Treaty, as in the case of the practice of riparians travelling on the river to meet the requirements of their daily life, left unaffected the practice of subsistence fishing by riparians from the Costa Rican bank of the San Juan river.

Declaration of Judge *ad hoc* Guillaume

In his declaration, Judge *ad hoc* Guillaume endorses many of the findings reached by the Court.

He makes various further points concerning the applicable law in this case and the effect of the passage of time on the interpretation of treaties.

He joins with the majority in considering that Article VI of the Treaty of 26 April 1858 gives Costa Rica a right of free navigation on the San Juan river for purposes of commerce. However, he takes the view that only boatmen are entitled to benefit from that right, and that the commercial or other activities of the persons transported have no bearing on the existence of the rights attributed to Costa Rica. He infers from this that all navigation by vessels for non-profit-making purposes is excluded from the cases provided for by Article VI.

Judge *ad hoc* Guillaume also differs from the Court when it accords the inhabitants of the Costa Rican bank of the river the right to navigate between riparian communities in certain cases, and when it attributes a similar right to certain official vessels of Costa Rica. He observes that the Court has strictly circumscribed these rights, but considers that it has nonetheless thereby disregarded the provisions of the 1858 Treaty. In his view, it would have been preferable to encourage the Parties to negotiate an agreement on this subject.

Lastly, Judge *ad hoc* Guillaume agrees with the Court's Judgment when it recognizes that Nicaragua has the power to regulate Costa Rica's exercise of its right of free navigation, and in particular to require that Costa Rican vessels and their passengers stop at Nicaraguan border posts. However, he differs from the Court as regards the issuing of visas; unlike the Court, he takes the view that Nicaragua remains free to make access to its territory conditional on visas being issued. He notes that the Court has acknowledged that Nicaragua has the right to refuse access for reasons connected with the maintenance of public order or protection of the environment. But he considers it to have been necessary to go further by recognizing the lawfulness of a visa system which is organized in practice so as not to prejudice free navigation on the river.

177. CASE CONCERNING PULP MILLS ON THE RIVER URUGUAY (ARGENTINA *v.* URUGUAY)

Judgment of 20 April 2010

On 20 April 2010, the International Court of Justice rendered its Judgment in the case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*.

The Court was composed as follows: Vice-President Tomka, Acting President; Judges Koroma, Al-Khasawneh, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood; Judges *ad hoc* Torres Bernárdez, Vinuesa; Registrar Couvreur.

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The operative paragraph (para. 282) of the Judgment reads as follows:

" . . .

The Court,

(1) By thirteen votes to one,

Finds that the Eastern Republic of Uruguay has breached its procedural obligations under Articles 7 to 12 of the 1975 Statute of the River Uruguay and that the declaration by the Court of this breach constitutes appropriate satisfaction;

In favour: Vice-President Tomka, Acting President; Judges Koroma, Al-Khasawneh, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood; Judge *ad hoc* Vinuesa;

Against: Judge *ad hoc* Torres Bernárdez;

(2) By eleven votes to three,

Finds that the Eastern Republic of Uruguay has not breached its substantive obligations under Articles 35, 36 and 41 of the 1975 Statute of the River Uruguay;

In favour: Vice-President Tomka, Acting President; Judges Koroma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood; Judge *ad hoc* Torres Bernárdez;

Against: Judges Al-Khasawneh, Simma; Judge *ad hoc* Vinuesa;

(3) Unanimously,

Rejects all other submissions by the Parties."

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Judges Al-Khasawneh and Simma appended a joint dissenting opinion to the Judgment of the Court; Judge Keith appended a separate opinion to the Judgment of the Court; Judge Skotnikov appended a declaration to the Judgment of the Court; Judge Cançado Trindade appended a separate opinion to the Judgment of the Court; Judge Yusuf appended a declaration to the Judgment of the Court; Judge Greenwood appended a separate opinion to the Judgment of the Court; Judge *ad hoc* Torres Bernárdez appended a separate opinion to the Judgment of the Court; Judge *ad hoc* Vinuesa appended a dissenting opinion to the Judgment of the Court.

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1. History of the proceedings and submissions of the Parties (paras. 1–24)

On 4 May 2006, the Argentine Republic (hereinafter "Argentina") filed in the Registry of the Court an Application instituting proceedings against the Eastern Republic of Uruguay (hereinafter "Uruguay") in respect of a dispute concerning the breach, allegedly committed by Uruguay, of obligations under the Statute of the River Uruguay (United Nations, *Treaty Series (UNTS)*, Vol. 1295, No. I-21425, p. 340), a treaty signed by Argentina and Uruguay at Salto (Uruguay) on 26 February 1975 and having entered into force on 18 September 1976 (hereinafter the "1975 Statute"); in the Application, Argentina stated that this breach arose out of "the authorization, construction and future commissioning of two pulp mills on the River Uruguay", with reference in particular to "the effects of such activities on the quality of the waters of the River Uruguay and on the areas affected by the river".

In its Application, Argentina, referring to Article 36, paragraph 1, of the Statute of the Court, seeks to found the jurisdiction of the Court on Article 60, paragraph 1, of the 1975 Statute.

On 4 May 2006, immediately after the filing of the Application, Argentina also submitted a request for the indication of provisional measures based on Article 41 of the Statute and Article 73 of the Rules of Court.

Since the Court included upon the Bench no judge of the nationality of the Parties, each of them exercised its right under Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case. Argentina chose Mr. Raúl Emilio Vinuesa, and Uruguay chose Mr. Santiago Torres Bernárdez.

By an Order of 13 July 2006, the Court, having heard the Parties, found "that the circumstances, as they [then] present[ed] themselves to [it], [we]re not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures".

By another Order of the same date, the Court, taking account of the views of the Parties, fixed 15 January 2007 and 20 July 2007, respectively, as the time-limits for the filing of a Memorial by Argentina and a Counter-Memorial by Uruguay; those pleadings were duly filed within the time-limits so prescribed.

On 29 November 2006, Uruguay, invoking Article 41 of the Statute and Article 73 of the Rules of Court, in turn submitted a request for the indication of provisional measures.

By an Order of 23 January 2007, the Court, having heard the Parties, found "that the circumstances, as they [then]

present[ed] themselves to [it], [we]re not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures".

By an Order of 14 September 2007, the Court, taking account of the agreement of the Parties and of the circumstances of the case, authorized the submission of a Reply by Argentina and a Rejoinder by Uruguay, and fixed 29 January 2008 and 29 July 2008 as the respective time-limits for the filing of those pleadings. The Reply of Argentina and the Rejoinder of Uruguay were duly filed within the time-limits so prescribed.

By letters dated 16 June 2009 and 17 June 2009 respectively, the Governments of Uruguay and Argentina notified the Court that they had come to an agreement for the purpose of producing new documents pursuant to Article 56 of the Rules of Court. By letters of 23 June 2009, the Registrar informed the Parties that the Court had decided to authorize them to proceed as they had agreed. The new documents were duly filed within the agreed time-limit.

On 15 July 2009, each of the Parties, as provided for in the agreement between them and with the authorization of the Court, submitted comments on the new documents produced by the other Party. Each Party also filed documents in support of these comments.

Public hearings were held between 14 September 2009 and 2 October 2009. At the hearings, Members of the Court put questions to the Parties, to which replies were given orally and in writing, in accordance with Article 61, paragraph 4, of the Rules of Court. Pursuant to Article 72 of the Rules of Court, one of the Parties submitted written comments on a written reply provided by the other and received after the closure of the oral proceedings.

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

On behalf of the Government of Argentina,
At the hearing of 29 September 2009:

"For all the reasons described in its Memorial, in its Reply and in the oral proceedings, which it fully stands by, the Argentine Republic requests the International Court of Justice:

1. to find that by authorizing

– the construction of the ENCE mill;

– the construction and commissioning of the Botnia mill and its associated facilities on the left bank of the River Uruguay,

the Eastern Republic of Uruguay has violated the obligations incumbent on it under the Statute of the River Uruguay of 26 February 1975 and has engaged its international responsibility;

2. to adjudge and declare that, as a result, the Eastern Republic of Uruguay must:

(i) resume strict compliance with its obligations under the Statute of the River Uruguay of 1975;

(ii) cease immediately the internationally wrongful acts by which it has engaged its responsibility;

(iii) re-establish on the ground and in legal terms the situation that existed before these internationally wrongful acts were committed;

(iv) pay compensation to the Argentine Republic for the damage caused by these internationally wrongful acts that would not be remedied by that situation being restored, of an amount to be determined by the Court at a subsequent stage of these proceedings;

(v) provide adequate guarantees that it will refrain in future from preventing the Statute of the River Uruguay of 1975 from being applied, in particular the consultation procedure established by Chapter II of that Treaty."

On behalf of the Government of Uruguay,
At the hearing of 2 October 2009:

"On the basis of the facts and arguments set out in Uruguay's Counter-Memorial, Rejoinder and during the oral proceedings, Uruguay requests that the Court adjudge and declare that the claims of Argentina are rejected, and Uruguay's right to continue operating the Botnia plant in conformity with the provisions of the 1975 Statute is affirmed."

2. Legal framework and facts of the case
(paras. 25–47)

The Court recalls that the dispute before the Court has arisen in connection with the planned construction authorized by Uruguay of one pulp mill and the construction and commissioning of another, also authorized by Uruguay, on the River Uruguay.

The boundary between Argentina and Uruguay in the River Uruguay is defined by the bilateral Treaty entered into for that purpose at Montevideo on 7 April 1961 (*UNTS*, Vol. 635, No. 9074, p. 98). Articles 1 to 4 of the Treaty delimit the boundary between the Contracting States in the river and attribute certain islands and islets in it to them. Articles 5 and 6 concern the régime for navigation on the river. Article 7 provides for the establishment by the parties of a "régime for the use of the river" covering various subjects, including the conservation of living resources and the prevention of water pollution of the river. Articles 8 to 10 lay down certain obligations concerning the islands and islets and their inhabitants.

The "régime for the use of the river" contemplated in Article 7 of the 1961 Treaty was established through the 1975 Statute. Article 1 of the 1975 Statute states that the parties adopted it "in order to establish the joint machinery necessary for the optimum and rational utilization of the River Uruguay, in strict observance of the rights and obligations arising from treaties and other international agreements in force for each of the parties".

The first pulp mill at the root of the dispute was planned by "Celulosas de M'Bopicuá S.A." (hereinafter "CMB"), a company formed by the Spanish company ENCE (from the Spanish acronym for "Empresa Nacional de Celulosas de España", hereinafter "ENCE"). This mill, hereinafter referred to as the "CMB (ENCE)" mill, was to have been built on the left bank of the River Uruguay in the Uruguayan department of Río Negro opposite the Argentine region of Gualeguaychú, more specifically to the east of the city of Fray Bentos, near

the "General San Martín" international bridge. On 9 October 2003, MVOTMA (the Uruguayan Ministry of Housing, Land Use Planning and Environmental Affairs) issued an initial environmental authorization to CMB for the construction of the CMB (ENCE) mill.

On 28 November 2005, Uruguay authorized preparatory work to begin for the construction of the CMB (ENCE) mill (ground clearing). On 28 March 2006, the project's promoters decided to halt the work for 90 days. On 21 September 2006, they announced their intention not to build the mill at the planned site on the bank of the River Uruguay.

The second industrial project at the root of the dispute before the Court was undertaken by "Botnia S.A." and "Botnia Fray Bentos S.A." (hereinafter "Botnia"), companies formed under Uruguayan law in 2003 specially for the purpose by Oy Metsä-Botnia AB, a Finnish company. This second pulp mill, called "Orion" (hereinafter the "Orion (Botnia)" mill), has been built on the left bank of the River Uruguay, a few kilometres downstream of the site planned for the CMB (ENCE) mill, and also near the city of Fray Bentos. It has been operational and functioning since 9 November 2007.

3. Scope of the Court's jurisdiction
(paras. 48–66)

The Court observes that the Parties are in agreement that the Court's jurisdiction is based on Article 36, paragraph 1, of the Statute of the Court and Article 60, first paragraph, of the 1975 Statute of the River Uruguay. The latter reads: "Any dispute concerning the interpretation or application of the Treaty[1] and the Statute which cannot be settled by direct negotiations may be submitted by either party to the International Court of Justice." The Parties differ as to whether all the claims advanced by Argentina fall within the ambit of the compromissory clause.

The Court notes that only those claims advanced by Argentina which are based on the provisions of the 1975 Statute fall within the Court's jurisdiction *ratione materiae* under the compromissory clause contained in Article 60. Although Argentina, when making claims concerning noise and "visual" pollution allegedly caused by the pulp mill, invokes the provision of Article 36 of the 1975 Statute, the Court sees no basis in it for such claims. The plain language of Article 36, which provides that "[t]he parties shall co-ordinate, through the Commission, the necessary measures to avoid any change in the ecological balance and to control pests and other harmful factors in the river and the areas affected by it", leaves no doubt that it does not address the alleged noise and visual pollution as claimed by Argentina. Nor does the Court see any other basis in the 1975 Statute for such claims; therefore, the claims relating to noise and visual pollution are manifestly outside the jurisdiction of the Court conferred upon it under Article 60.

Similarly, no provision of the 1975 Statute addresses the issue of "bad odours" complained of by Argentina. Consequently, for the same reason, the claim regarding the impact of bad odours on tourism in Argentina also falls outside the Court's jurisdiction.

The Court then turns to the issue of whether its jurisdiction under Article 60 of the 1975 Statute also encompasses obligations of the Parties under international agreements and general international law invoked by Argentina and to the role of such agreements and general international law in the context of the present case.

Examining Article 1 of the 1975 Statute, the Court takes the view that it sets out only the purpose of the Statute, and that the reference to "the rights and obligations arising from treaties and other international agreements in force for each of the parties" does not suggest that the Parties sought to make compliance with their obligations under other treaties one of their duties under the 1975 Statute; rather, the reference to other treaties emphasizes that the agreement of the Parties on the Statute is reached in implementation of the provisions of Article 7 of the 1961 Treaty *and "in strict observance* of the rights and obligations arising from treaties and other international agreements in force for each of the parties" (emphasis added).

The Court notes that the purpose of the provision in Article 41 *(a)* of the 1975 Statute is to protect and preserve the aquatic environment by requiring each of the parties to enact rules and to adopt appropriate measures. Article 41 *(a)* distinguishes between applicable international agreements and the guidelines and recommendations of international technical bodies. While the former are legally binding and therefore the domestic rules and regulations enacted and the measures adopted by the State have to comply with them, the latter, not being formally binding, are, to the extent they are relevant, to be taken into account by the State so that the domestic rules and regulations and the measures it adopts are compatible with those guidelines and recommendations. However, Article 41 does not incorporate international agreements as such into the 1975 Statute but rather sets obligations for the parties to exercise their regulatory powers, in conformity with applicable international agreements, for the protection and preservation of the aquatic environment of the River Uruguay. Under Article 41 *(b)* the existing requirements for preventing water pollution and the severity of the penalties are not to be reduced. Finally, paragraph *(c)* of Article 41 concerns the obligation to inform the other party of plans to prescribe rules on water pollution.

The Court concludes that there is no basis in the text of Article 41 of the 1975 Statute for the contention that it constitutes a "referral clause". Consequently, the various multilateral conventions relied on by Argentina are not, as such, incorporated in the 1975 Statute. For that reason, they do not fall within the scope of the compromissory clause and therefore the Court has no jurisdiction to rule whether Uruguay has complied with its obligations thereunder.

Lastly, the Court notes that it had recourse, in interpreting the 1975 Statute, to the customary rules on treaty interpretation as reflected in Article 31 of the Vienna Convention on the Law of Treaties. Accordingly the 1975 Statute is to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the [Statute] in their context and in light of its object and purpose". That interpretation will also take into account, together with the context, "any relevant

[1] The Montevideo Treaty of 7 April 1961, concerning the boundary constituted by the River Uruguay (*UNTS*, Vol. 635, No. 9074, p. 98; footnote added).

rules of international law applicable in the relations between the parties". The Court points out that, in the interpretation of the 1975 Statute, taking account of relevant rules of international law applicable in the relations between the Parties nevertheless has no bearing on the scope of its jurisdiction, which remains confined to disputes concerning the interpretation or application of the Statute.

4. The alleged breach of procedural obligations
(paras. 67–158)

The Court notes that the Application filed by Argentina on 4 May 2006 concerns the alleged breach by Uruguay of both procedural and substantive obligations laid down in the 1975 Statute.

(a) The links between the procedural obligations and the substantive obligations
(paras. 71–79)

The Court notes that the object and purpose of the 1975 Statute, set forth in Article 1 of that instrument, is for the Parties to achieve "the optimum and rational utilization of the River Uruguay" by means of the "joint machinery" for co-operation, which originates in the procedural obligations and the substantive obligations under the Statute.

The Court has observed in this respect, in its Order of 13 July 2006, that such use should allow for sustainable development which takes account of "the need to safeguard the continued conservation of the river environment and the rights of economic development of the riparian States" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006,* p. 133, para. 80).

The Court observes that it is by co-operating that the States concerned can jointly manage the risks of damage to the environment that might be created by the plans initiated by one or other of them, so as to prevent the damage in question, through the performance of both the procedural and the substantive obligations laid down by the 1975 Statute. However, whereas the substantive obligations are frequently worded in broad terms, the procedural obligations are narrower and more specific, so as to facilitate the implementation of the 1975 Statute through a process of continuous consultation between the parties concerned. The Court has described the régime put in place by the 1975 Statute as a "comprehensive and progressive régime" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006,* p. 133, para. 81), since the two categories of obligations mentioned above complement one another perfectly, enabling the parties to achieve the object of the Statute which they set themselves in Article 1.

The Court notes that the 1975 Statute created CARU (the Administrative Commission of the River Uruguay) and established procedures in connection with that institution, so as to enable the parties to fulfil their substantive obligations. However, nowhere does the 1975 Statute indicate that a party may fulfil its substantive obligations by complying solely with its procedural obligations, nor that a breach of procedural obligations automatically entails the breach of substantive ones. Likewise, the fact that the parties have complied with their substantive obligations does not mean that they are deemed to have complied ipso facto with their procedural obligations, or are excused from doing so. Moreover, the link between these two categories of obligations can also be broken, in fact, when a party which has not complied with its procedural obligations subsequently abandons the implementation of its planned activity.

Consequently, the Court considers that there is indeed a functional link, in regard to prevention, between the two categories of obligations laid down by the 1975 Statute, but that link does not prevent the States parties from being required to answer for those obligations separately, according to their specific content, and to assume, if necessary, the responsibility resulting from the breach of them, according to the circumstances.

(b) The procedural obligations and their interrelation
(paras. 80–122)

The Court notes that the obligations to inform CARU of any plan falling within its purview under the Statute, to notify the other party of the plan and to negotiate with the other party constitute an appropriate means, accepted by the Parties, of achieving the objective which they set themselves in Article 1 of the 1975 Statute. These obligations are all the more vital when a shared resource is at issue, as in the case of the River Uruguay, which can only be protected through close and continuous co-operation between the riparian States.

The Court examines the nature and role of CARU, and then considers whether Uruguay has complied with its obligations to inform CARU and to notify Argentina of its plans.

The nature and role of CARU
(paras. 84–93)

The Court notes, first, that CARU, in accordance with Article 50 of the 1975 Statute, was endowed with legal personality "in order to perform its functions" and that the parties to the 1975 Statute undertook to provide it with "the necessary resources and all the information and facilities essential to its operations". Consequently, far from being merely a transmission mechanism between the parties, CARU has a permanent existence of its own; it exercises rights and also bears duties in carrying out the functions attributed to it by the 1975 Statute.

The Court observes that, like any international organization with legal personality, CARU is entitled to exercise the powers assigned to it by the 1975 Statute and which are necessary to achieve the object and purpose of the latter, namely, "the optimum and rational utilization of the River Uruguay" (Article 1).

Since CARU serves as a framework for consultation between the parties, particularly in the case of the planned works contemplated in Article 7, first paragraph, of the 1975 Statute, neither of them may depart from that framework unilaterally, as they see fit, and put other channels of communication in its place. By creating CARU and investing it with all the resources necessary for its operation, the parties have sought to provide the best possible guarantees of stability, continuity and effectiveness for their desire to co-operate

in ensuring "the optimum and rational utilization of the River Uruguay".

That is why CARU plays a central role in the 1975 Statute and cannot be reduced to merely an optional mechanism available to the parties which each may use or not, as it pleases. CARU operates at all levels of utilization of the river and furthermore has been given the function of drawing up rules in many areas associated with the joint management of the river and listed in Article 56 of the 1975 Statute.

Consequently, the Court considers that, because of the scale and diversity of the functions they have assigned to CARU, the Parties intended to make that international organization a central component in the fulfilment of their obligations to co-operate as laid down by the 1975 Statute.

Uruguay's obligation to inform CARU
(paras. 94–111)

The Court notes that the obligation of the State initiating the planned activity to inform CARU constitutes the first stage in the procedural mechanism as a whole which allows the two parties to achieve the object of the 1975 Statute, namely, "the optimum and rational utilization of the River Uruguay". This stage, provided for in Article 7, first paragraph, involves the State which is initiating the planned activity informing CARU thereof, so that the latter can determine "on a preliminary basis" and within a maximum period of 30 days whether the plan might cause significant damage to the other party.

To enable the remainder of the procedure to take its course, the parties have included alternative conditions in the 1975 Statute: either that the activity planned by one party should be liable, in CARU's opinion, to cause significant damage to the other, creating an obligation of prevention for the first party to eliminate or minimize the risk, in consultation with the other party; or that CARU, having been duly informed, should not have reached a decision in that regard within the prescribed period.

The Court notes that the Parties are agreed in considering that the two planned mills were works of sufficient importance to fall within the scope of Article 7 of the 1975 Statute, and thus for CARU to have been informed of them. The same applies to the plan to construct a port terminal at Fray Bentos for the exclusive use of the Orion (Botnia) mill, which included dredging work and use of the riverbed.

However, the Court observes that the Parties disagree on whether there is an obligation to inform CARU in respect of the extraction and use of water from the river for industrial purposes by the Orion (Botnia) mill.

The Court also points out that while the Parties are agreed in recognizing that CARU should have been informed of the two planned mills and the plan to construct the port terminal at Fray Bentos, they nonetheless differ as regards the content of the information which should be provided to CARU and as to when this should take place.

The Court points out that the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States" (*Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949,* p. 22). A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State. This Court has established that this obligation "is now part of the corpus of international law relating to the environment" (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I),* p. 242, para. 29).

In the view of the Court, the obligation to inform CARU allows for the initiation of co-operation between the Parties which is necessary in order to fulfil the obligation of prevention. This first procedural stage results in the 1975 Statute not being applied to activities which would appear to cause damage only to the State in whose territory they are carried out.

The Court observes that with regard to the River Uruguay, which constitutes a shared resource, "significant damage to the other party" (Article 7, first paragraph, of the 1975 Statute) may result from impairment of navigation, the régime of the river or the quality of its waters. Moreover, Article 27 of the 1975 Statute stipulates that:

> "[t]he right of each party to use the waters of the river, within its jurisdiction, for domestic, sanitary, industrial and agricultural purposes shall be exercised without prejudice to the application of the procedure laid down in Articles 7 to 12 when the use is liable to affect the régime of the river or the quality of its waters".

The Court notes that, in accordance with the terms of Article 7, first paragraph, the information which must be provided to CARU, at this initial stage of the procedure, has to enable it to determine swiftly and on a preliminary basis whether the plan might cause significant damage to the other party. For CARU, at this stage, it is a question of deciding whether or not the plan falls under the co-operation procedure laid down by the 1975 Statute, and not of pronouncing on its actual impact on the river and the quality of its waters.

The Court considers that the State planning activities referred to in Article 7 of the Statute is required to inform CARU as soon as it is in possession of a plan which is sufficiently developed to enable CARU to make the preliminary assessment (required by paragraph 1 of that provision) of whether the proposed works might cause significant damage to the other party. At that stage, the information provided will not necessarily consist of a full assessment of the environmental impact of the project, which will often require further time and resources, although, where more complete information is available, this should, of course, be transmitted to CARU to give it the best possible basis on which to make its preliminary assessment. In any event, the duty to inform CARU will become applicable at the stage when the relevant authority has had the project referred to it with the aim of obtaining initial environmental authorization and before the granting of that authorization.

The Court observes that, in the present case, Uruguay did not transmit to CARU the information required by Article 7, first paragraph, in respect of the CMB (ENCE) and Orion

(Botnia) mills, despite the requests made to it by the Commission to that effect on several occasions, in particular on 17 October 2002 and 21 April 2003 with regard to the CMB (ENCE) mill, and on 16 November 2004 with regard to the Orion (Botnia) mill. Uruguay merely sent CARU, on 14 May 2003, a summary for public release of the environmental impact assessment for the CMB (ENCE) mill. CARU considered this document to be inadequate and again requested further information from Uruguay on 15 August 2003 and 12 September 2003. Moreover, Uruguay did not transmit any document to CARU regarding the Orion (Botnia) mill. Consequently, Uruguay issued the initial environmental authorizations to CMB on 9 October 2003 and to Botnia on 14 February 2005 without complying with the procedure laid down in Article 7, first paragraph.

Uruguay therefore came to a decision on the environmental impact of the projects without involving CARU, thereby simply giving effect to its domestic legislation.

The Court further notes that on 12 April 2005 Uruguay granted an authorization to Botnia for the first phase of the construction of the Orion (Botnia) mill and, on 5 July 2005, an authorization to construct a port terminal for its exclusive use and to utilize the riverbed for industrial purposes, without informing CARU of these projects in advance.

With regard to the extraction and use of water from the river, the Court takes the view that this is an activity which forms an integral part of the commissioning of the Orion (Botnia) mill and therefore did not require a separate referral to CARU.

Further, the Court considers that the information on the plans for the mills which reached CARU via the companies concerned or from other non-governmental sources cannot substitute for the obligation to inform laid down in Article 7, first paragraph, of the 1975 Statute, which is borne by the party planning to construct the works referred to in that provision. Similarly, in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France)*, the Court observed that

> "[i]f the information eventually came to Djibouti through the press, the information disseminated in this way could not be taken into account for the purposes of the application of Article 17 [of the Convention on Mutual Assistance in Criminal Matters between the two countries, providing that '[r]easons shall be given for any refusal of mutual assistance']" (Judgment of 4 June 2008, para. 150).

The Court concludes that Uruguay, by not informing CARU of the planned works before the issuing of the initial environmental authorizations for each of the mills and for the port terminal adjacent to the Orion (Botnia) mill, has failed to comply with the obligation imposed on it by Article 7, first paragraph, of the 1975 Statute.

Uruguay's obligation to notify the plans to the other party
(paras. 112–122)

The Court notes that, under the terms of Article 7, second paragraph, of the 1975 Statute, if CARU decides that the plan might cause significant damage to the other party or if a decision cannot be reached in that regard, "the party concerned shall notify the other party of this plan through the said Commission". It adds that, under the terms of Article 7, third paragraph, of the 1975 Statute, the notification must describe "the main aspects of the work" and "any other technical data that will enable the notified party to assess the probable impact of such works on navigation, the régime of the river or the quality of its waters".

In the opinion of the Court, the obligation to notify is intended to create the conditions for successful co-operation between the parties, enabling them to assess the plan's impact on the river on the basis of the fullest possible information and, if necessary, to negotiate the adjustments needed to avoid the potential damage that it might cause.

Article 8 stipulates a period of 180 days, which may be extended by the Commission, for the notified party to respond in connection with the plan, subject to it requesting the other party, through the Commission, to supplement as necessary the documentation it has provided.

If the notified party raises no objections, the other party may carry out or authorize the work (Article 9). Otherwise, the former must notify the latter of those aspects of the work which may cause it damage and of the suggested changes (Article 11), thereby opening a further 180-day period of negotiation in which to reach an agreement (Article 12).

The obligation to notify is therefore an essential part of the process leading the parties to consult in order to assess the risks of the plan and to negotiate possible changes which may eliminate those risks or minimize their effects.

The Court notes that the environmental impact assessments which are necessary to reach a decision on any plan that is liable to cause significant transboundary harm to another State must be notified by the party concerned to the other party, through CARU, pursuant to Article 7, second and third paragraphs, of the 1975 Statute. This notification is intended to enable the notified party to participate in the process of ensuring that the assessment is complete, so that it can then consider the plan and its effects with a full knowledge of the facts (Article 8 of the 1975 Statute).

The Court observes that this notification must take place before the State concerned decides on the environmental viability of the plan, taking due account of the environmental impact assessment submitted to it.

In the present case, the Court observes that the notification to Argentina of the environmental impact assessments for the CMB (ENCE) and Orion (Botnia) mills did not take place through CARU, and that Uruguay only transmitted those assessments to Argentina after having issued the initial environmental authorizations for the two mills in question.

The Court concludes that Uruguay failed to comply with its obligation to notify the plans to Argentina through CARU under Article 7, second and third paragraphs, of the 1975 Statute.

(c) Whether the Parties agreed to derogate from the procedural obligations set out in the 1975 Statute
(paras. 123–150)

The "understanding" of 2 March 2004 between Argentina and Uruguay
(paras. 125–131)

The Court notes that while the existence of the "understanding" which the Foreign Ministers of the two States came to on 2 March 2004 has not been contested by the Parties, they differ as to its content and scope. Whatever its specific designation and in whatever instrument it may have been recorded (the CARU minutes), this "understanding" is binding on the Parties, to the extent that they have consented to it and must be observed by them in good faith. They are entitled to depart from the procedures laid down by the 1975 Statute, in respect of a given project pursuant to an appropriate bilateral agreement. The Court recalls that the Parties disagree on whether the procedure for communicating information provided for by the "understanding" would, if applied, replace that provided for by the 1975 Statute. Be that as it may, such replacement was dependent on Uruguay complying with the procedure laid down in the "understanding".

The Court finds that the information which Uruguay agreed to transmit to CARU in the "understanding" of 2 March 2004 was never transmitted. Consequently, the Court cannot accept Uruguay's contention that the "understanding" put an end to its dispute with Argentina in respect of the CMB (ENCE) mill, concerning implementation of the procedure laid down by Article 7 of the 1975 Statute.

Further, the Court observes that, when this "understanding" was reached, only the CMB (ENCE) project was in question, and that it therefore cannot be extended to the Orion (Botnia) project, as Uruguay claims. The reference to both mills is made only as from July 2004, in the context of the PROCEL plan. However, this plan only concerns the measures to monitor and control the environmental quality of the river waters in the areas of the pulp mills, and not the procedures under Article 7 of the 1975 Statute.

The Court concludes that the "understanding" of 2 March 2004 would have had the effect of relieving Uruguay of its obligations under Article 7 of the 1975 Statute, if that was the purpose of the "understanding", only if Uruguay had complied with the terms of the "understanding". In the view of the Court, it did not do so. Therefore the "understanding" cannot be regarded as having had the effect of exempting Uruguay from compliance with the procedural obligations laid down by the 1975 Statute.

The agreement setting up the High-Level Technical Group (the GTAN)
(paras. 132–150)

The Court notes that, in furtherance of the agreement reached on 5 May 2005 between the Presidents of Argentina and Uruguay, the Foreign Ministries of the two States issued a press release on 31 May 2005 announcing the creation of the High-Level Technical Group, referred to by the Parties as the GTAN.

The Court points out that there is no reason to distinguish, as Uruguay and Argentina have both done for the purpose of their respective cases, between referral on the basis of Article 12 and of Article 60 of the 1975 Statute. While it is true that Article 12 provides for recourse to the procedure indicated in Chapter XV, should the negotiations fail to produce an agreement within the 180-day period, its purpose ends there. Article 60 then takes over, in particular its first paragraph, which enables either Party to submit to the Court any dispute concerning the interpretation or application of the Statute which cannot be settled by direct negotiations. This wording also covers a dispute relating to the interpretation or application of Article 12, like any other provision of the 1975 Statute.

The Court notes that the press release of 31 May 2005 sets out an agreement between the two States to create a negotiating framework, the GTAN, in order to study, analyse and exchange information on the effects that the operation of the cellulose plants that were being constructed in the Eastern Republic of Uruguay could have on the ecosystem of the shared Uruguay river, with "the group [having] to produce an initial report within a period of 180 days".

The Court recognizes that the GTAN was created with the aim of enabling the negotiations provided for in Article 12 of the 1975 Statute, also for a 180-day period, to take place. Under Article 11, these negotiations between the parties with a view to reaching an agreement are to be held once the notified party has sent a communication to the other party, through the Commission, specifying

> "which aspects of the work or the programme of operations might significantly impair navigation, the régime of the river or the quality of its waters, the technical reasons on which this conclusion is based and the changes suggested to the plan or programme of operations".

The Court is aware that the negotiation provided for in Article 12 of the 1975 Statute forms part of the overall procedure laid down in Articles 7 to 12, which is structured in such a way that the parties, in association with CARU, are able, at the end of the process, to fulfil their obligation to prevent any significant transboundary harm which might be caused by potentially harmful activities planned by either one of them.

The Court therefore considers that the agreement to set up the GTAN, while indeed creating a negotiating body capable of enabling the Parties to pursue the same objective as that laid down in Article 12 of the 1975 Statute, cannot be interpreted as expressing the agreement of the Parties to derogate from other procedural obligations laid down by the Statute.

Consequently, the Court finds that Argentina, in accepting the creation of the GTAN, did not give up, as Uruguay claims, the other procedural rights belonging to it by virtue of the1975 Statute, nor the possibility of invoking Uruguay's responsibility for any breach of those rights. Nor did it consent to suspending the operation of the procedural provisions of the 1975 Statute. Indeed, under Article 57 of the Vienna Convention on the Law of Treaties of 23 May 1969, concerning "[s]uspension of the operation of a treaty", including, according to the International Law Commission's commentary, suspension of "the operation of . . . some of its provisions" (*Yearbook of the International Law Commission*, 1966, Vol. II, p. 251), suspen-

sion is only possible "in conformity with the provisions of the treaty" or "by consent of all the parties".

The Court further observes that the agreement to set up the GTAN, in referring to "the cellulose plants that are being constructed in the Eastern Republic of Uruguay", is stating a simple fact and cannot be interpreted, as Uruguay claims, as an acceptance of their construction by Argentina.

The Court finds that Uruguay was not entitled, for the duration of the period of consultation and negotiation provided for in Articles 7 to 12 of the 1975 Statute, either to construct or to authorize the construction of the planned mills and the port terminal. It would be contrary to the object and purpose of the 1975 Statute to embark on disputed activities before having applied the procedures laid down by the "joint machinery necessary for the optimum and rational utilization of the [r]iver" (Article 1). However, Article 9 provides that: "[i]f the notified party raises no objections or does not respond within the period established in Article 8 [180 days], the other party may carry out or authorize the work planned".

Consequently, in the opinion of the Court, as long as the procedural mechanism for co-operation between the parties to prevent significant damage to one of them is taking its course, the State initiating the planned activity is obliged not to authorize such work and, *a fortiori*, not to carry it out.

The Court notes, moreover, that the 1975 Statute is perfectly in keeping with the requirements of international law on the subject, since the mechanism for co-operation between States is governed by the principle of good faith. Indeed, according to customary international law, as reflected in Article 26 of the 1969 Vienna Convention on the Law of Treaties, "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith". That applies to all obligations established by a treaty, including procedural obligations which are essential to co-operation between States.

In the view of the Court, there would be no point to the co-operation mechanism provided for by Articles 7 to 12 of the 1975 Statute if the party initiating the planned activity were to authorize or implement it without waiting for that mechanism to be brought to a conclusion. Indeed, if that were the case, the negotiations between the parties would no longer have any purpose.

In this respect, contrary to what Uruguay claims, the preliminary work on the pulp mills on sites approved by Uruguay alone does not constitute an exception. This work does in fact form an integral part of the construction of the planned mills.

The Court concludes that the agreement to set up the GTAN did not permit Uruguay to derogate from its obligations of information and notification under Article 7 of the 1975 Statute, and that by authorizing the construction of the mills and the port terminal at Fray Bentos before the expiration of the period of negotiation, Uruguay failed to comply with the obligation to negotiate laid down by Article 12 of the Statute. Consequently, Uruguay disregarded the whole of the co-operation mechanism provided for in Articles 7 to 12 of the 1975 Statute.

(d) Uruguay's obligations following the end of the negotiation period
(paras. 151–158)

Article 12 refers the Parties, should they fail to reach an agreement within 180 days, to the procedure indicated in Chapter XV.

Chapter XV contains a single article, Article 60, according to which:

> "Any dispute concerning the interpretation or application of the Treaty and the Statute which cannot be settled by direct negotiations may be submitted by either party to the International Court of Justice.
>
> In the cases referred to in Articles 58 and 59, either party may submit any dispute concerning the interpretation or application of the Treaty and the Statute to the International Court of Justice, when it has not been possible to settle the dispute within 180 days following the notification referred to in Article 59."

The Court observes that the "no construction obligation", said to be borne by Uruguay between the end of the negotiation period and the decision of the Court, is not expressly laid down by the 1975 Statute and does not follow from its provisions. Article 9 only provides for such an obligation during the performance of the procedure laid down in Articles 7 to 12 of the Statute.

Furthermore, in the event of disagreement between the parties on the planned activity persisting at the end of the negotiation period, the Statute does not provide for the Court, to which the matter would be submitted by the State concerned, according to Argentina, to decide whether or not to authorize the activity in question. The Court points out that, while the 1975 Statute gives it jurisdiction to settle any dispute concerning its interpretation or application, it does not however confer on it the role of deciding in the last resort whether or not to authorize the planned activities. Consequently, the State initiating the plan may, at the end of the negotiation period, proceed with construction at its own risk.

In its Order of 13 July 2006, the Court took the view that the "construction [of the mills] at the current site cannot be deemed to create a fait accompli" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006,* p. 133, para. 78). Thus, in pronouncing on the merits in the dispute between the Parties, the Court is the ultimate guarantor of their compliance with the 1975 Statute.

The Court concludes that Uruguay did not bear any "no construction obligation" after the negotiation period provided for in Article 12 expired on 3 February 2006, the Parties having determined at that date that the negotiations undertaken within the GTAN had failed. Consequently the wrongful conduct of Uruguay could not extend beyond that period.

5. Substantive obligations
(paras. 159–266)

Having established that Uruguay breached its procedural obligations to inform, notify and negotiate to the extent and for the reasons given above, the Court turns to the question of

the compliance of that State with the substantive obligations laid down by the 1975 Statute.

Burden of proof and expert evidence
(paras. 160–168)

Before taking up the examination of the alleged violations of substantive obligations under the 1975 Statute, the Court addresses two preliminary issues, namely, the burden of proof and expert evidence.

To begin with, the Court considers that, in accordance with the well-established principle of *onus probandi incumbit actori*, it is the duty of the party which asserts certain facts to establish the existence of such facts. This principle which has been consistently upheld by the Court applies to the assertions of fact both by the Applicant and the Respondent.

The Court observes that it is of course to be expected that the Applicant should, in the first instance, submit the relevant evidence to substantiate its claims. This does not, however, mean that the Respondent should not co-operate in the provision of such evidence as may be in its possession that could assist the Court in resolving the dispute submitted to it.

Regarding the arguments put forward by Argentina on the reversal of the burden of proof and on the existence, vis-à-vis each Party, of an equal onus to prove under the 1975 Statute, the Court considers that while a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute, it does not follow that it operates as a reversal of the burden of proof. The Court is also of the view that there is nothing in the 1975 Statute itself to indicate that it places the burden of proof equally on both Parties.

The Court next turns to the issue of expert evidence. Both Argentina and Uruguay have placed before the Court a vast amount of factual and scientific material in support of their respective claims. They have also submitted reports and studies prepared by the experts and consultants commissioned by each of them, as well as others commissioned by the International Finance Corporation in its quality as lender to the project. Some of these experts have also appeared before the Court as counsel for one or the other of the Parties to provide evidence.

The Parties, however, disagree on the authority and reliability of the studies and reports submitted as part of the record and prepared, on the one hand, by their respective experts and consultants, and on the other, by the experts of the IFC, which contain, in many instances, conflicting claims and conclusions.

The Court states that it has given most careful attention to the material submitted to it by the Parties, as shown in its consideration of the evidence with respect to alleged violations of substantive obligations. Regarding those experts who appeared before it as counsel at the hearings, the Court observes that it would have found it more useful had they been presented by the Parties as expert witnesses under Articles 57 and 64 of the Rules of Court, instead of being included as counsel in their respective delegations. The Court indeed considers that those persons who provide evidence before the Court based on their scientific or technical knowledge and on their personal experience should testify before the Court as experts, witnesses or in some cases in both capacities, rather than counsel, so that they may be submitted to questioning by the other party as well as by the Court.

As for the independence of such experts, the Court does not find it necessary in order to adjudicate the present case to enter into a general discussion on the relative merits, reliability and authority of the documents and studies prepared by the experts and consultants of the Parties. It needs only to be mindful of the fact that, despite the volume and complexity of the factual information submitted to it, it is the responsibility of the Court, after having given careful consideration to all the evidence placed before it by the Parties, to determine which facts must be considered relevant, to assess their probative value, and to draw conclusions from them as appropriate. Thus, in keeping with its practice, the Court will make its own determination of the facts, on the basis of the evidence presented to it, and then it will apply the relevant rules of international law to those facts which it has found to have existed.

Alleged violations of substantive obligations
(paras. 169–266)

(a) The obligation to contribute to the optimum and rational utilization of the river (Article 1 of the 1975 Statute)
(paras. 170–177)

The Court observes that Article 1, as stated in the title to Chapter I of the 1975 Statute, sets out the purpose of the Statute. As such, it informs the interpretation of the substantive obligations, but does not by itself lay down specific rights and obligations for the parties. Optimum and rational utilization is to be achieved through compliance with the obligations prescribed by the 1975 Statute for the protection of the environment and the joint management of this shared resource. This objective must also be ensured through CARU, which constitutes "the joint machinery" necessary for its achievement, and through the regulations adopted by it as well as the regulations and measures adopted by the Parties.

The Court recalls that the Parties concluded the treaty embodying the 1975 Statute, in implementation of Article 7 of the 1961 Treaty, requiring the Parties jointly to establish a régime for the use of the river covering, *inter alia*, provisions for preventing pollution and protecting and preserving the aquatic environment. Thus, optimum and rational utilization may be viewed as the cornerstone of the system of co-operation established in the 1975 Statute and the joint machinery set up to implement this co-operation.

The Court considers that the attainment of optimum and rational utilization requires a balance between the Parties' rights and needs to use the river for economic and commercial activities on the one hand, and the obligation to protect it from any damage to the environment that may be caused by such activities, on the other. The need for this balance is reflected in various provisions of the 1975 Statute establishing rights and obligations for the Parties, such as Articles 27, 36, and 41. The Court concludes that it will therefore assess the conduct of Uruguay in authorizing the construction and operation of the Orion (Botnia) mill in the light of those provisions of the 1975 Statute, and the rights and obligations prescribed therein.

Regarding Article 27, it is the view of the Court that it embodies the interconnectedness between equitable and reasonable utilization of a shared resource and the balance between economic development and environmental protection that is the essence of sustainable development.

(b) The obligation to ensure that the management of the soil and woodland does not impair the régime of the river or the quality of its waters (Article 35 of the 1975 Statute)
(paras. 178–180)

The Court is of the view that Argentina has not established its contention that Uruguay's decision to carry out major eucalyptus planting operations, to supply the raw material for the Orion (Botnia) mill, has an impact not only on management of the soil and Uruguayan woodland, but also on the quality of the waters of the river.

(c) The obligation to co-ordinate measures to avoid changes in the ecological balance (Article 36 of the 1975 Statute)
(paras. 181–189)

The Court recalls that Article 36 provides that "[t]he parties shall co-ordinate, through the Commission, the necessary measures to avoid any change in the ecological balance and to control pests and other harmful factors in the river and the areas affected by it".

It is the opinion of the Court that compliance with this obligation cannot be expected to come through the individual action of either Party, acting on its own. Its implementation requires co-ordination through the Commission. It reflects the common interest dimension of the 1975 Statute and expresses one of the purposes for the establishment of the joint machinery which is to co-ordinate the actions and measures taken by the Parties for the sustainable management and environmental protection of the river. The Parties have indeed adopted such measures through the promulgation of standards by CARU. These standards are to be found in Sections E3 and E4 of the CARU Digest. One of the purposes of Section E3 is "[t]o protect and preserve the water and its ecological balance". Similarly, it is stated in Section E4 that the section was developed "in accordance with . . . Articles 36, 37, 38, and 39".

In the view of the Court, the purpose of Article 36 of the 1975 Statute is to prevent any transboundary pollution liable to change the ecological balance of the river by co-ordinating, through CARU, the adoption of the necessary measures. It thus imposes an obligation on both States to take positive steps to avoid changes in the ecological balance. These steps consist not only in the adoption of a regulatory framework, as has been done by the Parties through CARU, but also in the observance as well as enforcement by both Parties of the measures adopted. As the Court emphasized in the *Gabčíkovo-Nagymaros* case:

> "in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage" (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997,* p. 78, para. 140).

The Court considers that the obligation laid down in Article 36 is addressed to both Parties and prescribes the specific conduct of co-ordinating the necessary measures through the Commission to avoid changes to the ecological balance. An obligation to adopt regulatory or administrative measures either individually or jointly and to enforce them is an obligation of conduct. Both Parties are therefore called upon, under Article 36, to exercise due diligence in acting through the Commission for the necessary measures to preserve the ecological balance of the river.

This vigilance and prevention is all the more important in the preservation of the ecological balance, since the negative impact of human activities on the waters of the river may affect other components of the ecosystem of the watercourse such as its flora, fauna, and soil. The obligation to co-ordinate, through the Commission, the adoption of the necessary measures, as well as their enforcement and observance, assumes, in this context, a central role in the overall system of protection of the River Uruguay established by the 1975 Statute. It is therefore of crucial importance that the Parties respect this obligation.

The Court concludes that Argentina has not convincingly demonstrated that Uruguay has refused to engage in such co-ordination as envisaged by Article 36, in breach of that provision.

(d) The obligation to prevent pollution and preserve the aquatic environment (Article 41 of the 1975 Statute)
(paras. 190–219)

Article 41 provides that:

> Without prejudice to the functions assigned to the Commission in this respect, the parties undertake:
>
> (a) to protect and preserve the aquatic environment and, in particular, to prevent its pollution, by prescribing appropriate rules and [adopting appropriate] measures in accordance with applicable international agreements and in keeping, where relevant, with the guidelines and recommendations of international technical bodies;
>
> (b) not to reduce in their respective legal systems:
>
> 1. the technical requirements in force for preventing water pollution, and
>
> 2. the severity of the penalties established for violations;
>
> (c) to inform one another of any rules which they plan to prescribe with regard to water pollution in order to establish equivalent rules in their respective legal systems."

Before turning to the analysis of Article 41, the Court recalls that:

> "the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment" (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I),* p. 242, para. 29).

First, in the view of the Court, Article 41 makes a clear distinction between regulatory functions entrusted to CARU under the 1975 Statute, which are dealt with in Article 56 of

the Statute, and the obligation it imposes on the Parties to adopt rules and measures individually to "protect and preserve the aquatic environment and, in particular, to prevent its pollution". Thus, the obligation assumed by the Parties under Article 41, which is distinct from those under Articles 36 and 56 of the 1975 Statute, is to adopt appropriate rules and measures within the framework of their respective domestic legal systems to protect and preserve the aquatic environment and to prevent pollution. This conclusion is supported by the wording of paragraphs (b) and (c) of Article 41, which refer to the need not to reduce the technical requirements and severity of the penalties already in force in the respective legislation of the Parties as well as the need to inform each other of the rules to be promulgated so as to establish equivalent rules in their legal systems.

Secondly, it is the opinion of the Court that a simple reading of the text of Article 41 indicates that it is the rules and measures that are to be prescribed by the Parties in their respective legal systems which must be "in accordance with applicable international agreements" and "in keeping, where relevant, with the guidelines and recommendations of international technical bodies".

Thirdly, the obligation to "preserve the aquatic environment, and in particular to prevent pollution by prescribing appropriate rules and measures" is an obligation to act with due diligence in respect of all activities which take place under the jurisdiction and control of each party. It is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party. The responsibility of a party to the 1975 Statute would therefore be engaged if it was shown that it had failed to act diligently and thus take all appropriate measures to enforce its relevant regulations on a public or private operator under its jurisdiction. The obligation of due diligence under Article 41 (a) in the adoption and enforcement of appropriate rules and measures is further reinforced by the requirement that such rules and measures must be "in accordance with applicable international agreements" and "in keeping, where relevant, with the guidelines and recommendations of international technical bodies". This requirement has the advantage of ensuring that the rules and measures adopted by the parties both have to conform to applicable international agreements and to take account of internationally agreed technical standards.

Finally, the Court notes that the scope of the obligation to prevent pollution must be determined in light of the definition of pollution given in Article 40 of the 1975 Statute. Article 40 provides that: "For the purposes of this Statute, pollution shall mean the direct or indirect introduction by man into the aquatic environment of substances or energy which have harmful effects." The term "harmful effects" is defined in the CARU *Digest* as:

> "any alteration of the water quality that prevents or hinders any legitimate use of the water, that causes deleterious effects or harm to living resources, risks to human health, or a threat to water activities including fishing or reduction of recreational activities" (Title I, Chapter I, Section. 2, Article 1 *(c)* of the *Digest* (E3)).

In the view of the Court, the rules by which any allegations of breach are to be measured and, more specifically, by which the existence of "harmful effects" is to be determined, are to be found in the 1975 Statute, in the co-ordinated position of the Parties established through CARU (as the introductory phrases to Article 41 and Article 56 of the Statute contemplate) and in the regulations adopted by each Party within the limits prescribed by the 1975 Statute (as paragraphs *(a)*, *(b)* and *(c)* of Article 41 contemplate).

The functions of CARU under Article 56 *(a)* include making rules governing the prevention of pollution and the conservation and preservation of living resources. In the exercise of its rule-making power, the Commission adopted in 1984 the *Digest* on the uses of the waters of the River Uruguay and has amended it since. In 1990, when Section E3 of the *Digest* was adopted, the Parties recognized that it was drawn up under Article 7 *(f)* of the 1961 Treaty and Articles 35, 36, 41 to 45 and 56 *(a)* (4) of the 1975 Statute.

The standards laid down in the *Digest* are not, however, exhaustive. As pointed out earlier, they are to be complemented by the rules and measures to be adopted by each of the Parties within their domestic laws.

The Court will apply, in addition to the 1975 Statute, these two sets of rules to determine whether the obligations undertaken by the Parties have been breached in terms of the discharge of effluent by the mill as well as in respect of the impact of those discharges on the quality of the waters of the river, on its ecological balance and on its biodiversity.

Environmental Impact Assessment
(paras. 203–219)

The Court notes that in order for the Parties properly to comply with their obligations under Article 41 *(a)* and *(b)* of the 1975 Statute, they must, for the purposes of protecting and preserving the aquatic environment with respect to activities which may be liable to cause transboundary harm, carry out an environmental impact assessment. As the Court has observed in the case concerning the *Dispute Regarding Navigational and Related Rights*,

> "there are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used—or some of them—a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law" (*Dispute Regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment of 13 July 2009*, para. 64).

In this sense, the obligation to protect and preserve, under Article 41 (a) of the Statute, has to be interpreted in accordance with 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 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. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.

The Court observes that neither the 1975 Statute nor general international law specify the scope and content of an environmental impact assessment. It points out moreover that Argentina and Uruguay are not parties to the Espoo Convention on Environmental Impact Assessment in a Transboundary Context. Finally, the Court notes that the other instrument to which Argentina refers in support of its arguments, namely, the UNEP Goals and Principles, is not binding on the Parties, but, as guidelines issued by an international technical body, has to be taken into account by each Party in accordance with Article 41 *(a)* in adopting measures within its domestic regulatory framework. Moreover, this instrument provides only that the "environmental effects in an EIA should be assessed with a degree of detail commensurate with their likely environmental significance" (Principle 5) without giving any indication of minimum core components of the assessment. Consequently, it is the view of the Court 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 the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment. The Court also considers that an environmental impact assessment must be conducted prior to the implementation of a project. Moreover, once operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken.

Next, the Court deals with the specific points in dispute with regard to the role of this type of assessment in the fulfilment of the substantive obligations of the Parties, that is to say, first, whether such an assessment should have, as a matter of method, necessarily considered possible alternative sites, taking into account the receiving capacity of the river in the area where the plant was to be built and, secondly, whether the populations likely to be affected, in this case both the Uruguayan and Argentine riparian populations, should have, or have in fact, been consulted in the context of the environmental impact assessment.

The siting of the Orion (Botnia) mill at Fray Bentos
(paras. 207–214)

Regarding the question of whether Uruguay failed to exercise due diligence in conducting the environmental impact assessment, particularly with respect to the choice of the location of the plant, the Court notes that under UNEP Principle 4 *(c)*, an environmental impact assessment should include, at a minimum, "[a] description of practical alternatives, as appropriate". It is also to be recalled that Uruguay has repeatedly indicated that the suitability of the Fray Bentos location was comprehensively assessed and that other possible sites were considered. The Court further notes that the IFC's Final Cumulative Impact Study of September 2006 (hereinafter "CIS") shows that in 2003 Botnia evaluated four locations in total at La Paloma, at Paso de los Toros, at Nueva Palmira, and at Fray Bentos, before choosing Fray Bentos. The evaluations concluded that the limited amount of fresh water in La Paloma and its importance as a habitat for birds rendered it unsuitable, while for Nueva Palmira its consideration was discouraged by its proximity to residential, recreational, and culturally important areas, and with respect to Paso de los Toros insufficient flow of water during the dry season and potential conflict with competing water uses, as well as a lack of infrastructure, led to its exclusion. Consequently, the Court is not convinced by Argentina's argument that an assessment of possible sites was not carried out prior to the determination of the final site.

The Court further notes that any decision on the actual location of such a plant along the River Uruguay should take into account the capacity of the waters of the river to receive, dilute and disperse discharges of effluent from a plant of this nature and scale.

The Court sees no need to go into a detailed examination of the scientific and technical validity of the different kinds of modelling, calibration and validation undertaken by the Parties to characterize the rate and direction of flow of the waters of the river in the relevant area. The Court notes however that both Parties agree that reverse flows occur frequently and that phenomena of low flow and stagnation may be observed in the concerned area, but that they disagree on the implications of this for the discharges from the Orion (Botnia) mill into this area of the river.

The Court considers that in establishing its water quality standards in accordance with Articles 36 and 56 of the 1975 Statute, CARU must have taken into account the receiving capacity and sensitivity of the waters of the river, including in the areas of the river adjacent to Fray Bentos. Consequently, in so far as it is not established that the discharges of effluent of the Orion (Botnia) mill have exceeded the limits set by those standards, in terms of the level of concentrations, the Court finds itself unable to conclude that Uruguay has violated its obligations under the 1975 Statute.

Consultation of the affected populations
(paras. 215–219)

The Court is of the view that no legal obligation to consult the affected populations arises for the Parties from the instruments invoked by Argentina. In any case, it finds that such a consultation by Uruguay did indeed take place.

Question of the production technology used in the Orion (Botnia) mill
(paras. 220–228)

The Court observes that the obligation to prevent pollution and protect and preserve the aquatic environment of the River Uruguay, laid down in Article 41 *(a)*, and the exercise of due diligence implied in it, entail a careful consideration of the technology to be used by the industrial plant to be established, particularly in a sector such as pulp manufacturing, which often involves the use or production of substances which have an impact on the environment. This is all the more important in view of the fact that Article 41 *(a)* provides that the regula-

tory framework to be adopted by the Parties has to be in keeping with the guidelines and recommendations of international technical bodies.

The Court finds that, from the point of view of the technology employed, and based on the documents submitted to it by the Parties, particularly the December 2001 Integrated Pollution Prevention and Control Reference Document on Best Available Techniques in the Pulp and Paper Industry of the European Commission (hereinafter "IPPC-BAT"), there is no evidence to support the claim of Argentina that the Orion (Botnia) mill is not BAT-compliant in terms of the discharges of effluent for each tonne of pulp produced. This finding is supported by the fact that, as shown below, no clear evidence has been presented by Argentina establishing that the Orion (Botnia) mill is not in compliance with the 1975 Statute, the CARU *Digest* and applicable regulations of the Parties in terms of the concentration of effluents per litre of wastewater discharged from the plant and the absolute amount of effluents that can be discharged in a day.

The Court notes that, taking into account the data collected after the start-up of the mill as contained in the various reports, it does not appear that the discharges from the Orion (Botnia) mill have exceeded the limits set by the effluent standards prescribed by the relevant Uruguayan regulation or the initial environmental authorization issued by MVOTMA (MVOTMA, Initial Environmental Authorization for the Botnia Plant (14 February 2005)), except for a few instances in which the concentrations have exceeded the limits. The only parameters for which a recorded measurement exceeded the standards set by Decree No. 253/79 or the initial environmental authorization by MVOTMA are: nitrogen, nitrates, and AOX (Adsorbable Organic Halogens). In those cases, measurements taken on one day exceeded the threshold. However, the initial environmental authorization of 14 February 2005 specifically allows yearly averaging for the parameters. The most notable of these cases in which the limits were exceeded is the one relating to AOX, which is the parameter used internationally to monitor pulp mill effluent, sometimes including persistent organic pollutants (POPs). According to the IPPC-BAT document of the European Commission submitted by the Parties, and considered by them as the industry standard in this sector, "the environmental control authorities in many countries have set severe restrictions on the discharges of chlorinated organics measured as AOX into the aquatic environment". Concentrations of AOX reached at one point on 9 January 2008, after the mill began operations, as high a level as 13 mg/L, whereas the maximum limit used in the environmental impact assessment and subsequently prescribed by MVOTMA was 6 mg/L. However, in the absence of convincing evidence that this is not an isolated episode but rather a more enduring problem, the Court is not in a position to conclude that Uruguay has breached the provisions of the 1975 Statute.

Impact of the discharges on the quality of the waters of the river
(paras. 229–259)

The Court notes that it has before it interpretations of the data provided by experts appointed by the Parties, and provided by the Parties themselves and their counsel. However, in assessing the probative value of the evidence placed before it, the Court will principally weigh and evaluate the data, rather than the conflicting interpretations given to it by the Parties or their experts and consultants, in order to determine whether Uruguay breached its obligations under Articles 36 and 41 of the 1975 Statute in authorizing the construction and operation of the Orion (Botnia) mill.

The Court observes that a post-operational average value of 3.8 mg/L for dissolved oxygen would indeed, if proven, constitute a violation of CARU standards, since it is below the minimum value of 5.6 mg of dissolved oxygen per litre required according to the CARU *Digest* (E3, title 2, Chap. 4, Sec. 2). However, the Court finds that the allegation made by Argentina remains unproven.

The Court finds that, based on the evidence before it, the Orion (Botnia) mill has so far complied with the standard for total phosphorus in effluent discharge. The Court notes that the amount of total phosphorus discharge into the river that may be attributed to the Orion (Botnia) mill is insignificant in proportionate terms as compared to the overall total phosphorus in the river from other sources. Consequently, the Court concludes that the fact that the level of concentration of total phosphorus in the river exceeds the limits established in Uruguayan legislation in respect of water quality standards cannot be considered as a violation of Article 41 *(a)* of the 1975 Statute in view of the river's relatively high total phosphorus content prior to the commissioning of the plant, and taking into account the action being taken by Uruguay by way of compensation.

The Court notes that it has not been established to its satisfaction that the algal bloom episode of 4 February 2009 to which Argentina refers was caused by the nutrient discharges from the Orion (Botnia) mill.

Based on the record, and the data presented by the Parties, the Court concludes that there is insufficient evidence to attribute the alleged increase in the level of concentrations of phenolic substances in the river to the operations of the Orion (Botnia) mill.

The Court recalls that the issue of nonylphenols was included in the record of the case before the Court only by the Report submitted by Argentina on 30 June 2009. Although testing for nonylphenols had been carried out since November 2008, Argentina has not however, in the view of the Court, adduced clear evidence which establishes a link between the nonylphenols found in the waters of the river and the Orion (Botnia) mill. Uruguay has also categorically denied before the Court the use of nonylphenolethoxylates for production or cleaning by the Orion (Botnia) mill. The Court therefore concludes that the evidence in the record does not substantiate the claims made by Argentina on this matter.

The Court considers that there is no clear evidence to link the increase in the presence of dioxins and furans in the river to the operation of the Orion (Botnia) mill.

Effects on biodiversity
(paras. 260–262)

The Court is of the opinion that as part of their obligation to preserve the aquatic environment, the Parties have a duty to

protect the fauna and flora of the river. The rules and measures which they have to adopt under Article 41 should also reflect their international undertakings in respect of biodiversity and habitat protection, in addition to the other standards on water quality and discharges of effluent. The Court has not, however, found sufficient evidence to conclude that Uruguay breached its obligation to preserve the aquatic environment including the protection of its fauna and flora. The record rather shows that a clear relationship has not been established between the discharges from the Orion (Botnia) mill and the malformations of rotifers, or the dioxin found in the sábalo fish or the loss of fat by clams reported in the findings of the Argentine River Uruguay Environmental Surveillance (URES) programme.

Air pollution
(paras. 263–264)

As regards air pollution, the Court is of the view that if emissions from the plant's stacks have deposited into the aquatic environment substances with harmful effects, such indirect pollution of the river would fall under the provisions of the 1975 Statute. Uruguay appears to agree with this conclusion. Nevertheless, in view of the findings of the Court with respect to water quality, it is the opinion of the Court that the record does not show any clear evidence that substances with harmful effects have been introduced into the aquatic environment of the river through the emissions of the Orion (Botnia) mill into the air.

Conclusions on Article 41
(para. 265)

Following a detailed examination of the Parties' arguments, the Court ultimately finds that there is no conclusive evidence in the record to show that Uruguay has not acted with the requisite degree of due diligence or that the discharges of effluent from the Orion (Botnia) mill have had deleterious effects or caused harm to living resources or to the quality of the water or the ecological balance of the river since it started its operations in November 2007. Consequently, on the basis of the evidence submitted to it, the Court concludes that Uruguay has not breached its obligations under Article 41.

Continuing obligations: monitoring
(para. 266)

The Court is of the opinion that both Parties have the obligation to enable CARU, as the joint machinery created by the 1975 Statute, to exercise on a continuous basis the powers conferred on it by the 1975 Statute, including its function of monitoring the quality of the waters of the river and of assessing the impact of the operation of the Orion (Botnia) mill on the aquatic environment. Uruguay, for its part, has the obligation to continue monitoring the operation of the plant in accordance with Article 41 of the Statute and to ensure compliance by Botnia with Uruguayan domestic regulations as well as the standards set by CARU. The Parties have a legal obligation under the 1975 Statute to continue their co-operation through CARU and to enable it to devise the necessary means to promote the equitable utilization of the river, while protecting its environment.

6. The claims made by the Parties in their final submissions
(paras. 267–281)

The Court considers that its finding of wrongful conduct by Uruguay in respect of its procedural obligations per se constitutes a measure of satisfaction for Argentina. As Uruguay's breaches of the procedural obligations occurred in the past and have come to an end, there is no cause to order their cessation.

The Court, not having before it a claim for reparation based on a régime of responsibility in the absence of any wrongful act, deems it unnecessary to determine whether Articles 42 and 43 of the 1975 Statute establish such a régime. But it cannot be inferred from these articles, which specifically concern instances of pollution, that their purpose or effect is to preclude all forms of reparation other than compensation for breaches of procedural obligations under the 1975 Statute.

Examining Argentina's claim that the Orion (Botnia) mill should be dismantled on the basis of *restitutio in integrum*, the Court recalls that customary international law provides for restitution as one form of reparation for injury, restitution being the re-establishment of the situation which existed before occurrence of the wrongful act. The Court further recalls that, where restitution is materially impossible or involves a burden out of all proportion to the benefit deriving from it, reparation takes the form of compensation or satisfaction, or even both.

The Court notes that like other forms of reparation, restitution must be appropriate to the injury suffered, taking into account the nature of the wrongful act having caused it.

As the Court has shown, the procedural obligations under the 1975 Statute did not entail any ensuing prohibition on Uruguay's building of the Orion (Botnia) mill, failing consent by Argentina, after the expiration of the period for negotiation. The Court has however observed that construction of that mill began before negotiations had come to an end, in breach of the procedural obligations laid down in the 1975 Statute. Further, as the Court has found, on the evidence submitted to it, the operation of the Orion (Botnia) mill has not resulted in the breach of substantive obligations laid down in the 1975 Statute. As Uruguay was not barred from proceeding with the construction and operation of the Orion (Botnia) mill after the expiration of the period for negotiation and as it breached no substantive obligation under the 1975 Statute, ordering the dismantling of the mill would not, in the view of the Court, constitute an appropriate remedy for the breach of procedural obligations.

As Uruguay has not breached substantive obligations arising under the 1975 Statute, the Court is likewise unable, for the same reasons, to uphold Argentina's claim in respect of compensation for alleged injuries suffered in various economic sectors, specifically tourism and agriculture.

Moreover, the Court fails to see any special circumstances in the present case requiring it to adjudge and declare, as Argentina requests, that Uruguay must provide adequate guarantees that it "will refrain in future from preventing the Statute of the River Uruguay of 1975 from being applied, in

particular the consultation procedure established by Chapter II of that Treaty".

The Court further finds that Uruguay's request for confirmation of its right "to continue operating the Botnia plant in conformity with the provisions of the 1975 Statute" is without any practical significance, since Argentina's claims in relation to breaches by Uruguay of its substantive obligations and to the dismantling of the Orion (Botnia) mill have been rejected.

Lastly, the Court points out that the 1975 Statute places the Parties under a duty to co-operate with each other, on the terms therein set out, to ensure the achievement of its object and purpose. This obligation to co-operate encompasses ongoing monitoring of an industrial facility, such as the Orion (Botnia) mill. In that regard the Court notes that the Parties have a long-standing and effective tradition of co-operation and co-ordination through CARU. By acting jointly through CARU, the Parties have established a real community of interests and rights in the management of the River Uruguay and in the protection of its environment.

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Joint dissenting opinion of Judges Al-Khasawneh and Simma

Judges Al-Khasawneh and Simma begin their joint dissenting opinion by highlighting their concurrence with the Judgment of the Court in so far as Uruguay's procedural obligations to inform and to notify Argentina of the construction of the pulp mills are concerned. However, because they consider that the Court has evaluated the scientific evidence brought before it by the Parties in a methodologically flawed manner, they dissent on the finding by the Court that there has been no breach of Uruguay's substantive obligations under Articles 35, 36 and 41 of the 1975 Statute of the River Uruguay.

Judges Al-Khasawneh and Simma emphasize the exceptionally fact-intensive nature of the case, which for them raises serious questions as to the role that scientific evidence can play in international judicial disputes. They consider that the traditional methods of evaluating evidence are deficient in assessing the relevance of such complex, technical and scientific facts, and that in the present case the assessment of scientific questions by experts is indispensable, as such experts possess knowledge and expertise to evaluate the increasingly complex nature of the facts put before courts such as the International Court of Justice. Judges Al-Khasawneh and Simma argue that the Court on its own is not in a position adequately to assess and weigh complex scientific evidence of the type presented by the Parties. They disagree with the decision of the Court to adhere to its traditional rules on the burden of proof and to oblige Argentina to substantiate claims on issues which they claim the Court cannot fully comprehend without recourse to expert assessment.

Judges Al-Khasawneh and Simma present two alternatives. Firstly, they argue that one route for the Court, under Article 62 of its Rules, would have been to call upon the Parties to produce evidence or explanations that it considered necessary for understanding the matters in issue. Secondly, they argue that the Court, under Article 50 of its Statute, could have entrusted an individual, body, bureau, commission, or other organization with the task of carrying out an enquiry or giving an expert opinion. Without expressing a preference for either of these options, they consider that it would have behoved the Court to have made recourse to at least one of the sources of external expertise which it is empowered to consult. In this regard, Judges Al-Khasawneh and Simma point out that in both the *Corfu Channel* and *Delimitation of the Maritime Boundary in the Gulf of Maine Area* cases, the Court exercised its powers under Article 50 of the Statute and appointed technical experts to assist it in the resolution of the dispute before it.

Next, the joint dissenting opinion turns to a summary review of recent scholarly criticism of the Court's practice of persisting, when faced with sophisticated scientific and technical evidence in support of the legal claims made by States before it, in resolving these issues purely through the application of its traditional legal techniques. Judges Al-Khasawneh and Simma conclude that, in a scientific case such as the present dispute, the insights needed to make sound legal decisions necessarily emanate from experts consulted by the Court; they emphasize that it remains for the Court to discharge the exclusively judicial functions, such as the interpretation of legal terms, the legal categorization of factual issues, and the assessment of the burden of proof.

Judges Al-Khasawneh and Simma claim that, so long as the Court persists in resolving complex scientific disputes without recourse to outside expertise in an appropriate institutional framework such as that offered under Article 50 of the Statute, it willingly deprives itself of the ability fully to consider the facts submitted to it and of several other advantages: the interaction with experts in their capacity of experts and not as counsel; the advantage of giving the Parties a voice in establishing the manner in which those experts would have been used; a chance for the Parties to review the Court's choice of experts (and for which subject-matter experts were needed); and the chance for the Parties to comment on any expert conclusions emerging from that process.

Judges Al-Khasawneh and Simma consider that the Court's unstated practice, particularly in boundary or maritime delimitation cases, of having recourse to internal experts without informing the Parties, is especially unsatisfactory in disputes with a complex scientific component. They consider that adopting such a practice would deprive the Court of the above-mentioned advantages of transparency, openness, procedural fairness, and the ability of the Parties to comment upon or otherwise assist the Court in understanding the evidence before it. The joint dissenting opinion emphasizes the overall duty of the Court to facilitate the production of evidence and to reach the best representation of the essential facts in a case, in order best to resolve a dispute.

The joint dissenting opinion then surveys the *Iron Rhine Railway* and *Arbitration between Guyana and Suriname* arbitral awards, and several decisions of the Appellate Body of the World Trade Organization. Judges Al-Khasawneh and Simma observe in this regard that each of these dispute-settlement bodies consulted experts in a comprehensive manner at dif-

ferent points in their work, and conclude accordingly that the Court should have considered pursuing a similar approach, subject of course to the procedures laid out under its Statute. They regret that the Judgment in the present case is a wasted opportunity for the Court to establish itself as a careful, systematic court which can be entrusted with complex scientific evidence in the resolution of international disputes.

The joint dissenting opinion next turns to the question of the jurisdiction of the Court in the present case. Judges Al-Khasawneh and Simma consider that the 1975 Statute provides a dual role for the Court: firstly, under its Article 60, to resolve disputes relating to interpreting and applying rights and obligations under the Statute; and secondly, under its Article 12, as the Court acts as the primary adjudicator on technical and/or scientific matters when the Parties cannot reach agreement. The two judges consider that the latter function is qualitatively different from the role that was embraced by the Court in the present case, especially in so far as the perspective of Article 12 is decisively forward-looking: here, the Court is to step in, *before* a project is realized, where there is disagreement on whether there are potentially detrimental effects to the environment. Judges Al-Khasawneh and Simma consider that the procedure of Article 12 implies that the Court had to take a forward-looking, prospective approach, engage in a comprehensive risk assessment and embrace a preventive rather than compensatory logic when determining what this risk might entail. They also consider that the Court's proper discharge of its responsibilities under Article 12 would not only have facilitated the recourse to experts for which they earlier argued, but that it also would have entrenched prospective, preventive reasoning at the institutional level in the assessment of risks from the authorization process onwards, taking into account the often irreversible character of damage to the environment.

Judges Al-Khasawneh and Simma conclude with a final observation as to the extreme elasticity and generality of the substantive principles involved in the law relating to environmental protection. They consider that in such a situation, respect for procedural obligations assumed by States takes on additional importance and comes to the forefront as being an essential indicator of whether, in a concrete case, substantive obligations were or were not breached. For this reason, Judges Al-Khasawneh and Simma consider that the Court's conclusion, whereby non-compliance with the pertinent procedural obligations in the 1975 Statute has eventually had no effect on compliance with the substantive obligations also contained therein, is a proposition that cannot be easily accepted. They argue that the Court's recognition of a functional link between procedural and substantive obligations laid down in the Statute is insufficient, as the Court does not give full weight to this interdependence.

Judges Al-Khasawneh and Simma reiterate, by way of conclusion, their regret that the Court in the present case has missed what they consider a golden opportunity to demonstrate to the international community its ability, and preparedness, to approach scientifically complex disputes in a state-of-the-art manner.

Separate opinion of Judge Keith

In his separate opinion Judge Keith, first, addresses certain aspects of the fact-finding process in which the Court engaged in reaching its conclusion that Uruguay was not in breach of its substantive obligations. He summarizes the technical and scientific evidence provided by each Party in support of its pleadings, relating to the impact of the Botnia plant on the river, the information provided by the Parties in a further exchange of documents following the two rounds of written argument, and in the course of the hearing. He does that to emphasize the extent in time and space of the information, covering 50 kilometres of the river and 30 monitoring stations, its quality and its consistency. That consistency may in general be seen in the data collected up and downstream of the plant, before and after it began operating, and from Argentinian and Uruguayan sources. He indicates why he does not consider there would have been any value, in the circumstances of this case, for the Court to have exercised its power to order an enquiry or to seek an expert opinion—actions which neither Party requested. He calls attention to statements made by Argentina which support the Court's evaluation of the extensive data put before it. Judge Keith concludes this part of his opinion by highlighting the continuing obligation of Uruguay to prevent pollution of the river in respect of the operation of the Botnia Plant.

In the second part of his opinion, relating to Uruguay's procedural obligations, Judge Keith states his agreement with the rulings of the Court (1) that Uruguay breached its obligation to notify in proper time the plans for two plants, and (2) that, once the negotiating period of 180 days ended on 30 January 2006, Uruguay was not barred from authorizing the completion and operation of the plants. He gives his reasons for concluding, contrary to the ruling made by the Court, that the actions taken by Uruguay relating to each plant during that period did not breach its procedural obligations. The reasons relate to the course of the negotiations, as they appear in the record before the Court, and to the particular actions, three in total, taken by Uruguay in that period relating to the two plants.

Declaration of Judge Skotnikov

Judge Skotnikov has voted in favour of all the operative paragraphs of the Judgment. However, he does not fully concur with the Court's interpretation of the 1975 Statute of the River Uruguay.

He disagrees with the majority's logic according to which, after the end of the negotiation period, Uruguay, rather than referring its dispute with Argentina to the Court in accordance with Article 12 of the 1975 Statute, was free to proceed with the construction of the Botnia mill. In his view, a "no construction obligation" clearly follows from the provisions of the Statute and from its object and purpose.

The purpose of Articles 7 to 12 of the 1975 Statute is to prevent unilateral action which is not in conformity with the substantive provisions of the Statute, and thus to avoid causing injury to the rights of each Party while protecting their shared watercourse. It is therefore only logical that, if there is still no agreement after negotiations have run their course, the

Party initiating the project has the option of either abandoning it altogether or requesting the Court, in accordance with Article 12 of the 1975 Statute, to resolve the dispute. Under this scheme of things, no injury is inflicted on either Party's rights and the shared watercourse remains protected.

By contrast, as follows from the interpretation contained in the Judgment, the Parties, when concluding the 1975 Statute, must have agreed to allow such an injury to occur, with the possibility of it later being rectified by a decision of the Court. The Parties cannot be presumed to have agreed to such an arrangement, since it is incompatible with the object and purpose of the Statute of the River Uruguay as defined in Article 1 ("the optimum and rational utilization of the River Uruguay"). There is nothing "optimum and rational" about including in the Statute a possibility of causing damage to the river and incurring financial losses, first by constructing new channels and other works (in violation of substantive obligations under the Statute) and then by destroying them.

In Judge Skotnikov's view, Article 12 of the 1975 Statute establishes, on top of what is a classical compromissory clause contained in Article 60, an obligation for each Party to resolve disputes concerning activities mentioned in Article 7 by referral to the Court. This clearly follows from the language of Article 12: "[s]hould the Parties fail to reach agreement within 180 days following the notification referred to in article 11, the procedure indicated in chapter XV [i.e., Article 60] shall be followed".

In the Court's interpretation, Article 12 is deprived of any meaning. There would be no need for this article at all if its only purpose were to activate Article 60, since the Parties could always have direct recourse to the latter.

Judge Skotnikov concludes that Articles 7 to 12 of the Statute of the River Uruguay clearly establish a procedural mechanism which includes not only an obligation to inform, notify and, if there are objections, to negotiate, but also an obligation for both Parties, should the negotiations fail, to settle the dispute by referring it to the Court.

Separate opinion of Judge Cançado Trindade

1. In his separate opinion, composed of 16 parts, Judge Cançado Trindade begins by pointing out that the identification itself of the applicable law in the *cas d'espèce* discloses the Court's own conception of the Law, and ineluctably leads to the consideration of the general theme of the "sources" of law, of international law. Although he accompanied the majority's decision in its findings on the basis of a strict valuation of the evidence produced before the Court, he regretted not to be able to concur with parts of the Court's reasoning, in particular its unfortunate overlooking of the general principles of law.

2. He would have supported reliance to a much greater extent on those legal principles, as, in his view, these latter (encompassing principles of international environmental law), together with the 1975 Statute of the River Uruguay, conform the applicable law in the present case. He pondered that his own personal position is in line with a current of international legal thinking, sedimented along the last nine decades (1920–2010), which, ever since the mid-seventies, has marked presence also in the domain of international environmental law.

3. Judge Cançado Trindade recalls that, already in the origins of the legislative history of Article 38 of the PCIJ/ICJ Statute (in 1920), and in its subsequent developments (from 1945 onwards) there was a trend in legal doctrine—cultivated also in subsequent decades—that sustained that the reference to "general principles of law" in that statutory provision was meant to refer not only to those principles found *in foro domestico*, but likewise to those identified at international law level. And these latter were not only those of general international law, but encompassed likewise the principles which were proper to a specific domain of international law, such as international environmental law (Parts I-III).

4. Next (Parts IV-VI), Judge Cançado Trindade proceeds to a review of the recourse to principles in the litigation before the ICJ, singling out relevant doctrinal developments on general principles of law to the same effect. He adds that those principles (of domestic as well as international law origin) are endowed with autonomy: the *mens legis* of the expression "general principles of law", as it appears in Article 38 (1) *(c)* of the ICJ Statute, indicates that those principles are not to be subsumed under custom or treaties: they constituted an autonomous "source", encompassing principles of both substantive and procedural law. Furthermore, their scope of application *ratione materiae* has in recent years been the object of attention of contemporary international tribunals, and he believes that an important role is here to be played by the ICJ, attentive as it ought to be to the role of general principles, of particular relevance in the evolution of the expanding *corpus juris* of international law in our times.

5. The following Parts VII and VIII of his separate opinion turn attention to the principle of prevention and the precautionary principle, proper to the domain of international environmental law, and invoked and acknowledged in the present case by both contending Parties, Argentina and Uruguay, which dwelt upon their formulation, content and applicability. After examining the key elements of risks, and scientific uncertainties, in the configuration of the precautionary principle, Judge Cançado Trindade singles out the ineluctable long-term dimension of the inter-generational equity (Part IX), which, in his view, should also have been acknowledged in the present Judgment of the Court. The last principle he draws attention to is that of sustainable development, also raised by both Uruguay and Argentina (Part X), in line with the deep-rooted tradition of Latin American international legal thinking of being attentive to the role reserved to general principles of law.

6. Moving to the judicial determination of the facts (Part XI), he would have preferred that the Court's decision would have referred to the possibility open to it to obtain further evidence *motu proprio*. He reviews the practice of the PCIJ/ICJ in the handling of evidence, and concludes that, in the light of the Court's own experience so far in the handling of conflicting evidence, in the present case of the *Pulp Mills* not all the possibilities of fact-finding were exhausted. Questions may thus be raised whether, if the Court would have made use of this additional possibility (e.g., by means of *in loco* fact-finding)—as he thinks it should have—its conclusion as to substantive obligations under Articles 35, 36 and 41 of the 1975 Statute of the River Uruguay may have been different:

any answer to this question would appear to him to be to a large extent conjectural.

7. The next set of Judge Cançado Trindade's considerations (Part XII) pertained to related aspects of the present case, lying beyond the inter-State dimension, to which he attributes particular importance, namely: *(a)* the imperatives of human health and the well-being of peoples; *(b)* the role of civil society in environmental protection; *(c)* the objective character of (environmental) obligations, beyond reciprocity; and *(d)* the legal personality of the Administrative Commission of River Uruguay (CARU). Attention to public health and the well-being of peoples—he recalls—was constantly present throughout the recent cycle of United Nations World Conferences, and has been raised on previous occasions before the ICJ itself.

8. The present case of the *Pulp Mills*, before becoming an inter-State case in October 2003, had originally been brought to the attention of CARU, by the end of 2001, by an Argentine non-governmental organization (NGO). In successive phases of the procedure of the present case, NGOs and other entities of civil society of both countries, Argentina and Uruguay, marked their presence by means of their participation in relation to environmental impact assessment and environmental monitoring. Both Uruguay and Argentina acknowledged the ineluctable partnership between public power and entities of the civil society when it came to matters of general public interest, such as environmental protection. Their indications were that, in the handling of environmental issues, States benefit from the contribution of NGOs and other entities of civil society, to the ultimate benefit of their populations.

9. Judge Cançado Trindade further argues that, in domains of *protection*, such as that of the environment, it is the *objective* character of obligations that ultimately matters. He is thus sceptical of any alleged ontological distinction between those obligations (such as, e.g., those of conduct and of result). This again brings to the fore the relevance of general principles of law (e.g., that of good faith, asserting the principle *pacta sunt servanda*). In addition, the legal personality of CARU, acknowledged by the Court itself, brought the present case beyond the strict inter-State dimension. Although the implications inferred by Uruguay and Argentina, from such legal personality, were not the same—it was beyond question that the 1975 Statute had established an institutional framework for the fulfilment, thereunder, of the common interests of the States parties. There was a procedure, laid down in Articles 7 to 12 of the 1975 Statute, to be necessarily followed by the Parties; their continued co-operation, through CARU, was intended to enable this latter—as reckoned by the Court itself—to devise the appropriate means to promote the equitable utilization of the River Uruguay, while protecting its environment.

10. The last set of reflections on the part of Judge Cançado Trindade pertained to interrelated issues of juridical epistemology (Parts XIII-XVI), namely: *(a)* fundamental principles as *substratum* of the legal order itself; *(b) prima principia* in their axiological dimension; and *(c)* general principles of law as indicators of the *status conscientiae* of the international community. He contends that the general principles of law have inspired not only the interpretation and the application of the legal norms, but also the law-making process itself of their elaboration; they reflect the *opinio juris*, which, in its turn, lies on the basis of the formation of Law. Such principles mark presence at both national and international levels. There are fundamental principles of law which identify themselves with the very foundations of the legal system, revealing the values and ultimate ends of the international legal order and fulfilling the necessities of the international community.

11. Such principles are, in his view, an expression of an objective "idea of justice", wherefrom they secure the unity of Law, touching on the foundations of the *necessary* law of nations. In his perception, they emanate from human or juridical conscience, as the ultimate material source of all Law. Judge Cançado Trindade argues that, if the observance of the precautionary principle, for example, had prevailed all the time, in the attitude of the two contending Parties as well as in that of the Court itself, that would have made a difference in the contentious situation now settled by the Court. The two States concerned would in all probability not have reached their so-called "understanding", in the Ministerial Meeting of 2 March 2004, in a way circumventing the procedure laid down in Articles 7 to 12 of the 1975 Statute (in particular Article 7). And the Court, in turn, would have reached a decision distinct from the one it took on 13 July 2006, and would have, in all probability, ordered or indicated the requested provisional measures of protection (to be effective until the present Judgment on the merits of the *Pulp Mills* case).

12. General principles of law indeed confer to the legal order (both national and international)—he adds—its ineluctable axiological dimension; they lie on the foundations of the *jus necessarium*, and reveal the values which inspire the whole legal order. The identification of the basic principles has accompanied *pari passu* the emergence and consolidation of all the domains of law. Judge Cançado Trindade concludes that international environmental law provides a good illustration in this respect, and could hardly be conceived nowadays without reference to the principles of prevention, of precaution, and of sustainable development with its temporal dimension, together with the long-term temporal dimension underlying inter-generational equity. In his perception, the International Court of Justice, as the World Court, cannot overlook principles.

Declaration of Judge Yusuf

Judge Yusuf, who concurs in the Judgment, appends a declaration in which he expresses his reservations regarding the manner in which the Court decided to handle the factual material presented by the Parties. In his view, the Court should have had recourse to expert assistance, as provided in Article 50 of its Statute, to help it gain a more profound insight into the scientific and technical intricacies of the evidence submitted by the Parties.

In the opinion of Judge Yusuf, the Court's recourse to an enquiry or to an expert opinion in the handling of the complex technical and scientific material submitted to it, far from undermining its judicial function, could have assisted it to elucidate the facts and to clarify the validity of the methods used to establish the scientific data presented to it. Such recourse

would not have affected the role of the judge as the arbiter of fact, since it is ultimately the responsibility of the Court to decide on the relevance and significance of the results of the work of the experts.

Judge Yusuf concludes that, to avoid errors in the appreciation or determination of facts that can substantially undermine the credibility of the Court, and to assure States appearing before the Court that scientifically complex facts related to their cases are fully understood and appreciated by the Court, it would serve the Court well in the future to develop a clear strategy which would enable it to assess the need for an expert opinion at an early stage of its deliberations on a case.

Separate opinion of Judge Greenwood

In his separate opinion, Judge Greenwood states that he agrees with the decision that Uruguay has committed no breach of its substantive obligations under the Statute of the River Uruguay and with the decision that Uruguay failed to comply with its procedural obligations under Articles 7 to 12 of the Statute. He considers, however, that the breach of the procedural obligations was more limited in scope than that found by the Court. In his opinion, the action authorized by Uruguay with regard to the two mills during the period of negotiation were not sufficient to amount to a violation of the obligation under Article 9 of the Statute or the obligation to negotiate in good faith.

Judge Greenwood considers that the burden of proof was on Argentina to establish the facts which it asserted on the balance of probabilities. He agrees with the methodology adopted by the Court and with its conclusion that Argentina had failed to prove its case regarding breaches of the substantive obligations. He adds that it is important that a party appearing before the Court maintain a clear distinction between the functions of witnesses and experts, on the one hand, and those of counsel, on the other. That is important both to assist the Court and to ensure that the right of the other party to put questions to an expert or witness is properly respected. Someone who is going to speak of facts within their own knowledge or offer their own opinion on scientific data should not do so as counsel but should make the declaration required by Article 64 of the Rules of Court and be subject to questioning.

Judge Greenwood concludes by drawing the attention of the Parties to their continuing obligations under the Statute.

Separate opinion of Judge *ad hoc* Torres Bernárdez

1. As is stated in the introduction to his separate opinion, Judge Torres Bernárdez endorses many of the conclusions reached by the Court in its Judgment, notably those relating: to the rejection of the Applicant's claims that the Respondent breached substantive obligations under the Statute of the River Uruguay; and to the dismantling of the Orion (Botnia) mill in Fray Bentos. He also fully supports the conclusions in the Judgment in respect of the scope of the Court's jurisdiction and the applicable law, the burden of proof and expert evidence, the rejection of the supposed "strict link" between the Statute's procedural and substantive obligations, the rejection of the alleged "no construction obligation" said to be borne by the Respondent between the end of direct negotiations and the decision of the Court; and he agrees that satisfaction is appropriate reparation for the breach of procedural obligations.

2. However, Judge Torres Bernárdez does not agree with certain considerations evoked in the Judgment relating to the Respondent's breach, alleged by Argentina, of the Statute's procedural obligations, which form the basis of the majority's finding on this point. He reaches very different conclusions to those of the majority on this matter. Wishing to explain his reasons for voting against point 1 of the Judgment's operative clause, Judge Torres Bernárdez focuses exclusively on those issues in his separate opinion.

1. Preliminary considerations

3. Firstly, in his opinion, Judge Torres Bernárdez points out that an excessively "institutional understanding" of CARU informs the Judgment and that, as a result, its reasoning gives a picture of the Commission's powers and of its role in the prior consultation process under Articles 7 to 12 of the 1975 Statute of the River Ururguay with which he does not agree. He believes that this understanding has affected the method of interpretation adopted by the majority, which has given precedence to certain interpretative elements to the detriment of others that are equally applicable. Judge Torres Bernárdez is of the opinion that the general rule of interpretation codified in Article 31 of the Vienna Convention on the Law of Treaties is one integrated rule, with each provision forming part of the whole. Granted, that rule incorporates the "relevant rules of international law applicable in the relations between the parties", but it has other components as well, and the interpreter must weigh each of these in an interpretation process where the starting point is to clarify the meaning of the text, not at the outset to ascertain the intent of the Parties.

4. In point of fact, the method of interpretation adopted by the majority facilitates an "evolutionary" interpretation of the provisions of the Statute of the River Uruguay. Judge Torres Bernárdez approves of this in so far as the *Statute's rules relating to substantive obligations* are concerned. This is indicated by the wording of Article 41 of the Statute concerning the obligation to protect and preserve the aquatic environment and to prevent the pollution of the river water. Furthermore, both Parties in this case accept the irrefutable developments in international environmental law over recent years.

5. On the other hand, Judge Torres Bernárdez does not believe that the methods of interpretation leading to such an evolutionary conclusion are justified in this case in respect of the *Statute's rules relating to procedural obligations*. Neither the wording of these rules in their context, nor subsequent agreements between the Parties, nor the practice of the Parties in their interpretation and application of the treaty, would warrant the application of methods leading to evolutionary interpretations. According to Judge Torres Bernárdez, this affects the territorial sovereignty of the State, i.e., an area where limits on sovereignty are not to be presumed (see the case concerning *S.S. "Wimbledon", P.C.I.J. Series A, No. 1*, p. 24).

6. Moreover, Judge Torres Bernárdez points out that the language itself of Article 7, paragraph 1, of the Statute introduces a precondition to the applicability of the rule: before

informing CARU, it is first necessary to determine whether the project in question falls within the scope of the obligation laid down by that provision of the Statute. Article 7 leaves this initial characterization to the Party planning the works, namely, the territorial sovereign, without prejudice to the other Party's right to dispute this initial characterization. In the present case, the Applicant has affirmed its right to make the initial characterization of its own projects and, on this basis, its unwavering practice has been, according to the record, to build industrial plants without informing CARU. Judge Torres Bernárdez believes that Argentina cannot deny that Uruguay had the right initially to characterize the CMB (ENCE) project in October 2003, because *allegans contraria non audiendus est*.

7. Judge Torres Bernárdez also states that the CARU minutes (for example, those concerning the *Transpapel* project) offer a good illustration of how this question of the initial characterization of planned works has been kept in mind in situations involving plans for national industrial plants by one or other of the Parties on *their respective banks of the river*, and of how the reactions of Commission members have been far from consistent. They even cross over. For example, the initial characterization, in 2003, of the CMB (ENCE) project by Mr. Opperti, the Minister for Foreign Affairs of Uruguay, appears to be in line with or very similar to that of the head of Argentina's delegation to CARU, Ambassador Carasales, for the *Transpapel* project.

8. Furthermore, Judge Torres Bernárdez recalls that both Parties acknowledge: (1) that CARU is without the power to approve the projects of which it is informed by the party planning the works; and (2) that the rules of Article 7, like all of the Statute's other rules on the "prior consultation" régime, do not constitute *jus cogens* and that, therefore, the Parties are free to agree not to apply them in a given case.

2. Stage of the procedure at which Uruguay was obliged to inform CARU about the work it was planning to carry out

9. According to the Judgment, the obligation of the State planning activities specified in Article 7 of the Statute to inform CARU "will become applicable at the stage when the relevant authority has had the project referred to it with the aim of obtaining initial environmental authorization and before the granting of that authorization" (para. 105). Judge Torres Bernárdez does not agree because, in his opinion, the text of Article 7, paragraph 1, of the Statute does not refer to such an early stage in the planning process of the work. The majority's finding may be explained by its institutional understanding of CARU, already noted, and by the link that it makes between the obligation to inform CARU and the principle of prevention, which, as a customary rule, is part of the corpus of rules of contemporary international environmental law.

10. However, Judge Torres Bernárdez believes that the majority by so finding has introduced limitations on the State's territorial sovereignty during the planning phase of an industrial project which go beyond those which are explicit in Article 7 of the Statute or by necessity underlie the text. According to Judge Torres Bernárdez, the majority is attributing a shared "evolutionary" intent to the Parties on this point, of which there is no evidence at all either in Article 7, or in any of the other procedural rules making up the "prior consultation" régime of the 1975 Statute, that is to say, that this is based on a presumption. However, as has been shown, limitations on a State's territorial sovereignty are not to be presumed.

11. Judge Torres Bernárdez believes that the adoption of methods characteristic of "evolutionary" interpretation is not justified in the present context because the wording of the provisions laying down the "prior consultation" régime of the 1975 Statute, including therefore Article 7, does not directly or indirectly permit the interpreter to do so. In fact, by adopting such methods, the Judgment's recourse to the "relevant rules of international law applicable in the relations between the parties" (Art. 31, para. 3 *(c)* of the Vienna Convention on the Law of Treaties) is not aimed at determining the stage or point at which the territorial State is obliged to inform CARU pursuant to Article 7, paragraph 1, of the Statute, but at determining the best time to inform CARU from the point of view of applying the customary principle of prevention under international environmental law, therefore assigning to the treaty provision, the subject of the interpretation, the role of satisfying the requirements of the application of the customary principle of prevention. The result, according to Judge Torres Bernárdez, is that the text, the context and the subsequent agreements or practice become trivial elements in the interpretation process of Article 7 of the Statute. Furthermore, Judge Torres Bernárdez strongly fears that the decided outcome will become an additional source of difficulty for one or both of the Parties in the future because it does not correspond to the practice they have followed to date.

12. For example, Judge Torres Bernárdez points out that, under Uruguayan law, the fact that a request for initial environmental authorization is submitted by a third party, or that DINAMA considers that request, or even makes a favourable recommendation to the higher authorities, does not mean that the planned activity in question can be described at any stage in this process as *a planned activity of the Uruguayan State*. Throughout this whole process, the State has not approved anything and, as a result, it cannot be said that "Uruguay is planning to carry out the works", as Article 7, paragraph 1, of the Statute requires. It is only after the initial environmental authorization (AAP) required by Uruguayan law has been issued, that the Uruguayan State can be said to have agreed to the project and then *only in respect of its environmental viability*. Indeed, under Uruguayan law, AAPs do not authorize construction activities of any sort; the holder of an AAP only has the right to request a construction authorization or permit.

13. Judge Torres Bernárdez also does not think it a good idea to specify, as the Judgment does, the stage at which CARU must be informed by reference to the provisions or rules of the law of the State concerned, since this subordinates the operation of the obligation under international law to inform CARU to the national law of one or other of the Parties. This may have the regrettable result of one party being obliged to inform CARU of its plans earlier than the other. Judge Torres Bernárdez does not believe that such intent can be attributed to the drafters of the 1975 Statute of the River Uruguay.

14. Judge Torres Bernárdez believes it is clear from the wording of Article 7, paragraph 1, of the Statute that the obligation to inform CARU is tied to the "carrying out" of the planned works, because the authentic Spanish text is unambiguous in this respect. That the State is only planning the works is not sufficient. According to the text of the provision, the State must also be "planning the carrying out of the work", because it is only during the carrying out of the work that activities or works of a physical nature relating thereto could affect navigation, the régime of the river or the quality of its waters and thereby cause significant damage to the other State, as the river is a shared natural resource. The mere granting by a public administrative body of an "authorization" is not an activity or an act likely to cause such effects. According to Judge Torres Bernárdez, the interpretative elements which define the general rule of interpretation under Article 31 of the Vienna Convention, as they are present in this case, do not confirm the position that—for the purposes of Article 7, paragraph 1, of the Statute—informing CARU must precede "any authorization", such as, for example, an AAP under Uruguayan law.

15. In light of the preceding considerations, Judge Torres Bernárdez is of the opinion that the interpreter should resolve this issue by looking to the rule of general international law stating that, where the text is silent, the obligation to inform or to notify must be satisfied "timely" ("en temps utile") or "in a timely manner" ("opportun"), that is to say, before the project is so far advanced in its construction that any assessment of the potential damage from the industrial facility would come too late to offer any remedy, which would undoubtedly be contrary to Article 7, paragraph 1, of the Statute. In the Judge's opinion, this would require the State making the communication to have, at the time of informing or notifying, solid technical data on the main aspects of the work.

16. In any case, Judge Torres Bernárdez believes that, at the date of conclusion of the 2 March 2004 and 5 May 2005 agreements, which will be examined below, the period for informing CARU timely or in a timely manner about the implementation of the CMB (ENCE) mill and Orion (Botnia) mill projects had not yet expired: Uruguay still had the opportunity to do this in a timely or appropriate manner for the purposes of the aims to be achieved through the information process. Therefore, at the date of conclusion of its agreements, Uruguay could not have breached the obligation to inform CARU under Article 7, paragraph 1, of the Statute, because "[a]n 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" (Article 13, Articles on Responsibility of States for Internationally Wrongful Acts).

17. Judge Torres Bernárdez is therefore of the opinion that there was no "wrongful delay" by Uruguay in respect of the obligation to inform CARU before concluding the abovementioned subsequent agreements. He also adds that the two Parties are agreed that the acts amounting to any procedural breaches involving Articles 7 to 12 of the Statute are to be categorized as being "instantaneous" in nature.

3. The scope and content of the agreements made by the Parties on 2 March 2004 and 5 May 2005

18. The opinion notes that in the cases of both ENCE and Botnia, the Parties jointly decided to dispense with the preliminary review by CARU provided for in Article 7 of the Statute of the River Uruguay and to proceed immediately to direct negotiations, as referred to in Article 12. Furthermore, in both cases, it was Argentina which sought direct consultations with Uruguay at times when CARU did not offer a viable framework, either because the Commission had halted its sessions, or because it was deadlocked. This is by no means surprising given that when the Parties fail to agree within CARU on the impact of the planned works on the ecosystem of the River Uruguay, the matter "leaves the orbit of competence of the Commission and is turned over to be considered at the level of the Governments" (presentation by the Argentine Minister for Foreign Affairs, Mr. Taiana, to the Foreign Affairs Commission of the Argentine Chamber of Deputies on 14 February 2006).

19. Furthermore, as the rules laid out in Articles 7 to 12 of the Statute are not peremptory norms (*jus cogens*), there was nothing to prevent the Parties from agreeing to proceed immediately to direct consultation or negotiations without having to adhere to the procedures under the Statute. In Judge Torres Bernárdez's opinion, this is precisely what the Parties did, first with the understanding reached by the Ministers for Foreign Affairs on 2 March 2004 (Bielsa-Opperti agreement), and later with the agreement concluded by the Presidents on 5 May 2005 (Vázquez-Kirchner agreement establishing the GTAN); the effects of these agreements in establishing an exception are fully accepted in the opinion. This is the basis of Judge Torres Bernárdez's difference of opinion with the majority because, despite acknowledging, in paragraphs 128 and 138, that the agreements in question are binding on the Parties since they have consented to them, the Judgment rejects that in the present case their effect is to depart from the Statute's régime.

(a) The 2 March 2004 understanding between the Ministers for Foreign Affairs

20. On 9 October 2003, MVOTMA granted an initial environmental authorization (AAP) to ENCE for the "Celulosas de M'Bopicuá S.A." (CMB) pulp mill on the Uruguayan bank of the River Uruguay at Fray Bentos, near the "General San Martín" international bridge, and opposite the Argentine region of Gualeguaychú, where the population had demonstrated against the mill. Argentina deemed this a breach of Article 7 of the Statute of the River Uruguay and protested against the granting of the AAP in question to ENCE, notably by ceasing to attend CARU meetings, a situation which continued until the conclusion of the 2 March 2004 agreement.

21. In this respect, Judge Torres Bernárdez points out that, in spite of the situation within CARU, the Parties continued their discussions about the CMB (ENCE) project at a higher level—through ministers or Ministers for Foreign Affairs—and that Argentina received from Uruguay all of the information relating to the project just a few days after the granting of the AAP to ENCE, namely, on 27 October and 9 November

2003. This information allowed Argentina's technical advisers to study the CMB (ENCE) project and to produce a report for their authorities in February 2004, in which they concluded that there was no significant environmental impact on the Argentine side of the river, something which was acknowledged in certain Argentine documents, as well as by Argentina's own delegates to CARU. In Judge Torres Bernárdez's view, this report reassured Argentina about the possible effects of building the disputed mill, thus opening the way to further meetings of the Parties and, eventually, to the conclusion of the Bielsa-Opperti agreement on 2 March 2004.

22. Argentina has argued in these proceedings that the 2 March 2004 agreement did not render Article 7 of the Statute of the River Uruguay inapplicable in this case. However, statements made to the press by the Ministers for Foreign Affairs, drafts exchanged by ambassadors Mr. Sguiglia (Argentina) and Mr. Sader (Uruguay) with a view to committing the ministers' oral agreement to writing, even the language of the agreement recorded in the minutes of CARU's meeting on 15 May 2004, as well as other pieces of documentary evidence from official Argentine sources, have convinced Judge Torres Bernárdez to the contrary.

23. In his view, these various factors tip the balance resolutely in favour of Ururguay's version of the facts as presented in its written pleadings and during the oral phase, that is, that the Ministers for Foreign Affairs agreed that the CMB (ENCE) pulp mill would be built in Fray Bentos on the condition: (1) that CARU maintained a certain level of control over technical aspects, as described in the agreement, relating to the construction of the mill (which is in no way connected to the preliminary review under Article 7, paragraph 1, of the Statute); and (2) that, once the mill had entered operation, a system would be established for CARU's monitoring of the quality of the river's waters throughout the area of the mill site. The "planning" phase for the mill, to which the obligation to inform CARU relates under Article 7 of the Statute, occurred before the Bielsa-Opperti agreement, which looked ahead to the future, that is, to the "construction" and "commissioning" phases of the mill.

24. The wording of the Bielsa-Opperti agreement was ratified in the minutes of CARU's extraordinary meeting on 15 May 2004 (first meeting of the Commission since October 2003) and duly authenticated by the signatures of the head of the Argentine delegation to CARU, Mr. Roberto García Moritán, and the head of the Uruguayan delegation, Mr. Walter M. Belvisi, as well as by that of CARU's Administrative Secretary, Mr. Sergio Chave. However, Judge Torres Bernárdez cannot find a single passage, nor even a single word, in these minutes to support the contention that the Bielsa-Opperti agreement implied a return to the Commission for the purposes of Article 7, paragraph 1, of the Statute.

25. It is Judge Torres Bernárdez's belief that the text of these minutes proves the exact opposite. Indeed, in Point I of the Specific Agreed-Upon Matters, it is stated that CARU shall receive and consider, taking into account the terms included in MVOTMA's Ministerial resolution 342/2003 of 9 October 2003 granting the AAP for the CMB project to ENCE, the Environmental Management Plans for the construction and operation of the mill provided by the company to the Uruguayan Government, as soon as the latter has communicated them, as well as the actions requiring additional implementation and assessment by the company before they are approved, while "formulating its observations, comments and suggestions, which shall be transmitted to Uruguay, to be dismissed or decided with the company". Moreover, in respect of the operational phase mentioned in Point II of the Specific Agreed-Upon Matters, the text states that monitoring of the environmental quality shall be carried out in conformity with the provisions of the Statute of the River Uruguay, especially Chapter X, Articles 40 to 43, and that both delegations agree that, in view of the scope of the undertaking and its possible effects, CARU shall adopt procedures in accordance with the minutes.

26. In his opinion, Judge Torres Bernárdez points out that the relevant extract of the minutes from 15 May 2004 concludes with the decision by the Commission to carry out the content of the agreement reached on 2 March 2004 between Ministers Bielsa and Opperti in its entirety, an agreement which, as was acknowledged at the time by the President of the Argentine delegation to CARU, Mr. Moritán, served as "an important limiting factor in our position" on the procedure provided for in Article 7 of the Statute. Judge Torres Bernárdez believes that the content of the statements of those involved shows that no-one was any longer expecting CARU to exercise the general powers conferred on it under Articles 7 to 18 of the Statute in respect of the CMB (ENCE) plant, rather that it would carry out only certain tasks agreed on in the Bielsa-Opperti agreement. In his separate opinion, Judge Torres Bernárdez also cites passages from certain official Argentine documents from that time which, he thinks, confirm the scope of the 2 March 2004 agreement, notably: (1) a statement from the Argentine Ministry of Foreign Affairs in a report on 2004 to the Senate; (2) a statement from the Argentine Ministry of Foreign Affairs in a report on 2004 to the Chamber of Deputies; and (3) a statement in the 2004 Annual Report on the State of the Nation, prepared by the Office of Argentina's President.

27. In these last two documents, it is expressly stated that the bilateral agreement of 2 March 2004 put an end to the dispute over the construction of a pulp mill in Fray Bentos. It therefore follows from these documents that the Bielsa-Opperti agreement established a *substitute procedure* for that of the Statute. It also follows that this procedure was later extended to Orion (Botnia) because, in some of these documents, there is mention of "two plants" or "the possible installation of pulp mill plants on the Uruguay river bank". Furthermore, Judge Torres Bernárdez points out that, when the GTAN was created, the joint press release of 31 March 2005 also referred to "pulp mill plants" being built in the Eastern Republic of Uruguay. CARU and its Sub-committee on Water Quality and Pollution Control did the same: the full title of PROCEL is "Plan for Monitoring Water Quality of the River Uruguay in the Area of the Pulp Mills".

28. Judge Torres Bernárdez therefore disagrees with the findings in paragraphs 129 and 131 of the Judgment, whereby the Court—although acknowledging that the understanding of 2 March 2004 is undoubtedly a procedure replacing that

under the Statute—concludes: (1) that it cannot accept Uruguay's contention that the understanding put an end to its dispute with Argentina in respect of the CMB (ENCE) mill concerning the implementation of the procedure laid down by Article 7 of the Statute, because the information—which Uruguay was obliged under the Bielsa-Opperti understanding to transmit to CARU—was never transmitted; and (2) that it cannot accept Uruguay's contention that the scope of the understanding was later extended by the Parties to the Orion (Botnia) project, because reference to "the two mills" is made only as from July 2004 in the context of the PROCEL plan, which concerns the measures to monitor the environmental quality of the river waters, not the procedures under Article 7 of the Statute.

29. As far as the findings of the majority of the Court on Uruguay's "non-performance" of the 2 March 2004 understanding are concerned, Judge Torres Bernárdez recalls that Uruguay was fully involved, as was Argentina, in drawing up the PROCEL within CARU, a plan which was definitively adopted by the Commission on 12 November 2004 and which was carried out until the withdrawal of the Argentine delegates. As for the failure to transmit the technical information relating to the construction of the CMB (ENCE) mill, Uruguay never had the chance to do so because the mill was not built. The only PGA (Environmental Management Plan) in existence for this mill concerned the "removal of vegetation and earth movement" of 28 November 2005. There were no others in relation to the construction of this mill, eventually abandoned by ENCE, in Fray Bentos. As far as Orion (Botnia) is concerned, construction work for the mill on the site was only authorized on 18 January 2006 and unfolded after the official end of direct negotiations within the GTAN, which the Judgment fixes at 3 February 2006 (para. 157). Furthermore, Uruguay transmitted to CARU by facsimile on 6 December 2006 "the text of the public file for the Kraft cellulose plant project, application for initial environmental authorization filed by Botnia S.A.", that is, with the grant by MVOTMA of the AAP to Botnia on 14 February 2005. In light of these facts, Judge Torres Bernárdez believes that the 2 March 2004 understanding was performed as far as it was physically possible to do so (*impossibilium nulla obligatio est*).

30. As far as the majority's finding on the applicability of the 2 March 2004 understanding to the "two mills" is concerned, Judge Torres Bernárdez points out that references may be found to them not only in CARU documents on PROCEL, but also in other documents in the record. It should not be forgotten that Argentina knew about the Botnia project at the latest by November 2003, when its official representatives met representatives of the company, and CARU itself was aware of it at the latest by April 2004, when it first met representatives of the company.

(b) The Presidents' agreement of 5 May 2005 establishing the GTAN

31. The granting by the outgoing Uruguayan Government of the AAP for the Orion (Botnia) mill project on 14 February 2005—on which date the Bielsa-Opperti understanding of 2 March 2004 was still in force between the Parties—gave rise to a new dispute within CARU in a political context of growing opposition to the construction of the two mills among the inhabitants of the Argentine province Entre Ríos. Mass demonstrations had taken place and international roads and bridges over the River Uruguay had been blockaded, notably the "General San Martín" bridge, which was closed to traffic as a result of the actions promoted by the "asambleistas" movement of Gualeguaychú. Furthermore, on 1 March 2005 a new Uruguayan Government took office following the inauguration of President Tabaré Vázquez. These events led the Governments of the two countries to look directly into the matter of establishing a high-level technical group (GTAN).

32. In his opinion, Judge Torres Bernárdez recalls that it was Argentina which, once again, took the initiative to suggest that the issue of the paper pulp mills be handled by the two Governments outside CARU. It was in fact the Argentine Minister Mr. Bielsa who suggested in a letter of 5 May 2005 to the Uruguayan Minister Mr. Gargano that the situation called for "a more direct intervention of the competent environmental authorities, with the co-operation of specialized academic institutions" although "without prejudice of the water quality control and monitoring procedures by CARU". This letter from Minister Bielsa also conveyed to his Uruguayan counterpart the requests made by the government of Entre Ríos, including on the issue of the location of the plants.

33. The text of the agreement between Presidents Tabaré Vázquez and Néstor Kirchner establishing the GTAN was the subject of an Argentine-Uruguayan press release dated 31 May 2005, which is quoted in paragraph 132 of the Judgment. In light of this text, and of the letter from Mr. Bielsa to Mr. Gargano, Judge Torres Bernárdez believes that there can be no doubt that the Parties agreed between themselves to dispense with the procedures set out in Articles 7 to 11 of the Statute in favour of immediate "direct negotiations" within the GTAN: negotiations provided for in Article 12 of the Statute, as Argentina expressly stated in paragraph 4 of its Application instituting these proceedings and in its diplomatic note of 14 December 2005 recording the failure of direct negotiations through the GTAN.

34. According to Judge Torres Bernárdez, it follows from the Presidents' agreement of 5 May 2005 that there was no question, at that date, of reconsidering the procedure agreed to on 2 March 2004 for CMB (ENCE) and later extended to Orion (Botnia). This conclusion is based on the fact that the points which were still outstanding and supposed to be examined by the Parties within the GTAN concerned solely—according to the Presidents' agreement—*complementary studies and analysis, exchange of information and follow-up on the effects that* the operation of the paper pulp mills *(the two mills) being constructed in the Eastern Republic of Uruguay would have on the ecosystem of the shared river.* The issue was no longer the planning or construction of the mills in question but the future, namely, the effects of those mills' operations on the river's ecosystem.

35. Judge Torres Bernárdez agrees with the Judgment that the press release of 31 May 2005 manifests an agreement between the two States to create a negotiating framework, the GTAN, with the aim of allowing for the negotiations provided for in Article 12 of the Statute to take place. But, to his mind,

the press release is only that. He believes that what is of particular note in the press release is the fact that is does not call into doubt the Bielsa-Opperti agreement of 2 March 2004, an agreement which was still in force at the date of conclusion of the Presidents' agreement of 5 May 2005. Thus, the 31 May 2005 press release confirms, in Judge Torres Bernárdez's opinion, the existence and scope of the 2 March 2004 agreement. In other words, by concluding the May 2005 agreement, Uruguay did not waive its rights under the March 2004 agreement.

36. Judge Torres Bernárdez finds that, in light of the facts, the interpretation is not tenable according to which the May 2005 agreement granted Argentina considerable rights of supervision over the mills (rights far greater than what is provided in the relevant articles of the 1975 Statute), without it giving anything in exchange. Nor does the letter from Minister Bielsa of 5 May 2005, which, by virtue of its content, constitutes part of the "travaux préparatoires" of the Presidents' agreement, confirm the findings in the Judgment on this matter. Judge Torres Bernárdez therefore completely disagrees with the majority's findings in paragraphs 140 and 141 of the Judgment. For him, *pacta sunt servanda,* with its associated good faith, does of course govern the relations between the Parties in respect of the interpretation of the application of the provisions of the 1975 Statute, but also the subsequent agreements of 2 March 2004 and 5 May 2005.

37. Judge Torres Bernárdez also fails to share the majority's conclusion in paragraph 142 of the Judgment that the press release of 31 May 2005 in referring to "the cellulose plants that are being constructed in the Eastern Republic of Uruguay" is stating a simple fact. He believes that, although this does indeed state a fact, it is *a fact that reflects a legal relationship between the Parties deriving from both the 1975 Statute and the understanding of 2 March 2004, as well as from the Presidents' agreement of 5 May 2005.*

(c) The procedure for the pulp mills in Fray Bentos established by the agreements

38. In paragraphs 77 to 88 of his separate opinion, Judge Torres Bernárdez describes the salient features of the replacement procedure agreed to by the Parties to deal with the issue of the pulp mills on the Uruguayan bank of the River Uruguay at Fray Bentos, a procedure against which the Parties' conduct must be measured in the present case. This *ad hoc* procedure retained the régime of direct negotiations and the judicial settlement procedure, but dispensed with the procedural arrangements provided for in Articles 7 to 11 of the 1975 Statute. In these paragraphs, Judge Torres Bernárdez points out, on the one hand, that the procedure adopted by the Parties in this case gave far more substantial powers to CARU than the Statute does and, on the other hand, that the procedure adopted was more favourable to the protection of Argentina's interests than are the provisions of Articles 7 to 11 of the Statute on a significant number of issues (level of consultations; extension of consultations to the construction and operational phases; extent of the information received; evaluation of the data in co-operation with the other Party; extension of the statutory time-limits). The Judge also points out that neither of the Parties asked CARU to resolve their dispute by means of conciliation.

4. Uruguay's obligations during the period of direct negotiations

39. On the matter of establishing whether Uruguay's conduct during the period of direct negotiations within the GTAN was in accordance with its legal obligations to Argentina, in light of the scope of the principle of the obligation to negotiate, Judge Torres Bernárdez is in no doubt that there is such an obligation under international law and that, given its significance in international relations, the Court must be exacting in ensuring that it is met, because reciprocal trust is an inherent condition of international co-operation. However, Judge Torres Bernárdez does not agree with the way in which the majority has applied it to the circumstances of the present case in respect of the "no construction obligation" during the period of direct negotiations. His disagreement extends to both the temporal and substantive scope of the obligation.

40. In the context of the GTAN, Uruguay was obliged—as indeed was Argentina—to take part in good faith and with an open mind, so as to ensure that the negotiations were meaningful, and to be willing to take reasonable account of the other Party's views, without however being obliged to reach an agreement because, under international law, a commitment to negotiate does not imply an obligation to agree. The GTAN was to produce a report within 180 days: GTAN having begun its work on 3 August 2005, in principle Uruguay would have been obliged to comply with the "no construction obligation" until the end of the GTAN negotiations, fixed in the Judgment at 3 February 2006.

41. Yet, in the light of the evidence submitted to the Court, Judge Torres Bernárdez considers that 3 February 2006 was merely the *official* end of negotiations: according to this evidence, negotiations had reached a deadlock long before this date. In such circumstances, Judge Torres Bernárdez believes it contrary to the sound administration of justice to oblige the Parties to wait until the official time-limit has elapsed before they are freed of the obligation, because a State cannot be required to take an action which is clearly futile and pointless, or which has already proved to be in vain (see on this subject: the separate opinion of Judge Tanaka in *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 145). To Judge Torres Bernárdez's mind, Argentina's diplomatic notes of 14 December 2005, 26 December 2005 and 12 January 2006, part of the record, confirm the deadlock at which the GTAN process had arrived towards the end of November 2005.

42. For Judge Torres Bernárdez, the diplomatic note of 14 December 2005 is decisive in this respect because, in this official note, the Argentine Republic notified the Eastern Republic of Uruguay of its "conclusion", specifically: (1) that, in accordance with the terms of Article 12 of the Statute of the River Uruguay, since direct negotiations between the Parties within the GTAN had not produced an agreement, the procedure provided for in Chapter XV of the Statute of the River Uruguay (judicial settlement) had become applicable; (2) that a dispute concerning the interpretation and application of the Statute of the River Uruguay had arisen; and (3) that the direct

negotiations referred to in Article 60 of the Statute concerning the dispute arising from the unilateral authorizations for the construction of the industrial plants in question (CMB and Orion) had been underway since 3 August 2005 (date of the first GTAN meeting). According to Judge Torres Bernárdez, the date to be used in determining the end of Uruguay's "no construction obligation" in this case is thus the date of Argentina's diplomatic note of 14 December 2005.

43. Moreover, Argentina's diplomatic note of 14 December 2005 states that in relation to the dispute arising from the unilateral authorization of the Botnia port, made official by virtue of the CARU minutes from 14 October 2005 (also mentioned in the note from the President of the Argentine delegation to the Uruguayan party presented at the CARU meeting of 17 November 2005), direct negotiations began *"today", i.e., 14 December 2005*. This was confirmed by Argentina's Minister for Foreign Affairs, Mr. Taiana, on 12 February 2006, before the Foreign Affairs Committee of the Argentine Chamber of Deputies, where he explained that:

> "in relation with the port construction project, the purpose of the note [of 14 December 2005] was to determine [that] the day of presentation to Uruguay would be the start date from which to compute the period in which to carry out direct negotiations" (Argentina's Application instituting proceedings, Ann. III, p. 17).

44. Judge Torres Bernárdez also disagrees with the majority's findings in the Judgment on the *substantive scope* of the obligation because, first, no distinction is made therein between "the administrative acts granting environmental authorization of a work" and "the construction authorizations or plans for the work itself" and, second, nor is there any distinction drawn between activities or work of "a preparatory character" to the work and the "construction" of the work, prohibited pursuant to the obligation. Judge Torres Bernárdez is particularly disappointed that the sound legal rule on the subject which the Court identified in the case concerning *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* was not applied to the present case: as the Court stated at the time:

> "A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which is of a preparatory character and which 'does not qualify as a wrongful act'." (*Judgment, ICJ Reports 1997*, p. 54, para. 79.)

45. Judge Torres Bernárdez is of the belief that the actions of Uruguay condemned in the Judgment—relating to the CMB (ENCE) and Orion (Botnia) projects—are of a "preparatory" character, as opposed to the actual construction work itself for the mills and that they fall outside the substantive scope of Uruguay's "no construction obligation" during the GTAN negotiation period. Only the PGA (Environmental Management Plan) entitled "Plan de Gestion Ambiental de las Obras Civiles Terrestres Planta de Celulosa Botnia Fray Bentos PGAV Version", dated 18 January 2006, would, in principle, fall within this scope. But, since this plan postdates Argentina's diplomatic note of 14 December 2005, it does not lie within the temporal ambit of the "no construction obligation" (see paragraph 25 above).

46. The only remaining issue is thus the authorization for the construction of the Botnia port. On this subject, Judge Torres Bernárdez recalls that the initial environmental authorization (AAP) for the Orion (Botnia) mill of 14 February 2005 granted by Uruguay was for both the paper pulp mill and its port terminal, and also that a Uruguayan resolution of 5 July 2005 authorized Botnia to make use of the river bed for the construction of the terminal. However, he also notes that approximately one month after this resolution, on 3 August 2005, the Argentine and Uruguayan delegations agreed, at the first GTAN meeting, to refer the Botnia port terminal project to CARU without condition. Following this understanding, Uruguay transmitted the Uruguayan resolution of 5 July 2005 to CARU by diplomatic note of 15 August 2005, in accordance with Article 7 of the Statute, and, on 13 October 2005, it supplied the Commission with the additional information on the project requested by the Argentine delegation.

47. Thus, by agreement of the Parties, the Botnia port terminal project was not the subject of "direct negotiations" within the GTAN. However, nor was it examined by CARU for the purposes of Article 7 of the Statute because Argentina blocked the preliminary review of the project by the Commission on the basis of Uruguay's refusal to halt construction work on the port. It follows, in Judge Torres Bernárdez's opinion, that the dispute over the port terminal at the Orion (Botnia) mill, which in fact was included in the Application instituting proceedings of 4 May 2006, is inadmissible, because the procedural steps set out in Articles 7 *et seq.* of the Statute were not followed, and because this dispute was not the subject of "direct negotiations", within the GTAN or elsewhere, a prerequisite under Article 60 of the Statute to be able to seise the Court of any dispute concerning the interpretation or application of the Statute of the River Uruguay. Furthermore, the 180-day period which Article 12 of the Statute reserves for "direct negotiations" was also not respected because, in point of fact, only some 140 days elapsed between Argentina's diplomatic note of 14 December 2005 and 4 May 2006, when it filed its Application instituting proceedings.

48. As for the substance, Judge Torres Bernárdez believes that the Botnia port project is not of sufficient scope ("de entidad suficiente") to make it "liable" to affect navigation, the régime of the river or the quality of its waters and therefore does not fall within the provisions of Article 7, paragraph 1, of the Statute. In 2001, Uruguay informed CARU of the plan to build the M'Bopicuá port after the AAP was granted for it; the two delegations nevertheless were able to come quickly to the conclusion, within the framework of CARU, that the port in question, much larger than the Botnia port, did not represent a threat to navigation, the régime of the river or the quality of its waters. It would appear therefore that objectively there is no dispute between the Parties on the environmental viability of the Botnia port. Furthermore, between 1979 and 2004, Argentina authorized the construction or restoration of ports on its bank of the river in Fédération, Concordia, Puerto Yuqueri and Concepcion del Uruguay, without informing CARU and without notifying or consulting Uruguay.

49. In light of the preceding considerations, Judge Torres Bernárdez cannot endorse the conclusion in paragraph 149 of the Judgment. However, given that the breaches found in the Judgment to have been committed by Uruguay are in themselves of a procedural nature and minor in gravity—in the sense that not one constitutes a "material breach"—Judge Torres Bernárdez concurs with the Judgment that "satisfaction" is the appropriate redress under international law.

General conclusion

50. In view of all of the preceding considerations, Judge Torres Bernárdez does not agree with the findings of the Court concerning the breaches by Uruguay of its procedural obligations towards Argentina, subject of the present case. For this reason, he voted against point 1 of the operative clause of the Judgment.

Dissenting opinion of Judge *ad hoc* Vinuesa

In a dissenting opinion, Judge *ad hoc* Vinuesa first noted his agreement with the Court's finding that Uruguay had breached the procedural obligations of the 1975 Statute. As to the link between procedural and substantive violations under the Statute, Judge *ad hoc* Vinuesa disagreed with the Court, finding that the procedural violations themselves constituted substantive violations. Next, Judge *ad hoc* Vinuesa held that a proper interpretation of the 1975 Statute under customary international law and the 1969 Vienna Convention on the Law of Treaties required an extension of the non-construction obligation imposed on Uruguay which would terminate only after the final resolution of the dispute by the Court. On the issue of reparation for the procedural breaches, Judge *ad hoc* Vinuesa found that**,** although the special circumstances of the case—Uruguay's repetition of breaches and its actions taken in bad faith—justified the imposition by the Court of an obligation of non-repetition upon Uruguay, this non-repetition obligation was implicit in the Court's Judgment and was further required by principles of good faith found in customary international law.

On the issue of substantive obligations, Judge *ad hoc* Vinuesa dissented from the Court's finding that the violations of these obligations had not been proven, discussing multiple flaws in the Judgment that led to this conclusion. First, Judge *ad hoc* Vinuesa questioned the Court's reasoning on issues surrounding the burden of proof in the case. Then, Judge *ad hoc* Vinuesa turned to substantive violations by Uruguay of Articles 1 and 27 and Article 36 of the Statute, finding that these substantive obligations had not been followed by Uruguay. Next, Judge *ad hoc* Vinuesa held that Article 41 was violated by Uruguay because it had not properly performed an environmental impact assessment. Specifically, Uruguay failed to properly consider the alternative sites for the plant and it had not consulted the affected population in a way that guaranteed their effective participation, as was required.

Finally, Judge *ad hoc* Vinuesa noted that the lack of scientific certainty in the evidence was particularly troubling. This lack of certainty undermined the conclusions drawn by the Court on all of the alleged violations by Uruguay of its substantive obligations. Noting that the Court often found that there was not enough evidence, or that proper conclusions could not be drawn, Judge *ad hoc* Vinuesa suggested that the Court would have been better served to request an outside expert's opinion, as has been done in the past, or to otherwise ensure that the Judgment was based on complete information, a clearer view of the state of the river's ecology, and full consideration of the future impact of the pulp mill on the river.

Based on these conclusions, Judge *ad hoc* Vinuesa held that by bypassing the application of the precautionary principle as required by the 1975 Statute and by general international law, the Court did not properly adjudge Uruguay's violations of the substantive obligations.

178. CERTAIN QUESTIONS CONCERNING DIPLOMATIC RELATIONS (HONDURAS *v.* BRAZIL) (DISCONTINUANCE)

Order of 12 May 2010

In the case on *Certain questions concerning diplomatic relations (Honduras* v. *Brazil)*, the President of the International Court of Justice issued an Order on 12 May 2010, officially recording the discontinuance by the Republic of Honduras of the proceedings and ordering the removal of the case from the Court's List.

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The text of the Order of the President reads as follows:

"The President of the International Court of Justice,

Having regard to Article 48 of the Statute of the Court and Article 89, paragraph 1, of the Rules of Court,

Having regard to the Application filed in the Registry of the Court on 28 October 2009, whereby the Republic of Honduras instituted proceedings against the Federative Republic of Brazil in respect of a

> 'dispute between [the two States] relat[ing] to legal questions concerning diplomatic relations and associated with the principle of non-intervention in matters which are essentially within the domestic jurisdiction of any State, a principle incorporated in the Charter of the United Nations';

Whereas the Application was signed by Mr. Julio Rendón Barnica, Ambassador of Honduras to the Kingdom of the Netherlands, appointed as Agent of the Republic of Honduras in a letter of 24 October 2009 from Mr. Carlos López Contreras, Minister for Foreign Affairs in the Government headed by Mr. Roberto Micheletti;

Whereas an original of the Application was transmitted on the same day to the Government of the Federative Republic of Brazil, and the Secretary-General of the United Nations was notified of the filing of the Application;

Whereas, by a letter of 28 October 2009 received in the Registry on 30 October 2009 under cover of a letter of 29 October 2009 from Mr. Jorge Arturo Reina, Permanent Representative of Honduras to the United Nations, Ms Patricia Isabel Rodas Baca, Minister for Foreign Affairs in the Government headed by Mr. José Manuel Zelaya Rosales, informed the Court, *inter alia*, that 'Ambassadors Julio Rendón Barnica, Carlos López Contreras and Roberto Flores Bermúdez [had been] relinquished of their duties as Agents and Co-Agents [of] the Republic of Honduras to the International Court of Justice, and [should] not be recognized as [the] legitimate representatives' of Honduras, and that 'Ambassador Eduardo Enrique Reina [had been] appointed as the sole legitimate representative of the Government of Honduras to the International Court of Justice';

Whereas, by a letter of 2 November 2009 received in the Registry on the same day, Mr. Julio Rendón Barnica informed the Court that 'the Government of the Republic of Honduras . . . [had] appointed Ambassador Carlos López Contreras to act as its Agent';

Whereas a copy of the communication, along with its annexes, from the Permanent Representative of Honduras to the United Nations was sent on 3 November 2009 to the Federative Republic of Brazil, as well as to the Secretary-General of the United Nations;

Whereas the Court decided that, given the circumstances, no other action would be taken in the case until further notice;

Whereas, by a letter of 30 April 2010 received in the Registry on 3 May 2010 under cover of a letter of 3 May 2010 from the chargé d'affaires a.i. at the Embassy of Honduras in The Hague, Mr. Mario Miguel Canahuati, Minister for Foreign Affairs of Honduras, informed the Court that the Honduran Government was 'not going on with the proceedings initiated by the Application filed on 28 October 2009 against the Federative Republic of Brazil' and that 'in so far as necessary, the Honduran Government accordingly [was] withdraw[ing] this Application from the Registry';

Whereas a copy of the letter from Mr. Mario Miguel Canahuati was transmitted on 4 May 2010 to the Government of the Federative Republic of Brazil;

Whereas the Brazilian Government has not taken any step in the proceedings in the case,

Officially records the discontinuance by the Republic of Honduras of the proceedings instituted by the Application filed on 28 October 2009; and

Orders the removal of the case from the List."

179. JURISDICTIONAL IMMUNITIES OF THE STATE (GERMANY *v.* ITALY) (COUNTER-CLAIM)

Order of 6 July 2010

On 6 July 2010, the International Court of Justice delivered its Order regarding the counter-claim presented by Italy in the case concerning *Jurisdictional Immunities of the State (Germany* v. *Italy)*. The Court found that the counter-claim presented by Italy on 23 December 2009 in its Counter-Memorial was inadmissible as such and did not form part of the current proceedings, and authorized Germany to submit a Reply and Italy to submit a Rejoinder. It fixed 14 October 2010 and 14 January 2011, respectively, as the time-limits for the filing of those pleadings and reserved the subsequent procedure for further decision.

The Court was composed as folllows: President Owada; Vice-President Tomka; Judges Koroma, Al-Khasawneh, Buergenthal, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Greenwood; Judge *ad hoc* Gaja; Registrar Couvreur.

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The operative paragraph (para. 35) of the Order reads as follows:

" . . .

The Court,

(A) By thirteen votes to one,

Finds that the counter-claim presented by Italy in its Counter-Memorial is inadmissible as such and does not form part of the current proceedings;

In favour: President Owada; Vice-President Tomka; Judges Koroma, Al-Khasawneh, Buergenthal, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Greenwood; Judge *ad hoc* Gaja;

Against: Judge Cançado Trindade;

(B) Unanimously,

Authorizes Germany to submit a Reply and Italy to submit a Rejoinder and *fixes* the following dates as time-limits for the filing of these pleadings:

For the Reply of Germany, 14 October 2010;

For the Rejoinder of Italy, 14 January 2011; and

Reserves the subsequent procedure for further decision."

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Judges Keith and Greenwood appended a joint declaration to the Order of the Court; Judge Cançado Trindade appended a dissenting opinion to the Order of the Court; Judge *ad hoc* Gaja appended a declaration to the Order of the Court.

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In its Order, the Court seeks to ascertain whether Italy's counter-claim meets the requirements laid down by Article 80 of the Rules of Court. Under paragraph 1 of that Article, "[t]he Court may entertain a counter-claim only if it comes within the jurisdiction of the Court and is directly connected with the subject-matter of the claim of the other party".

The Court recalls that Germany, while reserving its position on the question whether the requirement of direct connection is met in this case, denies expressly that the counter-claim meets the requirement of jurisdiction.

It notes that Italy bases the Court's jurisdiction over its counter-claim on Article 1 of the European Convention for the Peaceful Settlement of Disputes (hereinafter the "European Convention"), and that Germany contends that, under Article 27 *(a)* of that same Convention, the Court does not have jurisdiction *ratione temporis* over the counter-claim, because the provisions of the Convention "shall not apply to . . . disputes relating to facts or situations prior to the entry into force of this Convention as between the parties to the dispute", which, according to Germany, is the case in this instance.

The Court observes that its task is therefore to determine, in the light of the provisions of Article 27 *(a)* of the European Convention, whether the dispute that Italy intends to bring before the Court by way of its counter-claim relates to facts or situations prior to 18 April 1961, when the Convention came into force as between Germany and Italy.

It notes that, in accordance with its earlier case law, the facts and situations it must take into consideration are those "with regard to which the dispute has arisen or, in other words, only those which must be considered as being the source of the dispute, those which are its 'real cause' rather than those which are the source of the claimed rights".

The Court first observes that the dispute that Italy intends to submit to the Court by way of its counter-claim relates to the existence and the scope of the obligation of Germany to make reparation to certain Italian victims of serious violations of humanitarian law committed by Nazi Germany between 1943 and 1945, rather than to the violations themselves. According to the Court, while those violations are the source of the alleged rights of Italy or its citizens, they are not the source or "real cause" of the dispute. Consequently, those violations are not the "facts or situations to which the dispute in question relates".

The Court then turns to the Peace Treaty which the Allied Powers concluded on 10 February 1947 with Italy, and to the two agreements concluded between the Parties on 2 June 1961 relating to compensation to be paid by Germany to the Italian Government. In respect of the 1947 Treaty, it notes in particular that this formed part of a legal régime designed to settle various property and other claims arising out of the events of the Second World War and that it included a provision (Art. 77, para. 4) whereby Italy agreed, with certain excep-

tions, to waive "on its own behalf and on behalf of Italian nationals all claims against Germany and German nationals outstanding on May 8, 1945". With regard to the 1961 Agreements, the Court observes that they provided to Italy, for certain of its nationals, forms of compensation extending beyond the régime established in the aftermath of the Second World War, but that they did not affect or change the legal situation of the Italian nationals at issue in the present case.

The Court adds that the legislation which Germany enacted, between 1953 and 2000, concerning reparation for certain categories of victims of serious violations of humanitarian law committed by the Third Reich, and the fact that under this legislation certain Italian victims did not receive compensation, do not constitute "new situations" with regard to any obligation of Germany under international law to pay compensation to the Italian nationals at issue in the present case and did not give rise to any new dispute in that regard.

The Court proceeds to find that the dispute that Italy intends to bring before the Court by way of its counter-claim relates to facts and situations existing prior to the entry into force of the European Convention as between the Parties, namely, the legal régime established in the aftermath of the Second World War. That dispute accordingly falls outside the temporal scope of the Convention; the counter-claim therefore does not come within the Court's jurisdiction as required by Article 80, paragraph 1, of the Rules of Court. Having found thus, the Court observes that it need not address the question whether the counter-claim is directly connected with the subject-matter of the claims presented by Germany.

Further, having noted that the proceedings relating to the claims brought by Germany continue, the Court refers to the views expressed by the Parties at a meeting held on 27 January 2010 with the President of the Court, regarding the submission of a Reply by the Applicant and a Rejoinder by the Respondent, and the time-limits to be fixed for the filing of those pleadings.

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Joint declaration of Judges Keith and Greenwood

In their joint declaration, supporting the Order made by the Court, Judges Keith and Greenwood address two matters which they consider strengthen the Court's reasoning. Both relate to the requirement, in terms of Article 27 *(a)* of the European Convention for the Peaceful Settlement of Disputes, that the source or real cause of the dispute which Italy wishes to present by way of its counter-claim lay in facts or situations arising after 18 April 1961, the date when the Convention came into force between Italy and Germany. In that respect, Italy refers to the 1961 Agreement which came into force in 1963 and to a German Law of 2000 along with later German actions.

The first matter the two Judges address is the failure of Italy in its Counter-Memorial to establish the existence of any international legal dispute relating to the Agreements, the 2000 Law on later German actions. That failure is reflected by the absence from the Counter-Memorial of any diplomatic correspondence from Italy to Germany identifying any such dispute.

Second, the Judges conclude that even if such a dispute did exist, its source or real cause lay in facts before 18 April 1961. Any dispute about the scope and effect of the 1961 Agreements and German action was inextricably bound up with the provisions of the 1947 Peace Treaty between the Allied Powers and Italy.

For Judges Keith and Greenwood, Italy itself provided clear confirmation that the dispute submitted in the counter-claim did not fall within the Court's jurisdiction because its source or real cause is to be found in facts or situations arising long before 18 April 1961. In the first and second substantive sentences of the chapter of the Counter-Memorial setting out the counter-claim, Italy states:

> "As permitted by Article 80 of the Court's Rules, Italy hereby submits a counter-claim with respect to the question of the reparation owed to Italian victims of grave violations of international humanitarian law committed by forces of the German Reich.
>
> The present Chapter sets forth Italy's counter-claim in this case. Italy asks the Court to find that Germany has violated its obligation of reparation owed to Italian victims of the crimes committed by Nazi Germany during the Second World War and that, accordingly, Germany must cease its wrongful conduct and offer effective and appropriate reparation to these victims."

Dissenting opinion of Judge Cançado Trindade

1. Judge Cançado Trindade, in his dissenting opinion, composed of 14 parts, begins by recalling the emergence and *rationale* of counter-claims in international legal procedure, with attention turned to international legal doctrine as to its prerequisites, characteristics and effects (Parts I-III). He further recalls that, in the case-law of the PCIJ and ICJ, a counter-claim has a duality of character in relation to the original claim: it is, at a time, both independent from the original claim, as an autonomous legal act, while at the same time being directly linked to it. The "thrust" of a counter-claim is thus to widen the original subject-matter of the dispute by pursuing objectives other than the mere dismissal of the original claim. It is thus "distinguishable from a defence on the merits" (Part IV).

2. While in the four preceding cases concerning counter-claims the Court's jurisdiction had either not been contested by the applicant States, or else the Court had had the opportunity to establish its own jurisdiction in an incidental phase, previous to the filing of the counter-claims, in the present case of *Jurisdictional Immunities of the State* Germany has challenged the jurisdiction of the Court over Italy's counter-claim. Such procedural history shows that the Court's practice in relation to counter-claims is still in the making.

3. Be that as it may, the Court should have at least instructed properly the *dossier* of the case, by holding, prior to the decision it has taken, public hearings to obtain further clarifications from the contending parties. In the view of Judge Cançado Trindade (Part V), 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*). 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.

4. After examining the factual complex of the present case (including the 2008 Joint Declaration of Italy and Germany), Judge Cançado Trindade reviews the arguments of the contending parties on the counter-claim, focusing on the scope of the dispute, the substance of the dispute and the notion of "continuing situation" (Part VI). Next, he examines the origins of the notion of a "continuing situation" in international legal doctrine (Part VII), and its configuration in international litigation and case-law, in Public International Law as well as in the International Law of Human Rights (Part VIII). He then moves his analysis onto the configuration of a "continuing situation" in international legal conceptualization at normative level (Part IX).

5. He ponders that the present Order of the Court makes abstraction of the configuration of the notion of "continuing situation" in those distinct aspects, and its emphasis falls solely on *waiver* of claims (of war reparations), again oblivious of the incidence of *jus cogens*, rendering certain waivers of claims devoid of any juridical effects; he regrets that this is the case, in the light of the scope of the present dispute before the Court (Parts X-XI). Judge Cançado Trindade then turns, in Part XII of his dissenting opinion, to the true bearers (*titulaires*) of the originally violated rights, the individuals, and warns against the dangers of the Court's paying lip service to State voluntarism.

6. In his conception, the individuals' rights (including herein their vindication of reparations for war crimes) are not the same as their State's rights, and any purported waiver by a State of the rights inherent to the human person would be against the international *ordre public*, and would be deprived of any juridical effects. To substantiate his thesis, he examines developments in conventional international law (international humanitarian law, international labour conventions, and international law of human rights) as well as general international law, and stresses the relevance of the legacy of the Martens clause. To him, the "dictates of the public conscience" invoked therein is to the benefit of humankind as a whole.

7. In Part XIII of his Dissenting Opinion, Judge Cançado Trindade sustains that the gradual awakening of human conscience led to the evolution from the conceptualization of the *delicta juris gentium* to that of the violations of international humanitarian law (in the form of war crimes and crimes against humanity)—the Nuremberg legacy—and from these latter to that of the *grave* violations of international humanitarian law (with the four Geneva Conventions on International Humanitarian Law of 1949, and their I Additional Protocol of 1977). States cannot waive claims of reparations of violations of the fundamental human rights and of serious or grave breaches of International Humanitarian Law that amount to war crimes (such as deportation to forced labour).

8. After assessing the incidence of *jus cogens*, in the light of the submissions of the contending parties, Judge Cançado Trindade concludes (Part XIV) that neither the tragic occurrences of the Second World War, nor the purported waiver of claims of Article 77 (4) of the 1947 Peace Treaties between the Allied Powers and Italy, are controverted by the contending parties to the point of constituting the real cause of the present dispute (on State immunity in direct connection with war reparation claims). On the other hand, the two 1961 bilateral Agreements between Germany and Italy constitute the real cause of the present dispute, and form the triggering point of a *continuing situation* persisting to date. The Court is thus endowed with jurisdiction *ratione temporis* on the basis of Article 27 *(a)* of the 1957 European Convention for the Peaceful Settlement of Disputes, and the Court should thus have declared the counter-claim admissible, as it is furthermore "directly connected" with the original claim, in conformity with Article 80 (1) of the Rules of Court.

9. In Judge Cançado Trindade's view, the present case does not concern State immunities *in abstracto*, or in isolation: it pertains to State immunity in *direct connection* with reparations for war crimes. It is thus necessary to go well beyond the strict inter-State outlook, so as to reach the ultimate bearers (*titulaires*) of rights, the human beings, confronted with waiver of their claims of reparation of serious breaches of their rights by States supposed to protect, rather than to oppress, them. Any such waiver is in breach of *jus cogens*.

10. In Judge Cançado Trindade's perception, one cannot build (and try to maintain) an international legal order over the suffering of human beings. At the time of mass deportation of civilians, sent to forced labour (along the two World Wars of the XXth century, not only the Second World War), everyone already knew that that was a *wrongful* act, a serious violation of human rights and of international humanitarian law, which came to be reckoned as amounting also to a war crime and a crime against humanity. In his final observation, the voluntarist-positivist outlook does not stand, as above the will stands conscience, moving the Law ahead as its ultimate *material* source, and removing manifest injustice.

Declaration of Judge *ad hoc* Gaja

In his declaration, Judge *ad hoc* Gaja states that in deciding on the admissibility of Italy's counter-claim the Court applies for the first time Article 80 of the Rules of Court as amended with effect from 1 February 2001. Unlike the previous provision, the new text requires the Court to take a decision "after hearing the parties" also on an objection raised by the claimant State with regard to the Court's jurisdiction on the counter-claim.

He declares that, in the case in hand, an oral hearing would probably have helped the Court to identify more precisely the date when the dispute arose and the facts and situations to which the dispute related.

180. ACCORDANCE WITH INTERNATIONAL LAW OF THE UNILATERAL DECLARATION OF INDEPENDENCE IN RESPECT OF KOSOVO

Advisory opinion of 22 July 2010

On 22 July 2010, the International Court of Justice gave its Advisory Opinion on the question of the *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*.

The Court was composed as follows: President Owada; Vice-President Tomka; Judges Koroma, Al-Khasawneh, Buergenthal, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood; Registrar Couvreur.

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The final paragraph (para. 123) of the Advisory opinion reads as follows:

" . . .

The Court,

(1) Unanimously,

Finds that it has jurisdiction to give the advisory opinion requested;

(2) By nine votes to five,

Decides to comply with the request for an advisory opinion;

In favour: President Owada; Judges Al-Khasawneh, Buergenthal, Simma, Abraham, Sepúlveda-Amor, Cançado Trindade, Yusuf, Greenwood;

Against: Vice-President Tomka; Judges Koroma, Keith, Bennouna, Skotnikov;

(3) By ten votes to four,

Is of the opinion that the declaration of independence of Kosovo adopted on 17 February 2008 did not violate international law.

In favour: President Owada; Judges Al-Khasawneh, Buergenthal, Simma, Abraham, Keith, Sepúlveda-Amor, Cançado Trindade, Yusuf, Greenwood;

Against: Vice-President Tomka; Judges Koroma, Bennouna, Skotnikov.

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Vice-President Tomka appended a declaration to the Advisory Opinion of the Court; Judge Koroma appended a dissenting opinion to the Advisory Opinion of the Court; Judge Simma appended a declaration to the Advisory Opinion of the Court; Judges Keith and Sepúlveda-Amor appended separate opinions to the Advisory Opinion of the Court; Judges Bennouna and Skotnikov appended dissenting opinions to the Advisory Opinion of the Court; Judges Cançado Trindade and Yusuf appended separate opinions to the Advisory Opinion of the Court.

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History of the proceedings (paras. 1–16)

The Court begins by recalling that the question on which the advisory opinion has been requested is set forth in resolution 63/3 adopted by the General Assembly of the United Nations (hereinafter the General Assembly) on 8 October 2008. It further recalls that that question reads as follows: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"

The Court then gives a brief summary of the history of the proceedings.

Reasoning of the Court

The Advisory Opinion is divided into five parts: (I) jurisdiction and discretion; (II) scope and meaning of the question; (III) factual background; (IV) the question whether the declaration of independence is in accordance with international law; and (V) general conclusion.

I. Jurisdiction and discretion
(paras. 17–48)

A. Jurisdiction
(paras. 18–28)

The Court first addresses the question whether it possesses jurisdiction to give the advisory opinion requested by the General Assembly on 8 October 2008. The power of the Court to give an advisory opinion is based upon Article 65, paragraph 1, of its Statute, which provides that "[it] may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."

The Court notes that the General Assembly is authorized to request an advisory opinion by Article 96 of the Charter, which provides that "[t]he General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question." It recalls that Article 12, paragraph 1, of the Charter provides that, "[w]hile the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the . . . Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests."

The Court observes, however, as it has done on an earlier occasion, that "[a] request for an advisory opinion is not in itself a 'recommendation' by the General Assembly 'with regard to [a] dispute or situation'" (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 148, para. 25). Accordingly, the Court points out that while Article 12 may limit the scope of the action which the General Assembly may take subsequent to its receipt of the Court's opinion, it does not in itself limit the authorization to request an advisory

opinion which is conferred upon the General Assembly by Article 96, paragraph 1.

The Court notes that, in the present case, the question put by the General Assembly asks whether the declaration of independence to which it refers is "in accordance with international law". A question which expressly asks the Court whether or not a particular action is compatible with international law certainly appears to be a legal question. It also observes that, in the present case, it has not been asked to give an opinion on whether the declaration of independence is in accordance with any rule of domestic law but only whether it is in accordance with international law. The Court can respond to that question by reference to international law without the need to enquire into any system of domestic law.

The Court recalls that it has repeatedly stated that the fact that a question has political aspects does not suffice to deprive it of its character as a legal question (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 172, para. 14). The Court adds that, whatever its political aspects, it cannot refuse to respond to the legal elements of a question which invites it to discharge an essentially judicial task, namely, an assessment of an act by reference to international law. The Court has also made clear that, in determining the jurisdictional issue of whether it is confronted with a legal question, it is not concerned with the political nature of the motives which may have inspired the request or the political implications which its opinion might have (*Conditions of Admission of a State in Membership of the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947–1948*, p. 61, and *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 234, para. 13).

In light of the foregoing, "[t]he Court therefore considers that it has jurisdiction to give an advisory opinion in response to the request made by the General Assembly."

B. Discretion
(paras. 29–48)

The Court then notes that "[t]he fact that [it] has jurisdiction does not mean, however, that it is obliged to exercise it";

> "The Court has recalled many times in the past that Article 65, paragraph 1, of its Statute, which provides that 'The Court *may* give an advisory opinion . . . ' (emphasis added), should be interpreted to mean that the Court has a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met." (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 156, para. 44.)

The Court observes that the discretion whether or not to respond to a request for an advisory opinion exists "so as to protect the integrity of the Court's judicial function and its nature as the principal judicial organ of the United Nations".

At this point, the Court gives careful consideration as to whether, in the light of its previous jurisprudence, there are compelling reasons for it to refuse to respond to the request from the General Assembly. It notes that the advisory jurisdiction is not a form of judicial recourse for States but the means by which the General Assembly and the Security Council, as well as other organs of the United Nations and bodies specifically empowered to do so by the General Assembly in accordance with Article 96, paragraph 2, of the Charter, may obtain the Court's opinion in order to assist them in their activities. The Court's opinion is given not to States but to the organ which has requested it. The Court considers that "precisely for that reason, the motives of individual States which sponsor, or vote in favour of, a resolution requesting an advisory opinion are not relevant to the Court's exercise of its discretion whether or not to respond".

The Court recalls that it has consistently made clear that it is for the organ which requests the opinion, and not for the Court, to determine whether it needs the opinion for the proper performance of its functions. In its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, the Court rejected an argument that it should refuse to respond to the General Assembly's request on the ground that the General Assembly had not explained to the Court the purposes for which it sought an opinion, stating that

> "it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs." (*I.C.J. Reports 1996 (I)*, p. 237, para. 16.)

Similarly, in the Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court commented that "[t]he Court cannot substitute its assessment of the usefulness of the opinion requested for that of the organ that seeks such opinion, namely, the General Assembly" (*I.C.J. Reports 2004 (I)*, p. 163, para. 62).

Nor does the Court consider that it should refuse to respond to the General Assembly's request on the basis of suggestions that its opinion might lead to adverse political consequences. Just as the Court cannot substitute its own assessment for that of the requesting organ in respect of whether its opinion will be useful to that organ, it cannot—in particular where there is no basis on which to make such an assessment—substitute its own view as to whether an opinion would be likely to have an adverse effect.

An important issue which the Court must consider is whether, in view of the respective roles of the Security Council and the General Assembly in relation to the situation in Kosovo, the Court, as the principal judicial organ of the United Nations, should decline to answer the question which has been put to it on the ground that the request for the Court's opinion has been made by the General Assembly rather than the Security Council.

The Court observes that the situation in Kosovo had been the subject of action by the Security Council, in the exercise of its responsibility for the maintenance of international peace and security, for more than ten years prior to the present request for an advisory opinion.

It notes that the General Assembly has also adopted resolutions relating to the situation in Kosovo. Prior to the adoption by the Security Council of resolution 1244 (1999), the General Assembly adopted five resolutions on the situation of human

rights in Kosovo. Following resolution 1244 (1999), the General Assembly adopted one further resolution on the situation of human rights in Kosovo.

The Court finds that, while the request put to it concerns one aspect of a situation which the Security Council has characterized as a threat to international peace and security and which continues to feature on the agenda of the Council in that capacity, that does not mean that the General Assembly has no legitimate interest in the question. Articles 10 and 11 of the Charter confer upon the General Assembly a very broad power to discuss matters within the scope of the activities of the United Nations, including questions relating to international peace and security. That power is not limited by the responsibility for the maintenance of international peace and security which is conferred upon the Security Council by Article 24, paragraph 1. As the Court has made clear in its Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, paragraph 26, "Article 24 refers to a primary, but not necessarily exclusive, competence". The fact that the situation in Kosovo is before the Security Council and the Council has exercised its Chapter VII powers in respect of that situation does not preclude the General Assembly from discussing any aspect of that situation, including the declaration of independence. The limit which the Charter places upon the General Assembly to protect the role of the Security Council is contained in Article 12 and restricts the power of the General Assembly to make recommendations following a discussion, not its power to engage in such a discussion.

The Court further observes that Article 12 does not bar all action by the General Assembly in respect of threats to international peace and security which are before the Security Council. The Court considered this question in some detail in paragraphs 26 to 27 of its Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, in which it noted that there has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security.

In the present case, the Court has already held that Article 12 of the Charter does not deprive it of the jurisdiction conferred by Article 96, paragraph 1. The Court considers that the fact that a matter falls within the primary responsibility of the Security Council for situations which may affect the maintenance of international peace and security and that the Council has been exercising its powers in that respect does not preclude the General Assembly from discussing that situation or, within the limits set by Article 12, making recommendations with regard thereto.

The Court recalls that the purpose of the advisory jurisdiction is to enable organs of the United Nations and other authorized bodies to obtain opinions from the Court which will assist them in the future exercise of their functions. The Court cannot determine what steps the General Assembly may wish to take after receiving the Court's opinion or what effect that opinion may have in relation to those steps. As has been demonstrated, the General Assembly is entitled to discuss the declaration of independence and, within the limits considered above, to make recommendations in respect of that or other aspects of the situation in Kosovo without trespassing on the powers of the Security Council. That being the case, the fact that, hitherto, the declaration of independence has been discussed only in the Security Council and that the Council has been the organ which has taken action with regard to the situation in Kosovo does not constitute a compelling reason for the Court to refuse to respond to the request from the General Assembly.

The Court also notes that the General Assembly has taken action with regard to the situation in Kosovo in the past. Between 1995 and 1999, the General Assembly adopted six resolutions addressing the human rights situation in Kosovo. Since 1999, the General Assembly has each year approved, in accordance with Article 17, paragraph 1, of the Charter, the budget of UNMIK. The Court observes therefore that the General Assembly has exercised functions of its own in the situation in Kosovo.

The Court notes that the fact that it will necessarily have to interpret and apply the provisions of Security Council resolution 1244 (1999) in the course of answering the question put by the General Assembly does not constitute a compelling reason not to respond to that question. While the interpretation and application of a decision of one of the political organs of the United Nations is, in the first place, the responsibility of the organ which took that decision, the Court, as the principal judicial organ of the United Nations, has also frequently been required to consider the interpretation and legal effects of such decisions. The Court therefore finds that there is nothing incompatible with the integrity of its judicial function in undertaking such a task. In its view the question is, rather, whether it should decline to respond to the request from the General Assembly unless it is asked to do so by the Security Council, the latter being, as the Court recalls, both the organ which adopted resolution 1244 and the organ which is, in the first place, responsible for interpreting and applying it. The Court observes that "[w]here, as here, the General Assembly has a legitimate interest in the answer to a question, the fact that that answer may turn, in part, on a decision of the Security Council is not sufficient to justify the Court in declining to give its opinion to the General Assembly". The Court concludes from the foregoing that "there are no compelling reasons for it to decline to exercise its jurisdiction in respect of the . . . request" before it.

II. Scope and meaning of the question
(paras. 49–56)

In this part of its Advisory Opinion, the Court examines the scope and meaning of the question on which the General Assembly has requested that it give its opinion. The Court recalls that in some previous cases "it has departed from the language of the question put to it where the question was not adequately formulated" (see for example, in *Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV), Advisory Opinion, 1928, P.C.I.J., Series B, No. 16*) or where the Court determined, on the basis of its examination of the background to the request, that the request did not reflect the "legal questions really in issue" (*Interpretation of the Agreement of 25 March 1951 between the WHO*

and Egypt, Advisory Opinion, I.C.J. Reports 1980, p. 89, para. 35). Similarly, where the question asked was unclear or vague, the Court has clarified the question before giving its opinion (*Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 348, para. 46).

The Court observes that the question posed by the General Assembly is clearly formulated. The question is narrow and specific; it asks for the Court's opinion on whether or not the declaration of independence is in accordance with international law. It notes that the question does not ask about the legal consequences of that declaration. In particular, it does not ask whether or not Kosovo has achieved statehood. Nor does it ask about the validity or legal effects of the recognition of Kosovo by those States which have recognized it as an independent State. The Court accordingly sees no reason to reformulate the scope of the question.

It considers however that there are two aspects of the question which require comment. First, the question refers to "the unilateral declaration of independence *by the Provisional Institutions of Self-Government of Kosovo*" (General Assembly resolution 63/3 of 8 October 2008, single operative paragraph; emphasis added). In addition, the third preambular paragraph of the General Assembly resolution "[r]ecall[s] that on 17 February 2008 the Provisional Institutions of Self-Government of Kosovo declared independence from Serbia". Whether it was indeed the Provisional Institutions of Self-Government of Kosovo which promulgated the declaration of independence was contested by a number of those participating in the present proceedings. The identity of the authors of the declaration of independence, as is demonstrated below, is a matter which is capable of affecting the answer to the question whether that declaration was in accordance with international law. It would be incompatible with the proper exercise of the judicial function for the Court to treat that matter as having been determined by the General Assembly.

Nor does the Court consider that the General Assembly intended to restrict the Court's freedom to determine this issue for itself. The Court notes that the agenda item under which what became resolution 63/3 was discussed did not refer to the identity of the authors of the declaration and was entitled simply "Request for an advisory opinion of the International Court of Justice on whether the declaration of independence *of Kosovo* is in accordance with international law" (General Assembly resolution 63/3 of 8 October 2008; emphasis added). The wording of this agenda item had been proposed by the Republic of Serbia, the sole sponsor of resolution 63/3, when it requested the inclusion of a supplementary item on the agenda of the Sixty-Third Session of the General Assembly. The common element in the agenda item and the title of the resolution itself is whether the declaration of independence is in accordance with international law. Moreover, there was no discussion of the identity of the authors of the declaration, or of the difference in wording between the title of the resolution and the question which it posed to the Court during the debate on the draft resolution (A/63/PV.22).

As the Court has stated in a different context:

> "It is not to be assumed that the General Assembly would . . . seek to fetter or hamper the Court in the discharge of its judicial functions; the Court must have full liberty to consider all relevant data available to it in forming an opinion on a question posed to it for an advisory opinion." (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 157.)

The Court finds that this consideration is applicable in the present case. In assessing whether or not the declaration of independence is in accordance with international law, the Court must be free to examine the entire record and decide for itself whether that declaration was promulgated by the Provisional Institutions of Self-Government or some other entity.

The Court then notes, in paragraph 56 of the Opinion, that the General Assembly has asked it whether the declaration of independence was "in accordance with" international law and that the answer to that question turns on whether or not the applicable international law prohibited the declaration of independence. If the Court concludes that it did, then it must answer the question put by saying that the declaration of independence was not in accordance with international law. It follows that the task which the Court is called upon to perform is to determine whether or not the declaration of independence was adopted in violation of international law. The Court observes that it is not required by the question it has been asked to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, a fortiori, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it. Indeed, it is entirely possible for a particular act—such as a unilateral declaration of independence—not to be in violation of international law without necessarily constituting the exercise of a right conferred by it. The Court notes that it has been "asked for an opinion on the first point, not the second."

III. Factual Background
(paras. 57–77)

The Court continues its reasoning by indicating that "[t]he declaration of independence of [Kosovo adopted on] 17 February 2008 must be considered within the factual context which led to its adoption". It briefly describes the relevant characteristics of the framework put in place by the Security Council to ensure the interim administration of Kosovo, namely, Security Council resolution 1244 (1999) and the regulations promulgated thereunder by the United Nations Mission in Kosovo (UNMIK). It then gives a succinct account of the developments relating to the so-called "final status process" in the years preceding the adoption of the declaration of independence, before turning to the events of 17 February 2008.

IV. The question whether the declaration of independence is in accordance with international law
(paras. 78–121)

In this part of its Advisory Opinion, the Court turns to the substance of the request submitted by the General Assembly. It recalls that it has been asked by the latter to assess the

accordance of the declaration of independence of 17 February 2008 with "international law".

A. General international law
(paras. 79–84)

The Court first notes that during the eighteenth, nineteenth and early twentieth centuries, there were numerous instances of declarations of independence, often strenuously opposed by the State from which independence was being declared. Sometimes a declaration resulted in the creation of a new State, at others it did not. In no case, however, does the practice of States as a whole suggest that the act of promulgating the declaration was regarded as contrary to international law. On the contrary, State practice during this period points clearly to the conclusion that international law contained no prohibition of declarations of independence. During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation. A great many new States have come into existence as a result of the exercise of this right. There were, however, also instances of declarations of independence outside this context. The practice of States in these latter cases does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases.

The Court then recalls that the principle of territorial integrity is "an important part of the international legal order and is enshrined in the Charter of the United Nations, in particular in Article 2, paragraph 4, which provides that:

> 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.'"

In General Assembly resolution 2625 (XXV), entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations", which reflects customary international law (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 101–103, paras. 191–193), the General Assembly reiterated "[t]he principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State". This resolution then enumerated various obligations incumbent upon States to refrain from violating the territorial integrity of other sovereign States. In the same vein, the Final Act of the Helsinki Conference on Security and Co-operation in Europe of 1 August 1975 (the Helsinki Conference) stipulated that "[t]he participating States will respect the territorial integrity of each of the participating States" (Art. IV). Thus, the Court notes, "the scope of the principle of territorial integrity is confined to the sphere of relations between States".

The Court observes, however, that while the Security Council has condemned particular declarations of independence, in all of those instances it was making a determination as regards the concrete situation existing at the time that those declarations of independence were made; it states that "the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*)". The Court notes that "[i]n the context of Kosovo, the Security Council has never taken this position". The exceptional character of the resolutions enumerated above appears to the Court to confirm that no general prohibition against unilateral declarations of independence may be inferred from the practice of the Security Council.

The Court considers that it is not necessary, in the present case, to resolve the question whether, outside the context of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation, the international law of self-determination confers upon part of the population of an existing State a right to separate from that State, or whether international law provides for a right of "remedial secession" and, if so, in what circumstances. It recalls that the General Assembly has requested the Court's opinion only on whether or not the declaration of independence is in accordance with international law. The Court notes that debates regarding the extent of the right of self-determination and the existence of any right of "remedial secession", however, concern the right to separate from a State. That issue is beyond the scope of the question posed by the General Assembly. To answer that question, the Court need only determine whether the declaration of independence violated either general international law or the lex specialis created by Security Council resolution 1244 (1999).

For the reasons already given, the Court considers that general international law contains no applicable prohibition of declarations of independence. Accordingly, it concludes that the declaration of independence of 17 February 2008 did not violate general international law.

B. Security Council resolution 1244 (1999) and the UNMIK Constitutional Framework created thereunder
(paras. 85–121)

The Court then examines the legal relevance of Security Council resolution 1244, adopted on 10 June 1999. It notes that within the legal framework of the United Nations Charter, notably on the basis of Articles 24, 25 and Chapter VII thereof, the Security Council may adopt resolutions imposing obligations under international law. It recalls that resolution 1244 (1999) was expressly adopted by the Security Council on the basis of Chapter VII of the United Nations Charter, and therefore clearly imposes international legal obligations.

The Court observes that UNMIK regulations, including regulation 2001/9, which promulgated the Constitutional Framework, are adopted by the Special Representative of the Secretary-General on the basis of the authority derived from Security Council resolution 1244 (1999) and thus ultimately from the United Nations Charter. It adds that the Constitutional Framework "derives its binding force from the binding character of resolution 1244 (1999) and thus from interna-

tional law" and that, in that sense, "it therefore possesses an international legal character".

At the same time, the Court observes that the Constitutional Framework functions as part of a specific legal order, created pursuant to resolution 1244 (1999), which is applicable only in Kosovo and the purpose of which is to regulate, during the interim phase established by resolution 1244 (1999), matters which would ordinarily be the subject of internal, rather than international, law. Regulation 2001/9 opens with the statement that the Constitutional Framework was promulgated

> "[f]or the purposes of developing meaningful self-government in Kosovo pending a final settlement, and establishing provisional institutions of self-government in the legislative, executive and judicial fields through the participation of the people of Kosovo in free and fair elections".

The Constitutional Framework therefore took effect as part of the body of law adopted for the administration of Kosovo during the interim phase. The institutions which it created were empowered by the Constitutional Framework to take decisions which took effect within that body of law. In particular, the Assembly of Kosovo was empowered to adopt legislation which would have the force of law within that legal order, subject always to the overriding authority of the Special Representative of the Secretary-General.

The Court notes that both Security Council resolution 1244 (1999) and the Constitutional Framework entrust the Special Representative of the Secretary-General with considerable supervisory powers with regard to the Provisional Institutions of Self-Government.

It observes that Security Council resolution 1244 (1999) and the Constitutional Framework were still in force and applicable as at 17 February 2008. Paragraph 19 of Security Council resolution 1244 (1999) expressly provides that "the international civil and security presences are established for an initial period of 12 months, to continue thereafter unless the Security Council decides otherwise". No decision amending resolution 1244 (1999) was taken by the Security Council at its meeting held on 18 February 2008, when the declaration of independence was discussed for the first time, or at any subsequent meeting. Neither Security Council resolution 1244 (1999) nor the Constitutional Framework contains a clause providing for its termination and neither has been repealed; they therefore constituted the international law applicable to the situation prevailing in Kosovo on 17 February 2008. The Court further notes that the Special Representative of the Secretary-General continues to exercise his functions in Kosovo and, moreover, that the Secretary-General has continued to submit periodic reports to the Security Council, as required by paragraph 20 of Security Council resolution 1244 (1999).

From the foregoing, the Court concludes that Security Council resolution 1244 (1999) and the Constitutional Framework form part of the international law which is to be considered in replying to the question posed by the General Assembly in its request for the advisory opinion.

1. Interpretation of Security Council resolution 1244 (1999)
(paras. 94–100)

Before continuing further, the Court recalls several factors relevant in the interpretation of resolutions of the Security Council. It observes that while the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also require that other factors be taken into account. The Court notes that Security Council resolutions are issued by a single, collective body and are drafted through a very different process than that used for the conclusion of a treaty; they are the product of a voting process as provided for in Article 27 of the Charter, and the final text of such resolutions represents the view of the Security Council as a body. Moreover, Security Council resolutions can be binding on all Member States (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 54, para. 116), irrespective of whether they played any part in their formulation. The interpretation of Security Council resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions.

The Court first observes that resolution 1244 (1999) must be read in conjunction with the general principles set out in annexes 1 and 2 thereto, since in the resolution itself, the Security Council: "1. *Decide[d]* that a political solution to the Kosovo crisis shall be based on the general principles in annex 1 and as further elaborated in the principles and other required elements in annex 2." Those general principles sought to defuse the Kosovo crisis first by ensuring an end to the violence and repression in Kosovo and by the establishment of an interim administration. A longer-term solution was also envisaged, in that resolution 1244 (1999) was to initiate

> "[a] political process towards the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of the KLA" (Security Council resolution 1244 (1999) of 10 June 1999, Ann. 1, sixth principle; *ibid.*, Ann. 2, para. 8).

Further, it bears recalling that the tenth preambular paragraph of resolution 1244 (1999) also recalled the sovereignty and the territorial integrity of the Federal Republic of Yugoslavia.

Having earlier outlined the principal characteristics of Security Council resolution 1244 (1999), the Court next observes that three distinct features of that resolution are relevant for discerning its object and purpose.

First, resolution 1244 (1999) establishes an international civil and security presence in Kosovo with full civil and political authority and sole responsibility for the governance of Kosovo. On 12 June 1999, the Secretary-General presented to the Security Council his preliminary operational concept for the overall organization of the civil presence under UNMIK. On 25 July 1999, the Special Representative of the Secretary-General promulgated UNMIK regulation 1999/1, deemed to have entered into force as of 10 June 1999, the date of adoption of Security Council resolution 1244 (1999). Under this regulation, "[a]11 legislative and executive authority with respect to Kosovo, including the administration of the judiciary", was vested in UNMIK and exercised by the Special Representative. Viewed together, resolution 1244 (1999) and UNMIK regulation 1999/1 therefore had the effect of superseding the legal order in force at that time in the territory of Kosovo and setting up an international territorial administration. For this reason, the establishment of civil and security presences in Kosovo deployed on the basis of resolution 1244 (1999) must be understood as an exceptional measure relating to civil, political and security aspects and aimed at addressing the crisis existing in that territory in 1999.

Secondly, the solution embodied in resolution 1244 (1999), namely, the implementation of an interim international territorial administration, was designed for humanitarian purposes: to provide a means for the stabilization of Kosovo and for the re-establishment of a basic public order in an area beset by crisis. This becomes apparent in the text of resolution 1244 (1999) itself which, in its second preambular paragraph, recalls Security Council resolution 1239, adopted on 14 May 1999, in which the Security Council had expressed "grave concern at the humanitarian crisis in and around Kosovo". The priorities which are identified in paragraph 11 of resolution 1244 (1999) were elaborated further in the so-called "four pillars" relating to the governance of Kosovo described in the Report of the Secretary-General of 12 June 1999. By placing an emphasis on these "four pillars", namely, interim civil administration, humanitarian affairs, institution building and reconstruction, and by assigning responsibility for these core components to different international organizations and agencies, resolution 1244 (1999) was clearly intended to bring about stabilization and reconstruction. The interim administration in Kosovo was designed to suspend temporarily Serbia's exercise of its authority flowing from its continuing sovereignty over the territory of Kosovo. The purpose of the legal régime established under resolution 1244 (1999) was to establish, organize and oversee the development of local institutions of self-government in Kosovo under the aegis of the interim international presence.

Thirdly, resolution 1244 (1999) clearly establishes an interim régime; it cannot be understood as putting in place a permanent institutional framework in the territory of Kosovo. This resolution mandated UNMIK merely to facilitate the desired negotiated solution for Kosovo's future status, without prejudging the outcome of the negotiating process.

The Court thus concludes that the object and purpose of resolution 1244 (1999) was to establish a temporary, exceptional legal régime which, save to the extent that it expressly preserved it, superseded the Serbian legal order and which aimed at the stabilization of Kosovo. The Court notes that it was designed to do so on an interim basis.

2. The question whether the declaration of independence is in accordance with Security Council resolution 1244 (1999) and the measures adopted thereunder
(paras. 101–121)

The Court then addresses the question whether Security Council resolution 1244 (1999), or the measures adopted thereunder, introduces a specific prohibition on issuing a declaration of independence, applicable to those who adopted the declaration of independence of 17 February 2008. In order to answer this question, it is first necessary for the Court to determine precisely who issued that declaration.

(a) The identity of the authors of the declaration of independence
(paras. 102–109)

The Court turns to the question whether the declaration of independence of 17 February 2008 was an act of the "Assembly of Kosovo", one of the Provisional Institutions of Self-Government, established under Chapter 9 of the Constitutional Framework, or whether those who adopted the declaration were acting in a different capacity. It notes that, when opening the meeting of 17 February 2008 at which the declaration of independence was adopted, the President of the Assembly and the Prime Minister of Kosovo made reference to the Assembly of Kosovo and the Constitutional Framework. The Court considers, however, that the declaration of independence must be seen in its larger context, taking into account the events preceding its adoption, notably relating to the so-called "final status process". Security Council resolution 1244 (1999) was mostly concerned with setting up an interim framework of self-government for Kosovo. Although, at the time of the adoption of the resolution, it was expected that the final status of Kosovo would flow from, and be developed within, the framework set up by the resolution, the specific contours, let alone the outcome, of the final status process were left open by Security Council resolution 1244 (1999). Accordingly, its paragraph 11, especially in its subparagraphs *(d)*, *(e)* and *(f)*, deals with final status issues only in so far as it is made part of UNMIK's responsibilities to "[f]acilitat[e] a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords" and "[i]n a final stage, [to oversee] the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement".

The Court observes that the declaration of independence reflects the awareness of its authors that the final status negotiations had failed and that a critical moment for the future of Kosovo had been reached. The Preamble of the declaration refers to the "years of internationally-sponsored negotiations between Belgrade and Pristina over the question of our future political status" and expressly puts the declaration in the context of the failure of the final status negotiations, inasmuch as it states that "no mutually-acceptable status outcome was possible" (tenth and eleventh preambular paragraphs). Proceeding from there, the authors of the declaration of independence emphasize their determination to "resolve" the status of Kosovo and to give the people of Kosovo "clarity

about their future" (thirteenth preambular paragraph). This language indicates that the authors of the declaration did not seek to act within the standard framework of interim self-administration of Kosovo, but aimed at establishing Kosovo "as an independent and sovereign state" (para. 1). The declaration of independence, therefore, was not intended by those who adopted it to take effect within the legal order created for the interim phase, nor was it capable of doing so. On the contrary, the Court considers that the authors of that declaration did not act, or intend to act, in the capacity of an institution created by and empowered to act within that legal order but, rather, set out to adopt a measure the significance and effects of which would lie outside that order.

The Court observes that this conclusion is reinforced by the fact that the authors of the declaration undertook to fulfil the international obligations of Kosovo, notably those created for Kosovo by UNMIK (declaration of independence, para. 9), and expressly and solemnly declared Kosovo to be bound vis-à-vis third States by the commitments made in the declaration (*ibid*., para. 12). By contrast, under the régime of the Constitutional Framework, all matters relating to the management of the external relations of Kosovo were the exclusive prerogative of the Special Representative of the Secretary-General.

The Court asserts that certain features of the text of the declaration and the circumstances of its adoption also point to the same conclusion. Nowhere in the original Albanian text of the declaration (which is the sole authentic text) is any reference made to the declaration being the work of the Assembly of Kosovo. The words "Assembly of Kosovo" appear at the head of the declaration only in the English and French translations contained in the dossier submitted on behalf of the Secretary-General. The language used in the declaration differs from that employed in acts of the Assembly of Kosovo in that the first paragraph commences with the phrase "We, the democratically-elected leaders of our people . . .", whereas acts of the Assembly of Kosovo employ the third person singular.

Moreover, the procedure employed in relation to the declaration differed from that employed by the Assembly of Kosovo for the adoption of legislation. In particular, the declaration was signed by all those present when it was adopted, including the President of Kosovo, who was not a member of the Assembly of Kosovo. In fact, the self-reference of the persons adopting the declaration of independence as "the democratically-elected leaders of our people" immediately precedes the actual declaration of independence within the text ("hereby declare Kosovo to be an independent and sovereign state"; para. 1). It is also noticeable that the declaration was not forwarded to the Special Representative of the Secretary-General for publication in the Official Gazette.

The Court notes that the reaction of the Special Representative of the Secretary-General to the declaration of independence is also of some significance. The Constitutional Framework gave the Special Representative power to oversee and, in certain circumstances, annul the acts of the Provisional Institutions of Self-Government.

The silence of the Special Representative of the Secretary-General in the face of the declaration of independence of 17 February 2008 suggests that he did not consider that the declaration was an act of the Provisional Institutions of Self-Government designed to take effect within the legal order for the supervision of which he was responsible. As the practice shows, he would have been under a duty to take action with regard to acts of the Assembly of Kosovo which he considered to be *ultra vires*.

The Court accepts that the Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, submitted to the Security Council on 28 March 2008, stated that "the Assembly of Kosovo held a session during which it adopted a 'declaration of independence', declaring Kosovo an independent and sovereign State" (United Nations doc. S/2008/211, para. 3). This was the normal periodic report on UNMIK activities, the purpose of which was to inform the Security Council about developments in Kosovo; it was not intended as a legal analysis of the declaration or the capacity in which those who adopted it had acted.

The Court thus arrives at the conclusion that, taking all factors together, the authors of the declaration of independence of 17 February 2008 did not act as one of the Provisional Institutions of Self-Government within the Constitutional Framework, but rather as persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration.

(b) The question whether the authors of the declaration of independence acted in violation of Security Council resolution 1244 (1999) or the measures adopted thereunder
(paras. 110–121)

First, the Court observes that Security Council resolution 1244 (1999) was essentially designed to create an interim régime for Kosovo, with a view to channelling the long-term political process to establish its final status. The resolution did not contain any provision dealing with the final status of Kosovo or with the conditions for its achievement.

In this regard the Court notes that contemporaneous practice of the Security Council shows that in situations where the Security Council has decided to establish restrictive conditions for the permanent status of a territory, those conditions are specified in the relevant resolution.

By contrast, under the terms of resolution 1244 (1999) the Security Council did not reserve for itself the final determination of the situation in Kosovo and remained silent on the conditions for the final status of Kosovo.

Resolution 1244 (1999) thus does not preclude the issuance of the declaration of independence of 17 February 2008 because the two instruments operate on a different level: unlike resolution 1244 (1999), the declaration of independence is an attempt to determine finally the status of Kosovo.

Secondly, turning to the question of the addressees of Security Council resolution 1244 (1999), as described above, it sets out a general framework for the "deployment in Kosovo, under United Nations auspices, of international civil and security presences" (para. 5). It is mostly concerned with creating obligations and authorizations for United Nations Member States as well as for organs of the United Nations such as the Secretary-General and his Special Representative (see notably paras. 3, 5,

6, 7, 9, 10 and 11 of Security Council resolution 1244 (1999)). There is no indication, in the text of Security Council resolution 1244 (1999), that the Security Council intended to impose, beyond that, a specific obligation to act or a prohibition from acting, addressed to such other actors.

The Court recalls in this regard that it has not been uncommon for the Security Council to make demands on actors other than United Nations Member States and intergovernmental organizations. More specifically, a number of Security Council resolutions adopted on the subject of Kosovo prior to Security Council resolution 1244 (1999) contained demands addressed *eo nomine* to the Kosovo Albanian leadership.

The Court points out that such reference to the Kosovo Albanian leadership or other actors, notwithstanding the somewhat general reference to "all concerned" (para. 14), is missing from the text of Security Council resolution 1244 (1999). When interpreting Security Council resolutions, the Court must establish, on a case-by-case basis, considering all relevant circumstances, for whom the Security Council intended to create binding legal obligations. The language used by the resolution may serve as an important indicator in this regard. The approach taken by the Court with regard to the binding effect of Security Council resolutions in general is, *mutatis mutandis*, also relevant here. In this context, the Court recalls its previous statement that:

> "The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council." (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 53, para. 114.)

Bearing this in mind, the Court cannot accept the argument that Security Council resolution 1244 (1999) contains a prohibition, binding on the authors of the declaration of independence, against declaring independence; nor can such a prohibition be derived from the language of the resolution understood in its context and considering its object and purpose. The language of Security Council resolution 1244 (1999) is at best ambiguous in this regard. The object and purpose of the resolution, as has been explained in detail, is the establishment of an interim administration for Kosovo, without making any definitive determination on final status issues. The text of the resolution explains that the

> "main responsibilities of the international civil presence will include . . . [o]rganizing and overseeing the development of provisional institutions for democratic and autonomous self-government *pending a political settlement*" (para. 11 *(c)* of the resolution; emphasis added).

The phrase "political settlement", often cited in the proceedings before the Court, does not modify this conclusion. First, that reference is made within the context of enumerating the responsibilities of the international civil presence, i.e., the Special Representative of the Secretary-General in Kosovo and UNMIK, and not of other actors. Secondly, as the diverging views presented to the Court on this matter illustrate, the term "political settlement" is subject to various interpretations. The Court therefore concludes that this part of Security Council resolution 1244 (1999) cannot be construed to include a prohibition, addressed in particular to the authors of the declaration of 17 February 2008, against declaring independence.

The Court accordingly finds that Security Council resolution 1244 (1999) did not bar the authors of the declaration of 17 February 2008 from issuing a declaration of independence from the Republic of Serbia. Hence, the declaration of independence did not violate Security Council resolution 1244 (1999).

Turning to the question whether the declaration of independence of 17 February 2008 has violated the Constitutional Framework established under the auspices of UNMIK, the Court notes that it has already held that the declaration of independence of 17 February 2008 was not issued by the Provisional Institutions of Self-Government, nor was it an act intended to take effect, or actually taking effect, within the legal order in which those Provisional Institutions operated. It follows that the authors of the declaration of independence were not bound by the framework of powers and responsibilities established to govern the conduct of the Provisional Institutions of Self-Government. Accordingly, the Court finds that the declaration of independence did not violate the Constitutional Framework.

V. General conclusion
(para. 122)

The Court recalls its conclusions reached earlier, namely, "that the adoption of the declaration of independence of 17 February 2008 did not violate general international law, Security Council resolution 1244 (1999) or the Constitutional Framework". Finally, it concludes that "[c]onsequently the adoption of that declaration did not violate any applicable rule of international law."

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Declaration of Vice-President Tomka

The Vice-President considers that the majority has conducted an "adjustment" of the question posed by the General Assembly, an adjustment which he cannot in his judicial conscience follow. The Vice-President considers that the Court should have exercised its discretion and declined answering the request in order to protect the integrity of its judicial function and its nature as a judicial organ.

The Vice-President first considers that the Security Council is the body empowered to make a *determination* whether an act adopted by the institutions of Kosovo, which has been put under a régime of international territorial administration, is or is not in conformity with the legal framework applicable to and governing that régime. However, the Security Council has made no such determination and its silence cannot be inter-

preted as implying the tacit approval of, or acquiescence with, the declaration of independence adopted on 17 February 2008. Yet, the General Assembly is the body which has addressed the request to the Court. The Vice-President considers that Article 12, paragraph 1, of the Charter prevents the General Assembly from making any recommendation with regard to the status of Kosovo, as he fails to see any "sufficient interest" for the Assembly in requesting the opinion from the Court. He considers that the majority's answer given to the question put by the General Assembly prejudices the determination, still to be made by the Security Council, on the conformity *vel non* of the declaration with resolution 1244 and the international régime of territorial administration established thereunder.

As regards the question itself, the Vice-President considers it clearly formulated and sufficiently narrow and specific so as not to warrant any adjustment. He explains that he considers the Court's conclusion, that the authors of the declaration of independence did not act as one of the Provisional Institutions of Self-Government, as lacking a sound basis in the facts relating to the adoption of the declaration. After enumerating a series of facts and declarations by various relevant parties in relation to the declaration of 17 February 2008, the Vice-President concludes that the Assembly of Kosovo, consisting of its members, the President of Kosovo and its Government, headed by the Prime Minister, constituted, on 17 February 2008, the *Provisional Institutions of Self-Government* of Kosovo, and they together issued the declaration. Thus, according to him, the question was correctly formulated in the request of the General Assembly and there was no reason to "adjust" it and subsequently to modify the title itself of the case.

As regards the applicable legal framework, the Vice-President first recalls that Security Council resolution 1244 did not displace the Federal Republic of Yugoslavia's title to the territory in question; and he states that, by establishing an international territorial administration over Kosovo, which remained legally part of the FRY, the United Nations assumed its responsibility for this territory. Reiterating the primary responsibilities falling upon the United Nations in the interim administration of Kosovo under resolution 1244 (1999), he considers that the Security Council has not abdicated on its overall responsibility for the situation in Kosovo, and that it has remained actively seised of the matter.

The Vice-President affirms that the notion of a "final settlement" cannot mean anything else than the resolution of the dispute between the parties concerned, either by an agreement reached between them or by a decision of an organ having competence to do so. He denies that the notion of a settlement may be reconciled with the unilateral step-taking by one of the parties aiming at the resolution of the dispute against the will of the other. Turning then to the negotiations on determining Kosovo's future status, which led to no agreement, he questions whether the parties negotiated in good faith because, as the Court observed in several earlier cases, negotiating in good faith means that the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation; and that they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it. Observing that the proposal for supervised independence by Special Envoy Martti Ahtisaari was not endorsed by the Security Council, to his mind the only United Nations organ competent to do so, he considers that the Kosovo Declaration of Independence has been a way to put, to the extent possible, into practice the unendorsed Ahtisaari plan.

Finally, the Vice-President recalls that on previous occasions in 2002, 2003 and 2005, the Special Representative of the Secretary-General, entrusted by the United Nations with the interim administration of Kosovo, has not hesitated, in the exercise of that supervisory role, to declare null and void a measure of one of the Provisional Institutions which he considered to be beyond that Institution's powers (*ultra vires*). He considers that the Advisory Opinion provides no explanation why acts which were considered as going beyond the competencies of the Provisional Institutions in the period 2002–2005, would not have such character any more in 2008, despite the fact that provisions of the Constitutional Framework on the competencies of these institutions have not been amended and remained the same in February 2008 as they were in 2005.

The Vice-President concludes with the observation that the Court, as the principal judicial organ of the United Nations, is supposed to uphold the respect for the rules and mechanisms contained in the Charter and the decisions adopted thereunder. In his view, the majority has given preference to recent political developments and current realities in Kosovo, rather than to the strict requirement of respect for such rules, thus trespassing the limits of judicial restraint.

Dissenting opinion of Judge Koroma

In his dissenting opinion, Judge Koroma concludes that he cannot concur in the finding of the Court that the "declaration of independence of Kosovo adopted on 17 February 2008 did not violate international law".

In the view of Judge Koroma, the Court, in exercising its advisory jurisdiction, is entitled to reformulate or interpret a question put to it, but is not free to replace the question asked of it with its own question and then proceed to answer that question, which is what the Court has done in this case. Judge Koroma explains that the Court, as well as its predecessor, the Permanent Court of International Justice, has previously reformulated the question put in a request for an advisory opinion in an effort to make that question more closely correspond to the intent of the institution requesting the advisory opinion, but has never reformulated a question to such an extent that a completely new question results, one clearly distinct from the original question posed. Judge Koroma concludes that this is what the Court has done in this case by, without explicitly reformulating the question, concluding that the authors of the declaration of independence were distinct from the Provisional Institutions of Self-Government of Kosovo and that the answer to the question should therefore be developed on this presumption.

Turning to the Court's answer to the question, Judge Koroma begins by emphasizing that the Court's conclusion that the declaration of independence of 17 February 2008 was made by a body other than the Provisional Institutions of

Self-Government of Kosovo and thus did not violate international law is legally untenable, because it is based on the Court's perceived intent of those authors. Judge Koroma stresses that positive international law does not recognize or enshrine the right of ethnic, linguistic or religious groups to break away from the State of which they form part without its consent merely by expressing their wish to do so, especially in the present case where Security Council resolution 1244 (1999) is applicable. He cautions that to accept otherwise and to allow any ethnic, linguistic or religious group to declare independence and break away from the State of which it forms part without the existing State's consent, and outside the context of decolonization, would create a very dangerous precedent, amounting to nothing less than announcing to any and all dissident groups around the world that they are free to circumvent international law simply by acting in a certain way and crafting a unilateral declaration of independence in certain terms. In the view of Judge Koroma, rather than reaching a conclusion on the identity of the authors of the unilateral declaration of independence based on their subjective intent, the Court should have looked to the intent of States and, in particular in this case, the intent of the Security Council in resolution 1244 (1999).

Judge Koroma establishes that Security Council resolution 1244 (1999) constitutes the legal basis for the creation of the Provisional Institutions of Self-Government of Kosovo, and therefore the Court has first and foremost to apply resolution 1244 (1999), as the *lex specialis*, to the matter before it. Applying resolution 1244 (1999), Judge Koroma concludes that the declaration of independence contravenes that resolution for several reasons. First, that resolution calls for a negotiated settlement, meaning the agreement of all the parties concerned with regard to the final status of Kosovo, which the authors of the declaration of independence have circumvented. Secondly, the declaration of independence violates the provision of that resolution calling for a political solution based on respect for the territorial integrity of the Federal Republic of Yugoslavia and the autonomy of Kosovo. Additionally, the unilateral declaration of independence is an attempt to bring to an end the international presence in Kosovo established by Security Council resolution 1244 (1999), a result which could only be effected by the Security Council itself. In this analysis, Judge Koroma draws on the text of resolution 1244 (1999)—in particular its preamble and operative paragraphs 1, 2, 10 and 11—as well as other instruments it references, including its Annexes 1 and 2, the Helsinki Final Act and the Rambouillet accords. He also reviews the positions taken by various States with regard to resolution 1244 (1999).

Judge Koroma notes that the unilateral declaration of independence has also violated certain derivative law promulgated pursuant to resolution 1244 (1999), notably the Constitutional Framework and other UNMIK regulations. He observes that the majority opinion avoids this result by a kind of judicial sleight-of-hand, reaching a hasty conclusion that the authors of the unilateral declaration of independence were not acting as the Provisional Institutions of Self-Government of Kosovo but rather as the direct representatives of the Kosovo people and were thus not subject to the Constitutional Framework and UNMIK regulations.

Judge Koroma then proceeds to an examination of the accordance of the unilateral declaration of independence with general international law, concluding that it violated the principle of respect for the sovereignty and territorial integrity of States, which entails an obligation to respect the definition, delineation and territorial integrity of an existing State. In his analysis, Judge Koroma cites Article 2, paragraph 4, of the Charter of the United Nations, and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

Finally, Judge Koroma refers to the finding made by the Supreme Court of Canada that "international law does not specifically grant component parts of sovereign States the *legal* right to secede unilaterally from their 'parent' State". While Judge Koroma takes the view that that Court correctly answered the question posed to it, he emphasizes that the question now before this Court is different and provides an opportunity to complete the picture partially drawn by the Supreme Court of Canada. In particular, this Court should have made clear that the applicable law in this case contains explicit and implicit rules against the unilateral declaration of independence.

Judge Koroma thus concludes that the Court should have found that the unilateral declaration of independence of 17 February 2008 by the Provisional Institutions of Self-Government of Kosovo is not in accordance with international law.

Declaration of Judge Simma

Judge Simma concurs with the Court on the great majority of its reasoning, but questions what he considers to be its unnecessarily limited analysis. Judge Simma considers that, as the Advisory Opinion interprets the General Assembly's request to require only an assessment of whether or not the Kosovar declaration of independence was adopted in violation of international law, the Opinion not only ignores the plain wording of the request itself, which asks whether the declaration of independence was "in accordance with international law", but that it also excludes any consideration of whether international law may specifically permit or even foresee an entitlement to declare independence when certain conditions are met. Judge Simma finds this approach disquieting in the light of the Court's general conclusion that the declaration of independence "did not violate international law".

In Judge Simma's view, the underlying rationale of the Court's approach, that, in relation to a specific act, it is not necessary to demonstrate a permissive rule so long as there is no prohibition, is obsolete. He justifies this position for two reasons. First, by unduly limiting the scope of its analysis, the Court has not answered the question put before it in a satisfactory manner; it should have provided a fuller treatment of both prohibitive and permissive rules of international law. Secondly, Judge Simma considers that the Court's approach reflects an anachronistic, highly consensualist vision of international law rooted in the so-called *Lotus* principle developed by the Permanent Court more than 80 years ago. According to Judge Simma, the Court could also have considered the

possibility that international law can be neutral or deliberately silent on the international lawfulness of certain acts.

Judge Simma first recalls the wording of the General Assembly's request, which asked whether Kosovo's declaration of independence was "in accordance with international law". He regards this as a neutral wording which deliberately does not ask for the existence of either a prohibitive or permissive rule under international law; the term "in accordance with" being broad by definition. Although Judge Simma concedes that it is true that the request is not phrased in the same way as the question posed to the Supreme Court of Canada (asking for a "right to effect secession", cf. Advisory Opinion, paragraph 55), he maintains that this difference does not justify the Court's determination that the term "in accordance with" is to be understood as asking *exclusively* whether there is a prohibitive rule, and that, if there is none, the declaration of independence is *ipso facto* in accordance with international law.

Judge Simma considers that a broader approach would have better addressed the arguments invoked by many of the Participants, including the authors of the declaration of independence, relating the right to self-determination of peoples and the issue of "remedial secession". He considers these arguments important in terms of resolving the broader dispute in Kosovo and in comprehensively addressing all aspects of the accordance with international law of the declaration of independence. Moreover, he argues that consideration of these points is precisely within the scope of the question as understood by the Kosovars themselves, amongst several Participants, who make reference to a right of external self-determination grounded in self-determination and "remedial secession" as a people. Judge Simma believes that the General Assembly's request deserved a more comprehensive answer, which could have included a deeper analysis of whether the principle of self-determination or any other rule (perhaps expressly mentioning remedial secession) permit or even warrant independence (via secession) of certain people/territories. That said, he does not examine the Participants' arguments *in extenso*, simply declaring that the Court could have delivered a more intellectually satisfying Opinion, and one with greater relevance as regards the international legal order as it has evolved into its present form, had it not interpreted the scope of the question so restrictively.

Judge Simma further maintains that there is also a wider conceptual problem with the Court's approach. He considers that the Court's reasoning leaps straight from the lack of a prohibition to permissibility, and that for this reason, it is a straightforward application of the *Lotus* principle, with its excessively deferential approach to State consent. He feels that under this approach, everything which is not expressly prohibited carries with it the same colour of legality; it ignores the possible degrees of non-prohibition, ranging from "tolerated" to "permissible" to "desirable". He believes that there is room in international law for a category of acts that are neither prohibited nor permitted. In Judge Simma's view, by reading the General Assembly's question as it did, the Court denied itself the possibility to enquire into the precise status under international law of a declaration of independence. He expresses concern that the narrowness of this approach might constrain the Court in future cases with regard to its ability to deal with the great shades of nuance that permeate contemporary international law.

Judge Simma concludes his declaration by stating that the Court should have considered the question from a slightly broader perspective, and not limited itself merely to an exercise in mechanical jurisprudence. He states that for the Court consciously to have chosen further to narrow the scope of the question has brought with it a method of judicial reasoning which has ignored some of the most important questions relating to the final status of Kosovo. Consequently, this method has significantly reduced the *advisory* quality of the Opinion.

Separate opinion of Judge Keith

Judge Keith in his separate opinion explains why he considers that the Court in its discretion should have refused to answer the request for an Advisory Opinion put to it by the General Assembly.

For good reason, he says, the Statute of the Court recognizes that the Court has a discretion whether to reply to a request. The Court, in exercising that discretion considers both its character as a principal organ of the United Nations and its character as a judicial body. In terms of the former, the Court early declared that its exercise of its advisory jurisdiction represents its participation in the activities of the Organization and, *in principle*, should not be refused. Later it said that "compelling reasons" would be required to justify a refusal. While maintaining its integrity as a judicial body has so far been the reason for refusal which the Court has emphasized, it has not ever identified it as the *only* factor which might lead it to refuse. So too may other considerations, including the interest of the requesting organ and the relative interests of other United Nations organs. For Judge Keith that matter of interest is critical in the present case. He asks whether the request in this case should have come from the Security Council rather than from the General Assembly and whether for that reason the Court should refuse to answer the question. He accordingly considers in some detail the facts relating to this particular request and the relative interests of the General Assembly and Security Council.

At the end of that consideration he reaches this conclusion concerning the relative and absolute interests of the General Assembly and the Security Council in the matter submitted to the Court by the Assembly: Resolution 1244 adopted by the Security Council, the Council's role under it and the role of its subsidiary organ, UNMIK, are the very subject of the inquiry into the conformity of the declaration of independence with the *lex specialis* in this case—the resolution and the actions taken under it. The resolution, adopted under Chapter VII of the Charter and having binding force, established an interim international territorial administration with full internal powers which superseded for the time being the authority of the Federal Republic of Yugoslavia which remained sovereign. By contrast, the Assembly's only dispositive role since June 1999 and the introduction of that régime has been to approve the budget of the Mission.

Judge Keith then turns to the case law of the Court and in particular to the critical reason for its recognition that, as a

principal organ of the United Nations, it should in principle respond to requests for opinions. The Court in cases decided over the last 50 years has regularly coupled that recognition with an indication of the interest which the requesting organ has in seeking an opinion from the Court. In the case of every one of the other requests made by the General Assembly or the Security Council, their interest has been manifest and did not need to be expressly stated in the request or discussed by participants in the proceedings or by the Court. In its most recent Advisory Opinion in 2004, the Court stated this proposition: "As is clear from the Court's jurisprudence, advisory opinions have the purpose of furnishing to the requesting organ the elements of law *necessary for them in their action*." (Emphasis added.) While the Court has made it clear that it will not evaluate the motives of the requesting organ it does in practice determine, if the issue arises, whether the requesting organ has or claims to have a sufficient interest in the subject-matter of the request.

In the absence of such an interest, the purpose of furnishing to the requesting organ the elements of law necessary for it in its action is not present. Consequently, the reason for the Court to co-operate does not exist and what is sometimes referred to as its duty to answer disappears.

In this case the Court, in Judge Keith's opinion, has no basis on which to reach the conclusion that the General Assembly, which has not itself made such a claim, has the necessary interest. Also very significant is the almost exclusive role of the Security Council on this matter. Given the centrality of that role for the substantive question asked (as appears from the Court's Opinion) and the apparent lack of an Assembly interest, Judge Keith concludes that the Court should exercise its discretion and refuse to answer the question put to it by the General Assembly.

Cases on which the Court relies in this context were not seen as affecting this conclusion. In all of them, both the General Assembly and the Security Council had a real interest, and none involved anything comparable to the régime of international territorial administration introduced by Security Council resolution 1244.

As is indicated by his vote, Judge Keith states that he agrees with the substantive ruling made by the Court, essentially for the reasons it gives.

Separate opinion of Judge Sepúlveda-Amor

In his separate opinion, Judge Sepúlveda-Amor asserts that there are no compelling reasons for the Court to decline to exercise jurisdiction in respect of the General Assembly's request. Moreover, in his view, the Court has a duty, by virtue of its responsibilities in the maintenance of international peace and security under the United Nations Charter, to exercise its advisory function in respect of legal questions relating to Chapter VII situations.

Judge Sepúlveda-Amor is unable to agree with the Court's findings on the authors of the declaration of independence. In his opinion, the declaration was indeed adopted by the Assembly of Kosovo as one of Kosovo's Provisional Institutions of Self-Government, and not by "persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration". Accordingly, the Court should have examined the legality of the declaration by reference to Security Council resolution 1244 (1999) and the Constitutional Framework.

Finally, Judge Sepúlveda-Amor observes that the Court could have taken a broader approach so as to elucidate a number of important legal issues not addressed in the Advisory Opinion. These include, *inter alia*, the scope of the right of self-determination, the powers of the Security Council in relation to the principle of territorial integrity, the question of "remedial secession", and State recognition.

Dissenting opinion of Judge Bennouna

1. The propriety of the Court giving an advisory opinion

Judge Bennouna could not subscribe to the conclusions reached by the Court in its Advisory Opinion, nor to its reasoning. The judge considers, firstly, that the Court should have exercised its discretionary powers and declined to respond to the question put by the General Assembly. It is the first time that the General Assembly has sought an advisory opinion on a question which was not, as such, on its agenda, and that had fallen under the exclusive jurisdiction of the Security Council for at least ten years or so, in particular since the latter decided to place the territory of Kosovo under international administration (resolution 1244 of 10 June 1999).

In the judge's view, if the Court had declined to respond to this request, it could have put a stop to any "frivolous" requests which political organs might be tempted to submit to it in future, and indeed thereby protected the integrity of its judicial function. The question of the compatibility of a request for an opinion with the functions of the Court and its judicial character still stands, even if no case of incompatibility has yet been recorded. In the Kosovo case, the Court has been confronted with a situation that has never occurred before, since it has ultimately been asked to set itself up as a political decision-maker, in the place of the Security Council. In other words, an attempt has been made, through this request for an advisory opinion, to have it take on the functions of a political organ of the United Nations, the Security Council, which the latter has not been able to carry out.

While pointing out that the Special Envoy of the Secretary-General, Mr. Martti Ahtisaari, advocated the independence of Kosovo in his report of 26 March 2007 on Kosovo's future status, and that the Security Council has made no finding in this respect, Judge Bennouna emphasizes that the Court cannot substitute itself for the Security Council in assessing the lawfulness of the unilateral declaration of independence. It is essential for the Court to ensure, in performing its advisory function, that it is not exploited in favour of one specifically political strategy or another, and, in this case in particular, not enlisted either in the campaign to gather as many recognitions as possible of Kosovo's independence by other States, or in the one to keep these to a minimum; whereas the Security Council, which is primarily responsible for pronouncing on the option of independence, has not done so.

Judge Bennouna believes that the Court cannot substitute itself for the Security Council in exercising its responsibilities,

nor can it stand legal guarantor for a policy of fait accompli based simply on who can gain the upper hand. The Court's duty is to preserve its role, which is to state the law, clearly and independently. That is how it will safeguard its credibility in performing its functions, for the benefit of the international community.

2. The scope and meaning of the question posed

Judge Bennouna regrets that the Court has deemed itself authorized to modify the scope and meaning of the question posed, considering that it was free "to decide for itself whether that declaration was promulgated by the Provisional Institutions of Self-Government or some other entity" (Advisory Opinion, paragraph 54).

The question put to the Court does not need to be interpreted in any way. The General Assembly did not request the Court to give its opinion on just any declaration of independence, but on the one adopted on 17 February 2008 by the Provisional Institutions of Self-Government of Kosovo, which were established with specific competences by the United Nations. At that point in time, the only institution recognized by the United Nations as representing the people of Kosovo was the elected Assembly of the Provisional Institutions of Self-Government.

The judge notes that never before in its jurisprudence has the Court amended the question posed in a manner contrary to its object and purpose.

3. Accordance with international law of the unilateral declaration of independence

In Judge Bennouna's opinion, the Court should first look into the applicable *lex specialis* (that is to say, the law of the United Nations) before considering whether the declaration is in accordance with general international law. The Court has chosen instead to examine "the lawfulness of declarations of independence under general international law" (Advisory Opinion, paragraph 78). The General Assembly did not however ask the Court to opine in the abstract on declarations of independence generally, but rather on a specific declaration adopted in a particular context—that of a territory which the Council has placed under United Nations administration—and this at a time when Security Council resolution 1244 was in force, as it still is.

In the judge's view, the Court's reasoning, aimed at dispelling any inkling of the declaration's illegality under the law of the United Nations, consisted of severing it from the institution (the Assembly) that was created within this framework: "the authors of the declaration of independence of 17 February 2008 did not act as one of the Provisional Institutions of Self-Government . . . but rather as persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration" (Advisory Opinion, paragraph 109). To reach this conclusion, the Court relies upon the language used and the procedure employed. Thus it was enough for the authors of the declaration to change the appearance of the text, and to hold themselves out as "the democratically-elected leaders of [the] people" in order for them to cease to be bound by the Constitutional Framework for Kosovo, which states that "[t]he Provisional Institutions of Self-Government and their officials shall . . . [e]xercise their authorities consistent with the provisions of UNSCR 1244 (1999) and the terms set forth in this Constitutional Framework". If such reasoning is followed to its end, it would be enough to become an outlaw, as it were, in order to escape having to comply with the law.

Judge Bennouna asserts that no unilateral declaration affecting Kosovo's future status, whatever the form of the declaration or the intentions of its authors, has any legal validity until it has been endorsed by the Security Council. Contrary to what the Court implies, it is not enough for the authors simply to step beyond the bounds of the law to cease being subject to it.

He recalls that the Security Council was prevented, by a lack of agreement among its permanent members, from taking a decision on the Kosovo question after receiving the Ahtisaari report in March 2007. And, as is often the case within the United Nations, this deadlock in the Council had a reverberating effect on the Secretary-General, charged with implementing its decisions, and his Special Representative. But a stalemate in the Security Council does not release either the parties to a dispute from their obligations or by consequence the members of the Assembly of Kosovo from their duty to respect the Constitutional Framework and resolution 1244. Were that the case, the credibility of the collective security system established by the United Nations Charter would be undermined. This would, in fact, leave the parties to a dispute to face off against each other, with each being free to implement its own position unilaterally. And in theory the other party, Serbia, could have relied on the deadlock to claim that it was justified in exercising full and effective sovereignty over Kosovo in defence of the integrity of its territory.

UNMIK thus adopted the Constitutional Framework and set up the interim administration on the basis of the mandate it had received from the Security Council in resolution 1244. A violation of the Constitutional Framework therefore entails a simultaneous violation of the Security Council resolution, which is binding on all States and non-State actors in Kosovo as a result of the territory having been placed under United Nations administration. In Judge Bennouna's view, this being the case, it is difficult to see how the Court could find that "Security Council resolution 1244 (1999) did not bar the authors of the declaration of 17 February 2008 from issuing a declaration of independence from the Republic of Serbia" (Advisory Opinion, paragraph 119). He thinks it does establish such a bar, on at least two counts: because the declaration is not within the Constitutional Framework established pursuant to the mandate given to UNMIK in the resolution; and because the declaration is unilateral, whereas Kosovo's final status must be approved by the Security Council.

In the judge's opinion, it does not matter whether or not the authors of the declaration of independence are considered to be members of the Assembly of Kosovo; under no circumstances were they entitled to adopt a declaration that contravenes the Constitutional Framework and Security Council resolution 1244 by running counter to the legal régime for the administration of Kosovo established by the United Nations.

Finally, Judge Bennouna observes that the Court in this case has not identified the rules, general or special, of international law governing the declaration of independence of 17 February 2008; according to the Opinion, general international law is inoperative in this area and United Nations law does not cover the situation the Court has chosen to consider: that of a declaration arising in an indeterminate legal order. Accordingly, there is apparently nothing in the law to prevent the United Nations from pursuing its efforts at mediation in respect of Kosovo in co-operation with the regional organizations concerned.

Dissenting opinion of Judge Skotnikov

The Court, in the view of Judge Skotnikov, should have used its discretion to refrain from exercising its advisory jurisdiction in the rather peculiar circumstances of the present case. Never before has the Court been confronted with a question posed by one organ of the United Nations, to which an answer is entirely dependent on the interpretation of a decision taken by another United Nations organ. What makes this case even more anomalous is the fact that the latter is the Security Council, acting under Chapter VII of the United Nations Charter. Indeed, in order to give an answer to the General Assembly, the Court has to make a determination as to whether or not the Unilateral Declaration of Independence (UDI) is in breach of the régime established for Kosovo by the Security Council in its resolution 1244 (1999).

The Security Council itself has refrained from making such a determination. Nor has the Council sought advice from the Court on the subject. That is the position currently taken by the Council on the issue of the UDI.

Security Council resolutions are political decisions. Therefore, determining the accordance of a certain development, such as the issuance of the UDI in the present case, with a Security Council resolution is largely political. This means that even if a determination made by the Court were correct in the purely legal sense (which it is not in the present case), it may still not be the right determination from the political perspective of the Security Council. When the Court makes a determination as to the compatibility of the UDI with resolution 1244—a determination central to the régime established for Kosovo by the Security Council—without a request from the Council, it substitutes itself for the Security Council.

The Members of the United Nations, emphasizes Judge Skotnikov, have conferred distinct responsibilities upon the General Assembly, the Security Council and the International Court of Justice and have put limits on the competence of each of these principal organs. The Court—both as a principal United Nations organ and as a judicial body—must exercise great care in order not to disturb the balance between these three principal organs, as has been established by the Charter and the Statute. By not adequately addressing the issue of the propriety of giving an answer to the present request, the Court has failed in this duty. The Court's decision to answer the question posed by the General Assembly is as erroneous as it is regrettable.

As to the majority's attempt to interpret Security Council resolution 1244 with respect to the UDI, Judge Skotnikov points out that, unfortunately, in the process of doing so, the majority has drawn some conclusions, which simply cannot be right.

One of these is finding that resolution 1244, which had the overarching goal of bringing about "a political solution to the Kosovo crisis" (res. 1244, operative para. 1), did not establish binding obligations for the Kosovo Albanian leadership (see Advisory Opinion, paragraphs 117 and 118). The Security Council cannot be accused of such an omission, which would have rendered the entire process initiated by resolution 1244 unworkable.

No less striking is the Court's finding to the effect that "a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords" envisaged in resolution 1244 (res. 1244, operative para. 11 *(e)*), can be terminated by a unilateral action by the Kosovo Albanian leadership (see Advisory Opinion, paragraphs 117 and 118). In other words, the Security Council, in the view of the majority, has created a giant loophole in the régime it established under resolution 1244 by allowing for a unilateral "political settlement" of the final status issue. Such an approach, had it indeed been taken by the Council, would have rendered any negotiation on the final status meaningless. Obviously, that was not what the Security Council intended when adopting and implementing resolution 1244.

Finally, the authors of the UDI are being allowed by the majority to circumvent the Constitutional Framework created pursuant to resolution 1244, simply on the basis of a claim that they acted outside this Framework:

> "the Court considers that the authors of that declaration did not act, or intend to act, in the capacity of an institution created by and empowered to act within that legal order [established for the interim phase] but, rather, set out to adopt a measure [the UDI] the significance and effects of which would lie outside that order" (Advisory Opinion, paragraph 105).

The majority, unfortunately, does not explain the difference between acting outside the legal order and violating it.

The majority's version of resolution 1244, in the opinion of Judge Skotnikov, is untenable. Moreover, the Court's treatment of a Security Council decision adopted under Chapter VII of the United Nations Charter shows that it has failed its own responsibilities in the maintenance of international peace and security under the Charter and the Statute of the Court.

In conclusion, Judge Skotnikov points out that the purport and scope of the Advisory Opinion is as narrow and specific as the question it answers. The Opinion does not deal with the legal consequences of the UDI. It does not pronounce on the final status of Kosovo. The Court makes it clear that it

> "does not consider that it is necessary to address such issues as whether or not the declaration has led to the creation of a State or the status of the acts of recognition in order to answer the question put by the General Assembly (Advisory Opinion, paragraph 51).

The Court also notes that

> "[d]ebates regarding the extent of the right of self-determination and the existence of any right of 'remedial secession'

. . . concern the right to separate from a State . . . and . . . that issue is beyond the scope of the question posed by the General Assembly" (Advisory Opinion, paragraph 83).

In no way does the Advisory Opinion question the fact that resolution 1244 remains in force in its entirety (see paragraphs 91 and 92 of the Advisory Opinion). This means that "a political process designed to determine Kosovo's future status" envisaged in this resolution (para. 11 *(e)*) has not run its course and that a final status settlement is yet to be endorsed by the Security Council.

Separate opinion of Judge Cançado Trindade

1. In his separate opinion, composed of 15 parts, Judge Cançado Trindade explains how he has concurred with the conclusions that the Court has reached, on the basis of a reasoning distinct from that of the Court. He begins by laying the foundations of his own personal position on the matter at issue, by addressing, at first, the preliminary questions of jurisdiction and judicial propriety, with attention turned to the preponderant *humanitarian aspects* of the question put to the Court by the General Assembly, and to the Court's duty to exercise its advisory function, without attributing to so-called judicial "discretion" a dimension which it does not have. In his view, the Court´s jurisdiction to deliver the present Advisory Opinion is established beyond doubt, on the basis of Article 65 (1) of its Statute; it is for the Court, as master of its own jurisdiction, to satisfy itself that the request for an Advisory Opinion comes from an organ endowed with competence to make it. The General Assembly is so authorized by Article 96 (1) of the United Nations Charter, to request an Advisory Opinion of the ICJ on "any legal question".

2. Moreover, the ICJ itself has lately pointed out (as to the interpretation of Article 12 of the United Nations Charter) that in recent years there has been an "increasing tendency" for the General Assembly and the Security Council to deal "in parallel" with the same matter concerning the maintenance of international peace and security: while the Security Council has tended to focus on the aspects of such matters related to international peace and security, the General Assembly has taken a broader view, considering also their *humanitarian, social and economic aspects*. Furthermore, in its *jurisprudence constante*, the ICJ has made it clear that it cannot attribute a political character to a request for an Advisory Opinion which invites it to undertake an "essentially judicial task" concerning the scope of obligations imposed by international law, namely, an assessment of "the legality of the possible conduct of States" in respect of obligations imposed upon them by international law. By adopting, on 8 October 2008, resolution 63/3, seeking an Advisory Opinion from the ICJ relating to the declaration of independence by the authorities of Kosovo, the General Assembly has not acted *ultra vires* in respect of Article 12 (1) of the United Nations Charter: it was fully entitled to do so, in the faithful exercise of its functions under the United Nations Charter.

3. Judge Cançado Trindade, in sequence, discards all arguments based on so-called judicial "discretion", observing that the Court's advisory function is not a simple faculty, that it may utilize at its free discretion: it is a *function*, of the utmost importance ultimately for the international community as a whole, of the principal judicial organ of the United Nations. The Court, when seized of a matter, has a duty to perform faithfully its judicial functions, either in advisory matters or in respect of contentious cases. He ponders that ours is the age of an ever-increasing attention to the advances of the *rule of law* at both national and international levels. The international community expects that the Court acts at the height of the responsibilities incumbent upon it; it is incumbent upon the Court to say what the Law is (*juris dictio*), and it ought thus to deliver, as it has just done, the requested Advisory Opinion, thus fulfilling faithfully its duties as the principal judicial organ of the United Nations.

4. His next line of considerations (Part III of his separate opinion) concerns the *factual background* and context of the question put to the Court by the General Assembly. In his understanding, the Court should have devoted much more attention than it has done, in the present Advisory Opinion, to the factual context—in particular the *factual background*—of the question put to it by the General Assembly, focusing particularly on the *preponderant humanitarian aspects*. After all, declarations of independence are not proclaimed in a social *vacuum*, and require addressing at least its immediate *causes*, lying in the tragic succession of facts of the prolonged and *grave humanitarian crisis of Kosovo*, which culminated in the adoption of Security Council resolution 1244 (1999).

5. He recalls that this issue, to which he attaches great relevance, was, after all, brought repeatedly to the attention of the Court, in the course of the present advisory proceedings, by several participants, in both the written and oral phases. He adds that, on successive previous occasions, somewhat distinctly, the ICJ deemed it fit to dwell carefully on the *whole range of facts* which led to the questions brought to its cognizance for the purpose of the requested Advisory Opinions. It thus looks rather odd that, in the present Advisory Opinion, the Court has given only a brief and cursory attention to the *factual background* of the question put to it by the General Assembly for the purpose of the present Advisory Opinion.

6. He considers Kosovo's *humanitarian catastrophe* as deserving of careful attention on the part of the Court, for the purpose of the present Advisory Opinion. The Court should, in his view, have given explicit attention to the factual background and general context of the request of its Opinion. After all, the *grave humanitarian crisis* in Kosovo remained, along the decade of 1989–1999 (from the revocation of the constitutionally-guaranteed autonomy of Kosovo onwards), not only a continuing threat to international peace and security,—till the adoption of Security Council resolution 1244 (1999) bringing about the United Nations's international administration of territory,—but also a human tragedy marked by the massive infliction of death, serious injuries of all sorts, and dreadful suffering of the population.

7. The Court should not, in his view, have limited itself, as it did in the present Advisory Opinion, to select only the few reported and instantaneous facts of the circumstances surrounding the declaration of independence by Kosovo's authorities on 17.02.2008 and shortly afterwards, making abstraction of its factual background. He regrets that this factual back-

ground has been to a great extent eluded by the Court, apparently satisfied to concentrate on the events of 2008–2009, and only briefly and elliptically referring to the crisis in Kosovo, without any explanation of what it consisted of.

8. Yet,—Judge Cançado Trindade adds,—that *grave humanitarian crisis*, as it developed in Kosovo along the nineties, was marked by a prolonged pattern of successive crimes against civilians, by grave violations of International Humanitarian Law and of International Human Rights Law, and by the emergence of one of the most heinous crimes of our times, that of *ethnic cleansing*. The deprivation of Kosovo's autonomy (previously secured by the Constitution of 1974) in 1989, paved the way for the cycle of systematic discrimination, utmost violence and atrocities which, for one decade (1989–1999), victimized large segments of the population of Kosovo, leading to the adoption of a series of resolutions by the main political organs of the United Nations, and culminating in the adoption of Security Council resolution 1244 (1999), and, one decade later, in Kosovo's declaration of independence.

9. Judge Cançado Trindade considers it necessary to insert the matter at issue into the larger framework of the *Law of the United Nations*. To that end, he starts (in Part IV of his separate opinion) by recalling pertinent antecedents linked to the advent of international organizations, in their growing attention to the needs and aspirations of the "people" or the "population" (in the mandates system under the League of Nations, in the trusteeship system under the United Nations, and in contemporary United Nations experiments of international territorial administration). Such experiments, in Judge Cançado Trindade's perception, show that international organizations have contributed to a return to the *droit des gens*, and to a revival of its humanist vision, faithful to the teachings of the "founding fathers" of the law of nations.

10. That vision marked its presence in past experiments of the mandates system, under the League of Nations, and of the trusteeship system, under the United Nations, as it does today in the United Nations initiatives of international administration of territory. In Judge Cançado Trindade's reassessment, the recurring element of the due care with the *conditions of living of the "people" or the "population"* provides the common denominator, in an inter-temporal dimension, of the experiments of mandates, trust territories and contemporary international administration of territories. Those juridical institutions,—each one a product of its time,—were conceived and established, ultimately, to address, and respond to, the needs (including of protection) and aspirations of *peoples*, of human beings.

11. Other considerations were taken into account, in approaching those experiments. Resort to private law analogies is one of them. For example, the relation of the mandates, the analogy with the original *mandatum*, a consensual contract in Roman law; the roots of "trust" and "tutelage" in the *tutela* of Roman law (a sort of guardianship of infants); the English *trust*, to some extent a descendant of the *fideicomissa* of Roman law (in "fiduciary" relations). In any case, a new relationship was thereby created, in the mandates and trusteeship systems, on the basis of confidence (the "sacred trust") and, ultimately, of human conscience. What ultimately began to matter was the well-being and human development of the *population*, of the inhabitants of mandated and trust territories, rather than the notion of absolute territorial sovereignty. Those experiments were intended to give legal protection to newly-arisen needs of the "people" or the "population"; and the mandatory, tutor or trustee had duties, rather than rights.

12. Beyond those private law analogies, and well before them, were the teachings of the so-called "founding fathers" of the law of nations (*le droit des gens*), characterized by their essentially humanist outlook, supported by Judge Cançado Trindade. He recalls (Parts V and VI of the present separate opinion) that, from a historical as well as a deontological perspectives, peoples assumed a central position already in the early days of the emergence of the *droit des gens* (the *jus gentium* emancipated from its private law origins). The *droit des gens* was originally inspired by the principle of humanity *lato sensu*, with the legal order binding everyone (the ones ruled as well as the rulers); the *droit des gens* regulates an international community constituted by human beings socially organized in States and co-extensive with humankind (F. Vitoria, *De Indis—Relectio Prior*, 1538–1539); thus conceived, it is solely Law which regulates the relations among members of the universal *societas gentium* (A. Gentili, *De Jure Belli*, 1598). This latter (*totus orbis*) prevails over the individual will of each State (F. Vitoria). There is thus a *necessary* law of nations, and the *droit des gens* reveals the unity and universality of humankind (F. Suárez, *De Legibus ac Deo Legislatore*, 1612).

13. The *raison d'État* has limits, and the State is not an end in itself, but a means to secure the social order pursuant to the right reason (*recta ratio*), so as to perfect the *societas gentium*, which comprises the whole of humankind (H. Grotius, *De Jure Belli ac Pacis*, 1625). The legislator is subject to the natural law of human reason (S. Pufendorf, *De Jure Naturae et Gentium*, 1672), and individuals, in their association in the State, ought to promote together the common good (C. Wolff, *Jus Gentium Methodo Scientifica Pertractatum*, 1749). Since the times of those writings, the world of course has entirely changed, but human aspirations have remained the same. The advent, along the XXth century, of international organizations, has much contributed to put an end to abuses against human beings, and gross violations of human rights and international humanitarian law. The United Nations, in our times, has sought the prevalence of the dictates of the universal juridical conscience, particularly when aiming to secure dignified conditions of living to all peoples, in particular those subjected to oppression.

14. The old Permanent Court of International Justice (PCIJ) gave its own contribution to the rescue of the "population" or the "people", and some of its relevant *obiter dicta* in this respect seem to remain endowed with contemporaneity. Thus, even well before the 1948 Universal Declaration of Human Rights, the fundamental principle of equality and non-discrimination had found judicial recognition. The Universal Declaration placed the principle in a wider dimension, and projected it at universal level, by taking the individual *qua* individual, *qua* human being, irrespective of being a member of a minority, or an inhabitant of a territory under the mandates system, or, later on, under the trusteeship system. The Universal Declaration recalled in its preamble that "disregard and contempt for human rights have resulted in barbarous

acts which have outraged the conscience of mankind" (para. 2). And it then proclaimed, in its Article 1, that "all human beings are born free and equal in dignity and rights".

15. Judge Cançado Trindade then points out that the juridical institutions of mandates, trusteeship and international administration of territories emerged, in succession, to extend protection to those "*peoples*" or "*populations*" who stood in need of it. The respective "territorial" arrangements were the *means* devised in order to achieve that *end*, of protection of "populations" or "peoples". It was not mandates for mandates' sake, it was not trusteeship for trusteeship's sake, and it is not international administration of territory for administration's sake. Turning to their *causes*, as one ought to, their common purpose is clearly identified: to safeguard the "peoples" or "populations" concerned.

16. He then proceeds to an examination (in Part VII) of the grave concern expressed by the United Nations *as a whole* with various aspects of the *humanitarian tragedy* in Kosovo. To that end, he reviews successive resolutions adopted by the Security Council (period 1998–2001), by the General Assembly (period 1994–2008), and by ECOSOC (1998–1999), as well as reports (on UNMIK) and statements by the Secretary-General (period 1999–2008),—to all of which he ascribes much importance, as they disclose the *factual background* of the Kosovo crisis which was eluded by the Court.

17. After recalling the principle *ex injuria jus non oritur*, he moves on to an examination (in Part IX of the present separate opinion) of the relevant aspect of the conditions of living of the population in Kosovo (as from 1989), on the basis of the submissions adduced by participants in the present advisory proceedings before the Court, in their written and oral phases. He also recalls the judicial recognition (by the ICTY), and further evidence, of the atrocities perpetrated in Kosovo (in the decade 1989–1999), and ascribes a central position to the sufferings of the people, pursuant to the *humanizing* people-centered outlook in contemporary international law.

18. Under this outlook, Judge Cançado Trindade reassesses territorial integrity in the framework of the humane ends of the State, and considers the principle of self-determination of peoples applicable, beyond decolonization, in new situations of systematic oppression, subjugation and tyranny. He stresses the fundamental importance, in the context of the Kosovo crisis, of the principles of humanity, and of equality and non-discrimination, so as to extract the basic lesson: no State can use territory to destroy the population; such atrocities amount to an absurd reversal of the ends of the State, which was created and exists for human beings, and not *vice-versa*.

19. Judge Cançado Trindade adds (Part XIV of the present separate opinion) that the prohibitions of *jus cogens* have an incidence at *inter-State*, as well at *intra-State*, levels, that is, in the relations of States *inter se*, as well as in the relations of States with all human beings under their respective jurisdictions.

20. He adds (Part XV) that an examination of the factual background of Security Council resolution 1244 (1999), followed by Kosovo's declaration of independence on 17.02.2008, leaves no room for a "technical" and aseptic examination of the question put to the Court by the General Assembly for the present Advisory Opinion. It is the United Nations Charter that is ultimately to guide any reasoning. In his view, Kosovo's declaration of independence can only be appropriately considered in the light of the complex and tragic factual background of the *grave humanitarian crisis of Kosovo*, which culminated in the adoption by Security Council of its resolution 1244 (1999). The *Law of the United Nations* has been particularly attentive to the conditions of living of the population, in Kosovo as in distinct parts of the world, so as to preserve international peace and security.

21. Judge Cançado Trindade finally recalls a question he put to the participants at the close of the oral proceedings before the Court, in the public sitting of 11 December 2009, and the answers given to it by 15 of them. The point was made that Security Council resolution 1244 (1999) was meant to create the conditions for substantial autonomy and an extensive form of self-governance in Kosovo, in view of the unique circumstances of Kosovo. In the course of the following decade (1999–2009), the population of Kosovo was able, due to resolution 1244 (1999) of the Security Council, to develop its capacity for substantial self-governance,—as its declaration of independence by the Kosovar Assembly on 17 February 2008 shows. Declarations of the kind are neither authorized nor prohibited by international law, but their consequences and implications bring international law into the picture.

22. It is true that United Nations Security Council resolution 1244 (1999) did not determine Kosovo's end-status, nor did it prevent or impede the declaration of independence of 17 February 2008 by Kosovo's Assembly to take place. The United Nations Security Council has not passed any judgment whatsoever on the chain of events that has taken place so far, and UNMIK has adjusted itself to the new situation. There remains the United Nations presence in Kosovo, under the umbrella of Security Council resolution 1244 (1999); the permanence of United Nations presence in Kosovo, also from now on, appears necessary, for the sake of human security, and the preservation of international peace and security in the region.

23. The *Comprehensive Proposal for the Kosovo Status Settlement*, presented in mid-March 2007 by the Special Envoy of the United Nations Secretary-General, contains proposals of detailed measures aiming at: *(a)* ensuring the promotion and protection of the rights of communities and their members (with special attention to the protection of Serb minorities); *(b)* the effective decentralization of government and public administration (so as to encourage public participation); *(c)* the preservation and protection of cultural and religious heritage. The ultimate goal is the formation and consolidation of a multi-ethnic democratic society, under the rule of law, with the prevalence of the fundamental principle of equality and non-discrimination, the exercise of the right of participation in public life, and of the right of equal access to justice by everyone.

24. In its declaration of independence of 17 February 2008, Kosovo's Assembly expressly accepts the recommendations of the United Nations Special Envoy, and the continued presence of the United Nations in Kosovo; moreover, it expresses its commitment to "act consistent with principles of international

law and resolutions of the Security Council", including resolution 1244 (1999). The Special Representative of the United Nations Secretary-General continues, in effect, to exercise its functions in Kosovo to date. Judge Cançado Trindade concludes that States exist for human beings and not *vice-versa*. Contemporary international law is no longer indifferent to the fate of the population, the most precious constitutive element of statehood. The advent of international organizations has helped to put an end to the reversal of the ends of the State, and the expansion of international legal personality has entailed the expansion of international accountability.

Separate opinion of Judge Yusuf

Although generally in agreement with the Court's Opinion, Judge Yusuf appends a separate opinion in which he explains his serious reservations regarding, first, what he considers as the Court's restrictive reading of the question posed by the General Assembly, and, secondly, the inclusion by the Court of the Constitutional Framework established under the auspices of the United Nations Interim Administration Mission in Kosovo (UNMIK) in the category of the applicable international legal instruments under which the accordance of the declaration of independence with international law is assessed.

With regard to the first issue, Judge Yusuf is of the view that the question put to the Court by the General Assembly, did not merely concern whether or not the applicable international law prohibited the declaration of independence as such. A declaration of independence is the expression of a claim to separate statehood. From a legal standpoint, the question also concerned whether or not the process by which the people of Kosovo were seeking to establish their own State involved a violation of international law or whether it was in accordance with such law due to the possible existence of a positive right which could legitimize it.

Judge Yusuf finds it regrettable that the Court decided not to address this important aspect of the question, thereby failing to seize the opportunity offered by the General Assembly's request to define the scope and normative content of the post-colonial right of self-determination. Addressing the question of self-determination and clarifying its applicability to this specific case would have allowed the Court to contribute, *inter alia*, to the prevention of the misuse of this important right by groups promoting ethnic and tribal divisions within existing States.

Judge Yusuf then proceeds to elaborate on his own views regarding the post-colonial conception of the right of self-determination, and its scope of application. He considers this right to be chiefly exercisable within States, and examines the exceptional circumstances in which a claim to external self-determination may be supported by international law, as well as the conditions that such a claim may have to meet.

With respect to the second issue, regarding the legal nature and status of the Constitutional Framework for the Interim Administration of Kosovo enacted by the Special Representative of the Secretary-General of the United Nations (SRSG), Judge Yusuf is of the view that the legislative powers vested in the SRSG were not for the promulgation of international legal rules and principles, but were meant for the enactment of laws and regulations which are exclusively applicable in Kosovo.

According to him, the Constitutional Framework as well as all other regulations enacted by the SRSG are part of a domestic legal system established on the basis of authority derived from an international legal instrument. The fact that the source of this authority is international does not however qualify such regulations as part of international law. Since the Constitutional Framework is not, in his view, part of international law, the Court should not have taken it into account in assessing the accordance of the declaration of independence of Kosovo with international law.

181. CERTAIN CRIMINAL PROCEEDINGS IN FRANCE (REPUBLIC OF THE CONGO *v.* FRANCE) (DISCONTINUANCE)

Order of 16 November 2010

In the case concerning *Certain Criminal Proceedings in France (Republic of the Congo* v. *France)*, the International Court of Justice delivered an Order on 16 November 2010, recording the discontinuance of the proceedings and ordering the removal of the case from the Court's list.

The Court was composed as follows: President Owada; Vice-President Tomka; Judges Koroma, Al-Khasawneh, Simma, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue; Registrar Couvreur.

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The text of the Order reads as follows:

"The International Court of Justice, Composed as above,

Having regard to Article 48 of the Statute of the Court and to Article 89, paragraph 2, of the Rules of Court,

Having regard to the Application filed in the Registry of the Court on 9 December 2002, whereby the Republic of the Congo, referring to Article 38, paragraph 5, of the Rules of Court, sought to institute proceedings against the French Republic in respect of a dispute arising out of certain criminal proceedings in France,

Having regard to the letter from the Minister for Foreign Affairs of France, dated 8 April 2003 and received in the Registry on 11 April 2003, whereby France expressly consented to the jurisdiction of the Court to entertain the Application,

Having regard to the entering of the case in the General List of the Court on 11 April 2003,

Having regard to the Order of 17 June 2003 whereby the Court adjudicated upon the request for the indication of a provisional measure submitted by the Republic of the Congo on 9 December 2002,

Having regard to the Order of 11 July 2003 whereby the President of the Court, taking account of the agreement of the Parties, fixed 11 December 2003 and 11 May 2004 as the respective time-limits for the filing of the Memorial of the Republic of the Congo and the Counter-Memorial of the French Republic,

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

Having regard to the Order of 17 June 2004 whereby the Court, taking account of the agreement of the Parties and of the particular circumstances of the case, authorized the filing of a Reply by the Republic of the Congo and a Rejoinder by the French Republic, and fixed 10 December 2004 and 10 June 2005, respectively, as the time-limits for the filing of those pleadings,

Having regard to the Orders of 8 December 2004, 29 December 2004, 11 July 2005 and 11 January 2006 whereby those time-limits, taking account of the reasons given by the Republic of the Congo and of the agreement of the Parties, were successively extended to 10 January 2005, 11 July 2005, 11 January 2006 and 11 July 2006 for the filing of the Reply, and to 10 August 2005, 11 August 2006, 10 August 2007 and 11 August 2008 for the filing of the Rejoinder,

Having regard to the Reply and the Rejoinder duly filed by the Parties within those time-limits, as last extended,

Having regard to the Order of 16 November 2009 whereby the Court, referring to Article 101 of the Rules of Court and taking account of the agreement of the Parties and of the exceptional circumstances of the case, authorized the submission of an additional pleading by the Republic of the Congo followed by an additional pleading by the French Republic, and fixed 16 February 2010 and 17 May 2010 as the respective time-limits for the filing of those pleadings,

Having regard to the additional pleadings duly filed by the Parties within the time-limits so prescribed,

Having regard to the letters dated 9 February 2010 whereby the Registrar, *inter alia,* informed the Parties that the Court, acting in accordance with Article 54, paragraph 1, of the Rules of Court, had fixed Monday 6 December 2010 as the date for the opening of the oral proceedings in the case;

Whereas, by letter dated 5 November 2010 and received in the Registry the same day by facsimile, the Agent of the Republic of the Congo, referring to Article 89 of the Rules of Court, informed the Court that his Government "withdraws its Application instituting proceedings" and requested the Court "to make an order officially recording the discontinuance of the proceedings and directing the removal of the case from the list";

Whereas a copy of that letter was immediately communicated to the Government of the French Republic, which was informed that the time-limit provided for in Article 89, paragraph 2, of the Rules of Court, within which the French Republic could state whether it opposed the discontinuance of the proceedings, had been fixed as 12 November 2010;

Whereas, by letter dated 8 November 2010 and received in the Registry the same day by facsimile, the Agent of the French Republic informed the Court that her Government "has no objection to the discontinuance of the proceedings by the Republic of the Congo",

Places on record the discontinuance by the Republic of the Congo of the proceedings; and

Orders that the case be removed from the List."

182. CASE CONCERNING AHMADOU SADIO DIALLO (REPUBLIC OF GUINEA *v.* DEMOCRATIC REPUBLIC OF THE CONGO)

Judgment of 30 November 2010

On 30 November 2010, the International Court of Justice delivered its Judgment in the case concerning *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)*.

The Court was composed as follows: President Owada; Vice-President Tomka; Judges Al-Khasawneh, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood; Judges *ad hoc* Mahiou, Mampuya; Registrar Couvreur.

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The operative paragraph (para. 165) of the Judgment reads as follows:

" . . .

The Court,

(1) By eight votes to six,

Finds that the claim of the Republic of Guinea concerning the arrest and detention of Mr. Diallo in 1988–1989 is inadmissible;

In favour: President Owada; Vice-President Tomka; Judges Abraham, Keith, Sepúlveda-Amor, Skotnikov, Greenwood; Judge *ad hoc* Mampuya;

Against: Judges Al-Khasawneh, Simma, Bennouna, Cançado Trindade, Yusuf; Judge *ad hoc* Mahiou;

(2) Unanimously,

Finds that, in respect of the circumstances in which Mr. Diallo was expelled from Congolese territory on 31 January 1996, the Democratic Republic of the Congo violated Article 13 of the International Covenant on Civil and Political Rights and Article 12, paragraph 4, of the African Charter on Human and Peoples' Rights;

(3) Unanimously,

Finds that, in respect of the circumstances in which Mr. Diallo was arrested and detained in 1995–1996 with a view to his expulsion, the Democratic Republic of the Congo violated Article 9, paragraphs 1 and 2, of the International Covenant on Civil and Political Rights and Article 6 of the African Charter on Human and Peoples' Rights;

(4) By thirteen votes to one,

Finds that, by not informing Mr. Diallo without delay, upon his detention in 1995–1996, of his rights under Article 36, paragraph 1 *(b)*, of the Vienna Convention on Consular Relations, the Democratic Republic of the Congo violated the obligations incumbent upon it under that subparagraph;

In favour: President Owada; Vice-President Tomka; Judges Al-Khasawneh, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood; Judge *ad hoc* Mahiou;

Against: Judge *ad hoc* Mampuya;

(5) By twelve votes to two,

Rejects all other submissions by the Republic of Guinea relating to the circumstances in which Mr. Diallo was arrested and detained in 1995–1996 with a view to his expulsion;

In favour: President Owada; Vice-President Tomka; Judges Al-Khasawneh, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Yusuf, Greenwood; Judge *ad hoc* Mampuya;

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

(6) By nine votes to five,

Finds that the Democratic Republic of the Congo has not violated Mr. Diallo's direct rights as *associé* in Africom-Zaire and Africontainers-Zaire;

In favour: President Owada; Vice-President Tomka; Judges Simma, Abraham, Keith, Sepúlveda-Amor, Skotnikov, Greenwood; Judge *ad hoc* Mampuya;

Against: Judges Al-Khasawneh, Bennouna, Cançado Trindade, Yusuf; Judge *ad hoc* Mahiou;

(7) Unanimously,

Finds that the Democratic Republic of the Congo is under obligation to make appropriate reparation, in the form of compensation, to the Republic of Guinea for the injurious consequences of the violations of international obligations referred to in subparagraphs (2) and (3) above;

(8) Unanimously,

Decides that, failing agreement between the Parties on this matter within six months from the date of this Judgment, the question of compensation due to the Republic of Guinea shall be settled by the Court, and reserves for this purpose the subsequent procedure in the case."

*

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Judges Al-Khasawneh, Simma, Bennouna, Cançado Trindade and Yusuf appended a joint declaration to the Judgment of the Court; Judges Al-Khasawneh and Yusuf appended a joint dissenting opinion to the Judgment of the Court; Judges Keith and Greenwood appended a joint 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 *ad hoc* Mahiou appended a dissenting opinion to the Judgment of the Court; Judge *ad hoc* Mampuya appended a separate opinion to the Judgment of the Court.

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After recalling the history of the proceedings and the submissions of the Parties (paragraphs 1 to 14 of the Judgment), the Court presents its reasoning in four parts.

I. General factual background
(paras. 15–20)

The Court devotes the first part of its Judgment to recalling the general factual background of the case. It notes that, in its Judgment of 24 May 2007, it declared the Application of the Republic of Guinea to be admissible in so far as it concerns protection of Mr. Ahmadou Sadio Diallo's rights as an individual, and in so far as it concerns protection of his direct rights as *associé* in Africom-Zaire and Africontainers-Zaire. It states that it will therefore consider in turn the questions of the protection of Mr. Diallo's rights as an individual (paras. 21–98) and the protection of his direct rights as *associé* in Africom-Zaire and Africontainers-Zaire (paras. 99–159). In the light of the conclusions it comes to on these questions, the Court will then examine the claims for reparation made by Guinea in its final submissions (paras. 160–164).

II. Protection of Mr. Diallo's rights as an individual
(paras. 21–98)

In its arguments as finally stated, Guinea maintains that Mr. Diallo was the victim in 1988–1989 of arrest and detention measures taken by the Democratic Republic of the Congo (hereinafter the "DRC") authorities in violation of international law and in 1995–1996 of arrest, detention and expulsion measures also in violation of international law. Guinea reasons from this that it is entitled to exercise diplomatic protection of its national in this connection.

The DRC maintains that the claim relating to the events in 1988–1989 was presented belatedly and must therefore be rejected as inadmissible. In the alternative, the DRC maintains that the said claim must be rejected because of failure to exhaust local remedies, or, otherwise, rejected on the merits. The DRC denies that Mr. Diallo's treatment in 1995–1996 breached its obligations under international law.

A. The claim concerning the arrest and detention measures taken against Mr. Diallo in 1988–1989
(paras. 24–48)

In order to decide whether the claim relating to the events in 1988–1989 was raised late, the Court must first ascertain exactly when the claim was first asserted in the present proceedings.

The Court observes that, to begin, note should be taken that there is nothing in the Application instituting proceedings of 28 December 1998 referring to the events in 1988–1989, and nor are these facts mentioned in the Memorial Guinea filed pursuant to Article 49, paragraph 1, of the Rules of Court on 23 March 2001. It notes that it was not until the Applicant filed its Written Observations on the preliminary objections raised by the Respondent on 7 July 2003 that Mr. Diallo's arrest and detention in 1988–1989 were referred to for the first time.

In the opinion of the Court, the claim in respect of the events in 1988–1989 cannot be deemed to have been presented by Guinea in its "Written Observations" of 7 July 2003. According to the Court, the purpose of those observations was to respond to the DRC's objections in respect of admissibility. As those were incidental proceedings opened by virtue of the DRC's preliminary objections, Guinea could not present any submission other than those concerning the merit of the objections and how the Court should deal with them. Accordingly, the Written Observations of 7 July 2003 cannot be interpreted as having introduced an additional claim by the Applicant into the proceedings. In particular, the Court goes on to observe that Guinea first presented its claim in respect of the events in 1988–1989 in its Reply, filed on 19 November 2008, after the Court had handed down its Judgment on the preliminary objections. The Reply describes in detail the circumstances surrounding Mr. Diallo's arrest and detention in 1988–1989, states that these "inarguably figure among the wrongful acts for which Guinea is seeking to have the Respondent held internationally responsible" and indicates for the first time what, from the Applicant's point of view, were the international obligations, notably treaty-based ones, breached by the Respondent in connection with the acts in question.

Having determined exactly when the claim concerning the events in 1988–1989 was introduced into the proceedings, the Court can now decide whether that claim should be considered late and inadmissible as a result. The Judgment handed down on 24 May 2007 on the DRC's preliminary objections does not prevent the Respondent from now raising the objection that the additional claim was presented belatedly, since the claim was introduced, as just stated, after delivery of the 2007 Judgment.

Relying on its jurisprudence concerning additional claims introduced—by an Applicant—in the course of proceedings, the Court is of the opinion that such claims are inadmissible if they would result, were they to be entertained, in transforming "the subject of the dispute originally brought before [the Court] under the terms of the Application" (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II),* p. 695, para. 108).

However, the Court recalls that it has also previously made clear that "the mere fact that a claim is new is not in itself decisive for the issue of admissibility" and that:

> "In order to determine whether a new claim introduced during the course of the proceedings is admissible [it] will need to consider whether, 'although formally a new claim, the claim in question can be considered as included in the original claim in substance'." (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 695, para. 110, in part quoting *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 265–266, para. 65.)

In other words, a new claim is not inadmissible *ipso facto*; the decisive consideration is the nature of the connection between that claim and the one formulated in the Application instituting proceedings.

In this regard, the Court has also had the occasion to point out that, to find that a new claim, as a matter of substance, has

been included in the original claim, "it is not sufficient that there should be links between them of a general nature" (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 695, para. 110).

The Court recalls that, in order to be admissible, either the additional claim must be implicit in the Application or it must arise directly out of the question which is the subject-matter of the Application.

The Court finds itself unable to consider this claim as being "implicit" in the original claim as set forth in the Application. The initial claim concerned violations of Mr. Diallo's individual rights alleged by Guinea to have resulted from the arrest, detention and expulsion measures taken against him in 1995–1996. It is hard to see how allegations concerning other arrest and detention measures, taken at a different time and in different circumstances, could be regarded as "implicit" in the Application concerned with the events in 1995–1996. This is especially so given that the legal bases for Mr. Diallo's arrests in 1988–1989, on the one hand, and 1995–1996, on the other, were completely different. His first detention was carried out as part of a criminal investigation into fraud opened by the Prosecutor's Office in Kinshasa. The second was ordered with a view to implementing an expulsion decree, that is to say, as part of an administrative procedure. Among other consequences, it follows that the applicable international rules—which the DRC is accused of having violated—are different in part, and that the domestic remedies on whose prior exhaustion the exercise of diplomatic protection is as a rule contingent are also different in nature.

The Court considers that this last point deserves particular attention. Since, as noted above, the new claim was introduced only at the Reply stage, the Respondent was no longer able to assert preliminary objections to it, since such objections have to be submitted, under Article 79 of the Rules of Court as applicable to these proceedings, within the time-limit fixed for the delivery of the Counter-Memorial (and, under that Article as in force since 1 February 2001, within three months following delivery of the Memorial). A Respondent's right to raise preliminary objections, that is to say, objections which the Court is required to rule on before the debate on the merits begins (see *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 26, para. 47), is a fundamental procedural right. This right is infringed if the Applicant asserts a substantively new claim after the Counter-Memorial, which is to say at a time when the Respondent can still raise objections to admissibility and jurisdiction, but not preliminary objections. This is especially so in a case involving diplomatic protection if, as in the present instance, the new claim concerns facts in respect of which the remedies available in the domestic system are different from those which could be pursued in respect of the facts underlying the initial claim.

The Court considers that it cannot therefore be said that the additional claim in respect of the events in 1988–1989 was "implicit" in the initial Application.

For similar reasons, the Court sees no possibility of finding that the new claim "arises directly out of the question which is the subject-matter of the Application". It would be particularly odd to regard the claim concerning the events in 1988–1989 as "arising directly" out of the issue forming the subject-matter of the Application in that the claim concerns facts, perfectly well known to Guinea on the date the Application was filed, which long pre-date those in respect of which the Application (in that part of it concerning the alleged violation of Mr. Diallo's individual rights) was presented.

For all of the reasons set out above, the Court finds that the claim concerning the arrest and detention measures to which Mr. Diallo was subject in 1988–1989 is inadmissible.

In light of the above finding, the Court deems that there is no need for it to consider whether the DRC is entitled to raise, at this stage in the proceedings, an objection to the claim in question based on the failure to exhaust local remedies, or, if so, whether the objection would be warranted.

B. The claim concerning the arrest, detention and expulsion measures taken against Mr. Diallo in 1995–1996
(paras. 49–98)

The Court presents its reasoning on this point in two subsections, the first of which is devoted to the proven facts in the case and the second to the consideration of these in the light of the applicable international law, namely: (a) the International Covenant on Civil and Political Rights; (b) the African Charter on Human and Peoples' Rights; (c) the prohibition on subjecting a detainee to mistreatment; and (d) the Vienna Convention on Consular Relations.

1. The facts
(paras. 49–62)

The Court recalls that some of the facts relating to the arrest, detention and expulsion measures taken against Mr. Diallo between October 1995 and January 1996 are acknowledged by both Parties; others, in contrast, are in dispute. It briefly sets forth (para. 50) the facts on which the Parties are in agreement, before moving on to those on which the Parties disagree markedly. These concern, on the one hand, Mr. Diallo's situation between 5 November 1995, when he was first arrested, and his release on 10 January 1996, and, on the other hand, his situation during the period between this latter date and his actual expulsion on 31 January 1996.

As regards the first of these periods, Guinea maintains that Mr. Diallo remained continuously in detention for 66 consecutive days. According to the DRC, Mr. Diallo was only detained for two days in the first instance and subsequently for no longer than eight days. With regard to the period from 10 January to 31 January 1996, Guinea maintains that Mr. Diallo was rearrested on 14 January 1996, on the order of the Congolese Prime Minister for the purpose of effecting the expulsion decree, and kept in detention until he was deported from Kinshasa airport on 31 January, i.e., for another 17 days. On the other hand, the DRC asserts that Mr. Diallo remained at liberty from 10 January to 25 January 1996, on which date he was arrested prior to being expelled a few days later, on 31 January.

In addition, the Court recalls that the Parties also differ as to how Mr. Diallo was treated during the periods when he was deprived of his liberty.

Faced with a disagreement between the Parties as to the existence of the facts relevant to the decision of the case, the Court must first address the question of the burden of proof. The Court recalls that, as a general rule, it is for the party which alleges a fact in support of its claims to prove the existence of that fact (see, most recently, the Judgment delivered in the case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, Judgment of 20 April 2010, para. 162). It points out, however, that it would be wrong to regard this rule, based on the maxim *onus probandi incumbit actori*, as an absolute one, to be applied in all circumstances. The determination of the burden of proof is in reality dependent on the subject-matter and the nature of each dispute brought before the Court; it varies according to the type of facts which it is necessary to establish for the purposes of the decision of the case.

The Court goes on to state that in particular, where, as in these proceedings, it is alleged that a person has not been afforded, by a public authority, certain procedural guarantees to which he was entitled, it cannot as a general rule be demanded of the Applicant that it prove the negative fact which it is asserting. A public authority is generally able to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law—if such was the case—by producing documentary evidence of the actions that were carried out. However, it cannot be inferred in every case where the Respondent is unable to prove the performance of a procedural obligation that it has disregarded it: that depends to a large extent on the precise nature of the obligation in question; some obligations normally imply that written documents are drawn up, while others do not. The Court observes that the time which has elapsed since the events must also be taken into account.

It is for the Court to evaluate all the evidence produced by the two Parties and duly subjected to adversarial scrutiny, with a view to forming its conclusions. In short, the Court finds that when it comes to establishing facts such as those which are at issue in the present case, neither party is alone in bearing the burden of proof.

The Court is not convinced by the DRC's allegation that Mr. Diallo was released as early as 7 November 1995 and then only rearrested at the beginning of January 1996, before being freed again on 10 January. After setting out the reasons which led it to form this view (para. 59), it concludes that Mr. Diallo remained in continuous detention for 66 days, from 5 November 1995 to 10 January 1996. On the other hand, the Court does not accept the Applicant's assertion that Mr. Diallo was rearrested on 14 January 1996 and remained in detention until he was expelled on 31 January. This claim, which is contested by the Respondent, is not supported by any evidence at all. However, since the DRC has acknowledged that Mr. Diallo was detained, at the latest, on 25 January 1996, the Court will take it as established that he was in detention between 25 and 31 January 1996. Nor can the Court accept the allegations of death threats said to have been made against Mr. Diallo by his guards, in the absence of any evidence in support of these allegations.

2. Consideration of the facts in the light of the applicable international law
(paras. 63–98)

Guinea maintains that the circumstances in which Mr. Diallo was arrested, detained and expelled in 1995–1996 constitute in several respects a breach by the DRC of its international obligations.

First, the expulsion of Mr. Diallo is said to have breached Article 13 of the International Covenant on Civil and Political Rights (hereinafter the "Covenant") of 16 December 1966, to which Guinea and the DRC became parties on 24 April 1978 and 1 February 1977 respectively, as well as Article 12, paragraph 4, of the African Charter on Human and Peoples' Rights (hereinafter the "African Charter") of 27 June 1981, which entered into force for Guinea on 21 October 1986 and for the DRC on 28 October 1987.

Second, Mr. Diallo's arrest and detention are said to have violated Article 9, paragraphs 1 and 2, of the Covenant, and Article 6 of the African Charter.

Third, Mr. Diallo is said to have suffered conditions in detention comparable to forms of inhuman or degrading treatment that are prohibited by international law.

Fourth and last, Mr. Diallo is said not to have been informed, when he was arrested, of his right to request consular assistance from his country, in violation of Article 36 (1) *(b)* of the Vienna Convention on Consular Relations of 24 April 1963, which entered into force for Guinea on 30 July 1988 and for the DRC on 14 August 1976.

The Court examines in turn whether each of these assertions is well-founded.

(a) The alleged violation of Article 13 of the Covenant and Article 12, paragraph 4, of the African Charter
(paras. 64–74)

The Court recalls that Article 13 of the Covenant reads as follows:

> "An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."

Likewise, Article 12, paragraph 4, of the African Charter provides that: "A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law."

The Court finds that it follows from the terms of the two provisions cited above that the expulsion of an alien lawfully in the territory of a State which is a party to these instruments can only be compatible with the international obligations of that State if it is decided in accordance with "the law", in other

words the domestic law applicable in that respect. Compliance with international law is to some extent dependent here on compliance with internal law. However, it is clear that while "accordance with law" as thus defined is a necessary condition for compliance with the above-mentioned provisions, it is not the sufficient condition. First, the applicable domestic law must itself be compatible with the other requirements of the Covenant and the African Charter; second, an expulsion must not be arbitrary in nature, since protection against arbitrary treatment lies at the heart of the rights guaranteed by the international norms protecting human rights, in particular those set out in the two treaties applicable in this case.

The Court adds that the interpretation above is fully corroborated by the jurisprudence of the Human Rights Committee established by the Covenant to ensure compliance with that instrument by the States parties (see for example, in this respect, *Maroufidou* v. *Sweden*, No. 58/1979, para. 9.3; *Human Rights Committee, General Comment No. 15: The position of aliens under the Covenant*).

Since it was created, the Human Rights Committee has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications which may be submitted to it in respect of States parties to the first Optional Protocol, and in the form of its "General Comments".

The Court observes that although it is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.

Likewise, the Court notes that when it is called upon, as in these proceedings, to apply a regional instrument for the protection of human rights, it must take due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created, if such has been the case, to monitor the sound application of the treaty in question. In the present case, the interpretation given above of Article 12, paragraph 4, of the African Charter is consonant with the case law of the African Commission on Human and Peoples' Rights established by Article 30 of the said Charter (see, for example, *Kenneth Good* v. *Republic of Botswana*, No. 313/05, para. 204; *World Organization against Torture and International Association of Democratic Lawyers, International Commission of Jurists, Interafrican Union for Human Rights* v. *Rwanda*, No. 27/89, 46/91, 49/91, 99/93).

The Court also notes that the interpretation by the European Court of Human Rights and the Inter-American Court of Human Rights, respectively, of Article 1 of Protocol No. 7 to the (European) Convention for the Protection of Human Rights and Fundamental Freedoms and Article 22, paragraph 6, of the American Convention on Human Rights—the said provisions being close in substance to those of the Covenant and the African Charter which the Court is applying in the present case—is consistent with what has been found in respect of the latter provisions in paragraph 65 of this Judgment.

According to Guinea, the decision to expel Mr. Diallo first breached Article 13 of the Covenant and Article 12, paragraph 4, of the African Charter because it was not taken in accordance with Congolese domestic law, for three reasons:

– it should have been signed by the President of the Republic and not by the Prime Minister;

– it should have been preceded by consultation of the National Immigration Board;

– and it should have indicated the grounds for the expulsion, which it failed to do.

The Court is not convinced by the first of these arguments. It is true that Article 15 of the Zairean Legislative Order of 12 September 1983 concerning immigration control, in the version in force at the time, conferred on the President of the Republic, and not the Prime Minister, the power to expel an alien. However, the DRC explains that since the entry into force of the Constitutional Act of 9 April 1994, the powers conferred by particular legislative provisions on the President of the Republic are deemed to have been transferred to the Prime Minister—even though such provisions have not been formally amended—under Article 80 (2) of the new Constitution, which provides that "the Prime Minister shall exercise regulatory power by means of decrees deliberated upon in the Council of Ministers".

The Court recalls that it is for each State, in the first instance, to interpret its own domestic law. The Court does not, in principle, have the power to substitute its own interpretation for that of the national authorities, especially when that interpretation is given by the highest national courts (see, for this latter case, *Serbian Loans, Judgment No. 14, 1929, P.C.I.J., Series A, No. 20*, p. 46 and *Brazilian Loans, Judgment No. 15, 1929, P.C.I.J., Series A, No. 21*, p. 124). Exceptionally, where a State puts forward a manifestly incorrect interpretation of its domestic law, particularly for the purpose of gaining an advantage in a pending case, it is for the Court to adopt what it finds to be the proper interpretation.

The Court finds that that is not the situation here and states that the DRC's interpretation of its Constitution, from which it follows that Article 80 (2) produces certain effects on the laws already in force on the date when that Constitution was adopted, does not seem manifestly incorrect. It goes on to explain that it has not been contested that this interpretation corresponded, at the time in question, to the general practice of the constitutional authorities. The DRC has included in the case file, in this connection, a number of other expulsion decrees issued at the same time and all signed by the Prime Minister. Consequently, although it would be possible in theory to discuss the validity of that interpretation, it is certainly not for the Court to adopt a different interpretation of Congolese domestic law for the purposes of the decision of this case. The Court finds that it therefore cannot be concluded that the decree expelling Mr. Diallo was not issued "in accordance with law" by virtue of the fact that it was signed by the Prime Minister.

However, the Court is of the opinion that this decree did not comply with the provisions of Congolese law for two other reasons.

First, the Court notes that it was not preceded by consultation of the National Immigration Board, whose opinion is required by Article 16 of the above-mentioned Legislative Order concerning immigration control before any expulsion measure is taken against an alien holding a residence permit. The DRC has not contested either that Mr. Diallo's situation placed him within the scope of this provision, or that consultation of the Board was neglected. This omission is confirmed by the absence in the decree of a citation mentioning the Board's opinion, whereas all the other expulsion decrees included in the case file specifically cite such an opinion, in accordance with Article 16 of the Legislative Order, moreover, which concludes by stipulating that the decision "shall mention the fact that the Board was consulted".

Second, the Court observes that the expulsion decree should have been "reasoned" pursuant to Article 15 of the 1983 Legislative Order; in other words, it should have indicated the grounds for the decision taken. The fact is that the general, stereotyped reasoning included in the decree cannot in any way be regarded as meeting the requirements of the legislation. The decree confines itself to stating that the "presence and conduct [of Mr. Diallo] have breached Zairean public order, especially in the economic, financial and monetary areas, and continue to do so". The first part of this sentence simply paraphrases the legal basis for any expulsion measure according to Congolese law, since Article 15 of the 1983 Legislative Order permits the expulsion of any alien "who, by his presence or conduct, breaches or threatens to breach the peace or public order". As for the second part, while it represents an addition, this is so vague that it is impossible to know on the basis of which activities the presence of Mr. Diallo was deemed to be a threat to public order (in the same sense, *mutatis mutandis*, see *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 231, para. 152).

The Court takes the view that the formulation used by the author of the decree therefore amounts to an absence of reasoning for the expulsion measure.

The Court thus concludes that in two important respects, concerning procedural guarantees conferred on aliens by Congolese law and aimed at protecting the persons in question against the risk of arbitrary treatment, the expulsion of Mr. Diallo was not decided "in accordance with law". Consequently, it adds, regardless of whether that expulsion was justified on the merits, a question to which it returns later in the Judgment, the disputed measure violated Article 13 of the Covenant and Article 12, paragraph 4, of the African Charter.

Furthermore, the Court considers that Guinea is justified in contending that the right afforded by Article 13 to an alien who is subject to an expulsion measure to "submit the reasons against his expulsion and to have his case reviewed by . . . the competent authority" was not respected in the case of Mr. Diallo. It observes that it is indeed certain that, neither before the expulsion decree was signed on 31 October 1995, nor subsequently but before the said decree was implemented on 31 January 1996, was Mr. Diallo allowed to submit his defence to a competent authority in order to have his arguments taken into consideration and a decision made on the appropriate response to be given to them.

It is true, as the DRC has pointed out, that Article 13 of the Covenant provides for an exception to the right of an alien to submit his reasons where "compelling reasons of national security" require otherwise. The Respondent maintains that this was precisely the case here. However, the Court notes that the DRC has not provided it with any tangible information that might establish the existence of such "compelling reasons". The Court goes on to assert that in principle it is doubtless for the national authorities to consider the reasons of public order that may justify the adoption of one police measure or another. But when this involves setting aside an important procedural guarantee provided for by an international treaty, it cannot simply be left in the hands of the State in question to determine the circumstances which, exceptionally, allow that guarantee to be set aside. It is for the State to demonstrate that the "compelling reasons" required by the Covenant existed, or at the very least could reasonably have been concluded to have existed, taking account of the circumstances which surrounded the expulsion measure.

In the present case, the Court considers that no such demonstration has been provided by the Respondent. On these grounds too, it concludes that Article 13 of the Covenant was violated in respect of the circumstances in which Mr. Diallo was expelled.

(b) The alleged violation of Article 9, paragraphs 1 and 2, of the Covenant and Article 6 of the African Charter (paras. 75–85)

The Court first recalls that Article 9, paragraphs 1 and 2, of the Covenant provides that:

> "1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
>
> 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him."

It also recalls that Article 6 of the African Charter provides that:

> "Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained."

According to Guinea, the above-mentioned provisions were violated when Mr. Diallo was arrested and detained in 1995–1996 for the purpose of implementing the expulsion decree, for a number of reasons. First, the deprivations of liberty which he suffered did not take place "in accordance with such procedure as [is] established by law" within the meaning of Article 9, paragraph 1, of the Covenant, or on the basis of "conditions previously laid down by law" within the mean-

ing of Article 6 of the African Charter. Second, they were "arbitrary" within the meaning of these provisions. Third, Mr. Diallo was not informed, at the time of his arrests, of the reasons for those arrests, nor was he informed of the charges against him, which constituted a violation of Article 9, paragraph 2, of the Covenant.

The Court examines in turn whether each of these assertions is well-founded.

The Court states that it is first necessary to make a general remark. The provisions of Article 9, paragraphs 1 and 2, of the Covenant, and those of Article 6 of the African Charter, apply in principle to any form of arrest or detention decided upon and carried out by a public authority, whatever its legal basis and the objective being pursued (see in this respect, with regard to the Covenant, the Human Rights Committee's General Comment No. 8 of 30 June 1982 concerning the right to liberty and security of person (*Human Rights Committee, CCPR General Comment No. 8: Article 9 (Right to Liberty and Security of Person)*)). It observes that the scope of these provisions is not, therefore, confined to criminal proceedings; they also apply, in principle, to measures which deprive individuals of their liberty that are taken in the context of an administrative procedure, such as those which may be necessary in order to effect the forcible removal of an alien from the national territory. In this latter case, it is of little importance whether the measure in question is characterized by domestic law as an "expulsion" or a "*refoulement*". The position is only different as regards the requirement in Article 9, paragraph 2, of the Covenant that the arrested person be "informed of any charges" against him, a requirement which is only meaningful in the context of criminal proceedings.

The Court now turns to the first of Guinea's three allegations, namely, that Mr. Diallo's arrest and detention were not in accordance with the requirements of the law of the DRC. It first notes that Mr. Diallo's arrest on 5 November 1995 and his detention until 10 January 1996 (see paragraph 58 of the Judgment) were for the purpose of enabling the expulsion decree issued against him on 31 October 1995 to be effected. The second arrest, on 25 January 1996 at the latest, was also for the purpose of implementing that decree: the mention of a "*refoulement*" on account of "illegal residence" in the notice served on Mr. Diallo on 31 January 1996, the day when he was actually expelled, was clearly erroneous, as the DRC acknowledges.

The Court then observes that Article 15 of the Legislative Order of 12 September 1983 concerning immigration control, as in force at the time of Mr. Diallo's arrest and detention, provided that an alien "who is likely to evade implementation" of an expulsion measure may be imprisoned for an initial period of 48 hours, which may be "extended by 48 hours at a time, but shall not exceed eight days". The Court finds that Mr. Diallo's arrest and detention were not in accordance with these provisions. There is no evidence that the authorities of the DRC sought to determine whether Mr. Diallo was "likely to evade implementation" of the expulsion decree and, therefore, whether it was necessary to detain him. The fact that he made no attempt to evade expulsion after he was released on 10 January 1996 suggests that there was no need for his detention. The overall length of time for which he was detained—66 days following his initial arrest and at least six more days following the second arrest—greatly exceeded the maximum period permitted by Article 15. In addition, it adds that the DRC has produced no evidence to show that the detention was reviewed every 48 hours, as required by that provision.

The Court further finds, in response to the second allegation set out above (see paragraph 76 of the Judgment), that Mr. Diallo's arrest and detention were arbitrary within the meaning of Article 9, paragraph 1, of the Covenant and Article 6 of the African Charter.

The Court acknowledges that in principle an arrest or detention aimed at effecting an expulsion decision taken by the competent authority cannot be characterized as "arbitrary" within the meaning of the above-mentioned provisions, even if the lawfulness of the expulsion decision might be open to question. Consequently, the fact that the decree of 31 October 1995 was not issued, in some respects, "in accordance with law", as the Court has noted earlier in the Judgment in relation to Article 13 of the Covenant and Article 12, paragraph 4, of the African Charter, is not sufficient to render the arrest and detention aimed at implementing that decree "arbitrary" within the meaning of Article 9, paragraph 1, of the Covenant and Article 6 of the African Charter.

However, the Court considers that account should be taken here of the number and seriousness of the irregularities tainting Mr. Diallo's detentions. As noted above, he was held for a particularly long time and it would appear that the authorities made no attempt to ascertain whether his detention was necessary.

Moreover, the Court can but find not only that the decree itself was not reasoned in a sufficiently precise way, as was pointed out above (see paragraph 70), but that throughout the proceedings, the DRC has never been able to provide grounds which might constitute a convincing basis for Mr. Diallo's expulsion. Allegations of "corruption" and other offences have been made against Mr. Diallo, but no concrete evidence has been presented to the Court to support these claims. It notes that these accusations did not give rise to any proceedings before the courts or, *a fortiori*, to any conviction. Furthermore, it is difficult not to discern a link between Mr. Diallo's expulsion and the fact that he had attempted to recover debts which he believed were owed to his companies by, amongst others, the Zairean State or companies in which the State holds a substantial portion of the capital, bringing cases for this purpose before the civil courts. The Court is of the opinion that, under these circumstances, the arrest and detention aimed at allowing such an expulsion measure, one without any defensible basis, to be effected can only be characterized as arbitrary within the meaning of Article 9, paragraph 1, of the Covenant and Article 6 of the African Charter.

Finally, the Court turns to the allegation relating to Article 9, paragraph 2, of the Covenant. It observes that, for the reasons discussed in paragraph 77 of the Judgment, Guinea cannot effectively argue that at the time of each of his arrests (in November 1995 and January 1996), Mr. Diallo was not informed of the "charges against him", as the Applicant contends is required by Article 9, paragraph 2, of the Covenant.

This particular provision of Article 9 is applicable only when a person is arrested in the context of criminal proceedings; the Court finds that that was not the case for Mr. Diallo.

On the other hand, it adds, Guinea is justified in arguing that Mr. Diallo's right to be "informed, at the time of arrest, of the reasons for his arrest"—a right guaranteed in all cases, irrespective of the grounds for the arrest—was breached.

The Court observes that the DRC has failed to produce a single document or any other form of evidence to prove that Mr. Diallo was notified of the expulsion decree at the time of his arrest on 5 November 1995, or that he was in some way informed, at that time, of the reason for his arrest. Although the expulsion decree itself did not give specific reasons, as pointed out above (see paragraph 72), the notification of this decree at the time of Mr. Diallo's arrest would have informed him sufficiently of the reasons for that arrest for the purposes of Article 9, paragraph 2, since it would have indicated to Mr. Diallo that he had been arrested for the purpose of an expulsion procedure and would have allowed him, if necessary, to take the appropriate steps to challenge the lawfulness of the decree. The Court notes, however, that no information of this kind was provided to him; the DRC, which should be in a position to prove the date on which Mr. Diallo was notified of the decree, has presented no evidence to that effect.

The Court takes the view that the same applies to Mr. Diallo's arrest in January 1996. On that date, it has also not been established that Mr. Diallo was informed that he was being forcibly removed from Congolese territory in execution of an expulsion decree. Moreover, on the day when he was actually expelled, he was given the incorrect information that he was the subject of a "*refoulement*" on account of his "illegal residence" (see paragraph 50). This being so, the Court finds that the requirement for him to be informed, laid down by Article 9, paragraph 2, of the Covenant, was not complied with on that occasion either.

(c) The alleged violation of the prohibition on subjecting a detainee to mistreatment
(paras. 86–89)

The Court recalls that Guinea maintains that Mr. Diallo was subjected to mistreatment during his detention, because of the particularly tough conditions thereof, because he was deprived of his right to communicate with his lawyers and with the Guinean Embassy, and because he received death threats from the guards. The Applicant invokes in this connection Article 10, paragraph 1, of the Covenant, according to which: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

According to the Court, Article 7 of the Covenant, providing that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment", and Article 5 of the African Charter, stating that "[e]very individual shall have the right to the respect of the dignity inherent in a human being", are also pertinent in this area. The Court states that there is no doubt, moreover, that the prohibition of inhuman and degrading treatment is among the rules of general international law which are binding on States in all circumstances, even apart from any treaty commitments.

It notes, however, that Guinea has failed to demonstrate convincingly that Mr. Diallo was subjected to such treatment during his detention. There is no evidence to substantiate the allegation that he received death threats. It seems that Mr. Diallo was able to communicate with his relatives and his lawyers without any great difficulty and, even if this had not been the case, such constraints would not per se have constituted treatment prohibited by Article 10, paragraph 1, of the Covenant and by general international law. The question of Mr. Diallo's communications with the Guinean authorities is distinct from that of compliance with the provisions currently under examination and will be addressed under the next heading, in relation to Article 36, paragraph 1 *(b)*, of the Vienna Convention on Consular Relations. Finally, that Mr. Diallo was fed thanks to the provisions his relatives brought to his place of detention—which the DRC does not contest—is insufficient in itself to prove mistreatment, since access by the relatives to the individual deprived of his liberty was not hindered.

In conclusion, the Court finds that it has not been demonstrated that Mr. Diallo was subjected to treatment prohibited by Article 10, paragraph 1, of the Covenant.

(d) The alleged violation of the provisions of Article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations
(paras. 90–98)

Article 36, paragraph 1 *(b)*, of the Vienna Convention on Consular Relations provides that:

> "[I]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph."

The Court observes that these provisions, as is clear from their very wording, are applicable to any deprivation of liberty of whatever kind, even outside the context of pursuing perpetrators of criminal offences. They therefore apply in the present case, which the DRC does not contest.

According to Guinea, these provisions were violated when Mr. Diallo was arrested in November 1995 and January 1996, because he was not informed "without delay" at those times of his right to seek assistance from the consular authorities of his country.

At no point in the written proceedings or the first round of oral argument did the DRC contest the accuracy of Guinea's allegations in this respect; it did not attempt to establish, or even claim, that the information called for by the last sentence of the quoted provision was supplied to Mr. Diallo, or that it was supplied "without delay", as the text requires. The Respondent replied to the Applicant's allegation with two

arguments: that Guinea had failed to prove that Mr. Diallo requested the Congolese authorities to notify the Guinean consular post without delay of his situation; and that the Guinean Ambassador in Kinshasa was aware of Mr. Diallo's arrest and detention, as evidenced by the steps he took on his behalf. The Court notes that it was only in replying to a question put by a judge during the hearing of 26 April 2010 that the DRC asserted for the first time that it had "orally informed Mr. Diallo immediately after his detention of the possibility of seeking consular assistance from his State" (written reply by the DRC handed in to the Registry on 27 April 2010 and confirmed orally at the hearing of 29 April, during the second round of oral argument).

The Court points out that the two arguments put forward by the DRC before the second round of oral pleadings lack any relevance. It adds that it is for the authorities of the State which proceeded with the arrest to inform on their own initiative the arrested person of his right to ask for his consulate to be notified; the fact that the person did not make such a request not only fails to justify non-compliance with the obligation to inform which is incumbent on the arresting State, but could also be explained in some cases precisely by the fact that the person had not been informed of his rights in that respect (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 46, para. 76). The Court considers, moreover, that the fact that the consular authorities of the national State of the arrested person have learned of the arrest through other channels does not remove any violation that may have been committed of the obligation to inform that person of his rights "without delay".

As for the DRC's assertion, made in the conditions described above, that Mr. Diallo was "orally informed" of his rights upon his arrest, the Court can but note that it was made very late in the proceedings, whereas the point was at issue from the beginning, and that there is not the slightest piece of evidence to corroborate it. The Court is therefore unable to give it any credit.

Consequently, the Court finds that there was a violation by the DRC of Article 36, paragraph 1 *(b)*, of the Vienna Convention on Consular Relations.

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Guinea has further contended that Mr. Diallo's expulsion, given the circumstances in which it was carried out, violated his right to property, guaranteed by Article 14 of the African Charter, because he had to leave behind most of his assets when he was forced to leave the Congo.

In the Court's view, this aspect of the dispute has less to do with the lawfulness of Mr. Diallo's expulsion in the light of the DRC's international obligations and more to do with the damage Mr. Diallo suffered as a result of the internationally wrongful acts of which he was a victim. The Court therefore examines it later in the Judgment, within the context of the question of reparation owed by the Respondent (see paragraphs 160–164 of the Judgment).

III. Protection of Mr. Diallo's direct rights as associé *in Africom-Zaire and Africontainers-Zaire*
(paras. 99–159)

The Court observes that it is especially important to clarify the issues of the legal existence of the two *sociétés privées à responsabilité limitée* (private limited liability companies, hereinafter "SPRLs") incorporated under Zairean law, Africom-Zaire and Africontainers-Zaire, and of Mr. Diallo's participation and role in them, since the Parties are in disagreement on these points.

After carefully considering the situation (paras. 99–113), the Court reaches the conclusion that Mr. Diallo was, both as *gérant* and *associé* of the two companies, fully in charge and in control of them, but that they nevertheless remained legal entities distinct from him. The Court then addresses the various claims of Guinea pertaining to the direct rights of Mr. Diallo as *associé*. In doing so, it has to assess whether, under DRC law, the claimed rights are indeed direct rights of the *associé*, or whether they are rather rights or obligations of the companies. As the Court has already pointed out, claims relating to rights which are not direct rights held by Mr. Diallo as *associé* have been declared inadmissible by the Judgment of 24 May 2007; they can therefore no longer be entertained. In particular, this is the case of the claims relating to the contractual rights of Africom-Zaire against the State of Zaire (DRC), and of Africontainers-Zaire against the Gécamines, Onatra, Fina and Shell companies.

In the following paragraphs, the Court is careful to maintain the strict distinction between the alleged infringements of the rights of the two SPRLs at issue and the alleged infringements of Mr. Diallo's direct rights as *associé* of these latter (see *I.C.J. Reports 2007 (II)*, pp. 605–606, paras. 62–63).

Guinea's claims relating to Mr. Diallo's direct rights as *associé* pertain to the right to participate and vote in general meetings of the two SPRLs, the right to appoint a *gérant*, and the right to oversee and monitor the management of the companies. Guinea also presents a claim in relation to the right to property concerning Mr. Diallo's *parts sociales* in Africom-Zaire and Africontainers-Zaire. The Court addresses these different claims.

A. The right to take part and vote in general meetings
(paras. 117–126)

Guinea maintains that the DRC, in expelling Mr. Diallo, deprived him of his right, guaranteed by Article 79 of the Congolese Decree of 27 February 1887 on commercial corporations, to take part in general meetings and to vote. It claims that under DRC law general meetings of Africom-Zaire and Africontainers-Zaire could not be held outside the territory of the DRC. Guinea admits that Mr. Diallo could of course have exercised his rights as *associé* from another country by appointing a proxy of his choice, in accordance with Article 81 of the 1887 Decree, but argues that appointing a proxy is merely an option available to the *associé*, whose recognized right is clearly to have a choice whether to appoint a representative or to attend in person. Guinea adds that, in the case of Africontainers-Zaire, it would have been impossible for Mr. Diallo to be represented by a proxy, since Article 22 of

the Articles of Incorporation of the SPRL stipulates that only an *associé* may be appointed proxy of another, whereas he had become its sole *associé* at the time of his expulsion.

The DRC maintains that there cannot have been any violation of Mr. Diallo's right to take part in general meetings, as there has been no evidence that any general meetings were convened and that Mr. Diallo was unable to attend owing to his removal from DRC territory. The DRC asserts that in any case Congolese commercial law places no obligation on commercial companies in respect of where general meetings are to be held.

The Court observes that, under Congolese law, the right to participate and vote in general meetings belongs to the *associés* and not to the company. It then turns to the question of whether the DRC, in expelling Mr. Diallo, deprived him of his right to take part in general meetings and to vote, as guaranteed by Article 79 of the Congolese Decree of 27 February 1887 on commercial corporations.

In view of the evidence submitted to it by the Parties, the Court finds that there is no proof that Mr. Diallo, acting either as *gérant* or as *associé* holding at least one-fifth of the total number of shares, has taken any action to convene a general meeting, either after having been expelled from the DRC, or at any time when he was a resident in the DRC after 1980. Nor has any evidence been provided that Mr. Diallo would have been precluded from taking any action to convene general meetings from abroad, either as *gérant* or as *associé*.

The Court recalls that an *associé*'s right to take part and vote in general meetings may be exercised by the *associé* in person or through a proxy of his choosing. There is no doubt in this connection that a vote expressed through a proxy at a general meeting has the same legal effect as a vote expressed by the *associé* himself. On the other hand, it is more difficult to infer with certainty from the above-mentioned provisions that they establish the right, as Guinea maintains, for the *associé* to attend general meetings in person. In the opinion of the Court, the primary purpose of these provisions is to ensure that the general meetings of companies can take place effectively. Guinea's interpretation of Congolese law might frustrate that objective, by allowing an *associé* to prevent the organs of the company from operating normally. According to the Court, it is questionable whether the Congolese legislators could have desired such an outcome, which is far removed from the *affectio societatis*. In respect of Africom-Zaire and Africontainers-Zaire, the Court does not see how the appointment of a representative by Mr. Diallo could in any way have breached in practical terms his right to take part and vote in general meetings of the two SPRLs, since he had complete control over them.

Furthermore, with regard to Africontainers-Zaire, the Court finds that it cannot accept Guinea's argument that it would have been impossible for Mr. Diallo to be represented at a general meeting by a proxy other than himself because he was the sole *associé* of that SPRL and Article 22 of Africontainers-Zaire's Articles of Incorporation stipulates that an *associé* may only appoint another *associé* as proxy. As the Court has already observed (see paragraph 110 of the Judgment), that company has two *associés*, namely, Mr. Diallo and Africom-Zaire. Therefore, pursuant to the above-mentioned Article 22, Mr. Diallo, acting as *associé* of Africontainers-Zaire, could appoint the "representative or agent" of Africom-Zaire as his proxy for a general meeting of Africontainers-Zaire. Prior to the appointment of that proxy, and acting as *gérant* of Africom-Zaire pursuant to Article 69 of the 1887 Decree (see paragraph 135 of the Judgment), Mr. Diallo could have appointed such a "representative or agent" of the latter company.

The Court therefore concludes that it cannot sustain Guinea's claim that the DRC has violated Mr. Diallo's right to take part and vote in general meetings. The DRC, in expelling Mr. Diallo, has probably impeded him from taking part in person in any general meeting, but, in the opinion of the Court, such hindrance does not amount to a deprivation of his right to take part and vote in general meetings.

B. The rights relating to the gérance
(paras. 127–140)

The Court observes that, at various points in the proceedings, Guinea has made four slightly different assertions which it has grouped under the general claim of a violation of Mr. Diallo's right to "appoint a *gérant*". It has contended that, by unlawfully expelling Mr. Diallo, the DRC has committed: a violation of his alleged right to appoint a *gérant*, a violation of his alleged right to be appointed as *gérant*, a violation of his alleged right to exercise the functions of a *gérant*, and a violation of his alleged right not to be removed as *gérant*.

In particular, the DRC contends that the right to appoint the *gérant* of an SPRL is a right of the company, not of the *associé*, as it lies with the general meeting, which is an organ of the company. It also submits that Mr. Diallo did appoint Mr. N'Kanza as *gérant* of Africontainers-Zaire following his expulsion.

The Court observes that the appointment and functions of *gérants* are governed, in Congolese law, by the 1887 Decree on commercial corporations, and by the Articles of Incorporation of the company in question. It begins by dismissing the DRC's argument that Mr. Diallo's right to appoint a *gérant* could not have been violated because he in fact appointed a *gérant* for Africontainers-Zaire in the person of Mr. N'Kanza. It has already concluded that this allegation has not been proved (see paragraphs 111 and 112 of the Judgment).

As regards the first assertion put forth by Guinea that the DRC has violated Mr. Diallo's right to appoint a *gérant*, the Court notes that the appointment of the *gérant* falls under the responsibility of the company itself, without constituting a right of the *associé*; accordingly, the Court concludes that Guinea's claim that the DRC has violated Mr. Diallo's right to appoint a *gérant* must fail.

As regards the second assertion put forward by Guinea that the DRC has violated Mr. Diallo's right to be appointed *gérant*, the Court notes in particular that this right cannot have been violated in this instance because Mr. Diallo has in fact been appointed as *gérant*, and still is the *gérant* of both companies in question.

As regards Guinea's third assertion, that a right of Mr. Diallo to exercise his functions as *gérant* was violated, the

Court finds in particular that while the performance of Mr. Diallo's duties as *gérant* may have been rendered more difficult by his presence outside the country, Guinea has failed to demonstrate that it was impossible to carry out those duties. The Court further observes that in fact, it is clear from various documents submitted to it that, even after Mr. Diallo's expulsion, representatives of Africontainers-Zaire have continued to act on behalf of the company in the DRC and to negotiate contractual claims with the Gécamines company. The Court accordingly concludes that Guinea's claim that the DRC has violated a right of Mr. Diallo to exercise his functions as *gérant* must fail.

As regards Guinea's fourth assertion, that the DRC has violated Mr. Diallo's right not to be removed as *gérant*, the Court notes that although it may have become more difficult for Mr. Diallo to carry out his duties as *gérant* from outside the DRC following his expulsion, as previously discussed, he remained, from a legal standpoint, the *gérant* of both Africom-Zaire and Africontainers-Zaire. Accordingly, it concludes that Guinea's claim that the DRC has violated Mr. Diallo's right not to be removed as *gérant* must fail.

In light of all the above, the Court concludes that the various assertions put forward by Guinea, grouped under the general claim of a violation of Mr. Diallo's rights relating to the *gérance*, must be rejected.

C. The right to oversee and monitor the management
(paras. 141–148)

The Court considers that, even if a right to oversee and monitor the management exists in companies where only one *associé* is fully in charge and in control, Mr. Diallo could not have been deprived of the right to oversee and monitor the *gérance* of the two companies. While it may have been the case that Mr. Diallo's detentions and expulsion from the DRC rendered the business activity of the companies more difficult, they simply could not have interfered with his ability to oversee and monitor the *gérance*, wherever he may have been. Accordingly, the Court concludes that Guinea's claim that the DRC has violated Mr. Diallo's right to oversee and monitor the management fails.

D. The right to property of Mr. Diallo over his parts sociales *in Africom-Zaire and Africontainers-Zaire*
(paras. 149–159)

The Court first observes that international law has repeatedly acknowledged the principle of domestic law that a company has a legal personality distinct from that of its shareholders. This remains true even in the case of an SPRL which may have become unipersonal in the present case. The Court states, therefore, that the rights and assets of a company must be distinguished from the rights and assets of an *associé*. In this respect, it is legally untenable to consider, as Guinea argues, that the property of the corporation merges with the property of the shareholder. Furthermore, it must be recognized that the liabilities of the company are not the liabilities of the shareholder. In the case of Africontainers-Zaire, as an SPRL, it is specifically indicated in its Articles of Incorporation that the "liability of each *associé* in respect of corporate obligations shall be limited to the amount of his/her *parts sociales* in the company" (Art. 7; Annex 1 to Guinea's Memorial; see also paragraphs 105 and 115 of the Judgment).

The Court recalls that it has already indicated that the DRC has not violated Mr. Diallo's direct right as *associé* to take part and vote in general meetings of the companies, nor his right to be appointed or to remain *gérant*, nor his right to oversee and monitor the management (see paragraphs 117–148 of the Judgment). The Court reaffirms that Mr. Diallo's other direct rights, in respect of his *parts sociales*, must be clearly distinguished from the rights of the SPRLs, in particular in respect of the property rights belonging to the companies. It observes in this connection that, together with its other assets, including debts receivable from third parties, the capital is part of the company's property, whereas the *parts sociales* are owned by the *associés*. The *parts sociales* represent the capital but are distinct from it, and confer on their holders rights in the operation of the company and also a right to receive any dividends or any monies payable in the event of the company being liquidated. The only direct rights of Mr. Diallo which remain to be considered are in respect of these last two matters, namely, the receipt of dividends or any monies payable on a winding-up of the companies. There is, however, no evidence that any dividends were ever declared or that any action was ever taken to wind up the companies, even less that any action attributable to the DRC has infringed Mr. Diallo's rights in respect of those matters.

Finally, the Court considers there to be no need to determine the extent of the business activities of Africom-Zaire and Africontainers-Zaire at the time Mr. Diallo was expelled, or to make any finding as to whether they were in a state of "undeclared bankruptcy", as alleged by the DRC.

The Court concludes from the above that Guinea's allegations of infringement of Mr. Diallo's right to property over his *parts sociales* in Africom-Zaire and Africontainers-Zaire have not been established.

IV. Reparation
(paras. 160–164)

Having concluded that the Democratic Republic of the Congo has breached its obligations under Articles 9 and 13 of the International Covenant on Civil and Political Rights, Articles 6 and 12 of the African Charter on Human and Peoples' Rights, and Article 36, paragraph 1 *(b)*, of the Vienna Convention on Consular Relations (see paragraphs 73, 74, 85 and 97 of the Judgment), it is now for the Court to determine, in light of Guinea's final submissions, what consequences flow from these internationally wrongful acts giving rise to the DRC's international responsibility.

The Court recalls that "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed" (*Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47). Where this is not possible, reparation may take "the form of compensation or satisfaction, or even both" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, Judgment of 20 April 2010, para. 273). In the light of the circumstances of the case,

in particular the fundamental character of the human rights obligations breached and Guinea's claim for reparation in the form of compensation, the Court is of the opinion that, in addition to a judicial finding of the violations, reparation due to Guinea for the injury suffered by Mr. Diallo must take the form of compensation.

In this respect, Guinea requested in its final submissions that the Court defer its Judgment on the amount of compensation, in order for the Parties to reach an agreed settlement on that matter. Should the Parties be unable to do so "within a period of six months following [the] delivery of the [present] Judgment", Guinea also requested the Court to authorize it to submit an assessment of the amount of compensation due to it, in order for the Court to decide on this issue "in a subsequent phase of the proceedings" (see paragraph 14 of the Judgment).

The Court is of the opinion that the Parties should indeed engage in negotiation in order to agree on the amount of compensation to be paid by the DRC to Guinea for the injury flowing from the wrongful detentions and expulsion of Mr. Diallo in 1995–1996, including the resulting loss of his personal belongings.

In light of the fact that the Application instituting proceedings in the present case was filed in December 1998, the Court considers that the sound administration of justice requires that those proceedings soon be brought to a final conclusion, and thus that the period for negotiating an agreement on compensation should be limited. Therefore, the Court concludes that, failing agreement between the Parties within six months following the delivery of the present Judgment on the amount of compensation to be paid by the DRC, the matter shall be settled by the Court itself in a subsequent phase of the proceedings. Having been sufficiently informed of the facts of the present case, the Court finds that a single exchange of written pleadings by the Parties would then be sufficient in order for it to decide on the amount of compensation.

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Joint declaration of Judges Al-Khasawneh, Simma, Bennouna, Cançado Trindade and Yusuf

Judges Al-Khasawneh, Simma, Bennouna, Cançado Trindade and Yusuf voted against the first subparagraph of the operative part of the Judgment, according to which "the claim of the Republic of Guinea concerning the arrest and detention of Mr. Diallo in 1988–1989 is inadmissible", because they believe that that claim, albeit presented belatedly, falls within the subject of the dispute as defined in the Application instituting proceedings.

The judges regret that the majority was content with a formal analysis of the circumstances of the arrests and detention of Mr. Diallo in 1988–1989 and 1995–1996, and of the legal bases for them which have been alleged by the DRC, without concern for the continuity which exists between Mr. Diallo's detentions and the attempts to recover the debts said to be owed to the companies Africom-Zaire and Africontainers-Zaire by the State and by Congolese companies. In the judges' view, the detentions in 1988–1989 and 1995–1996 took place for the same reasons and were of the same arbitrary character.

Furthermore, since the Democratic Republic of the Congo was informed at quite an early stage by Guinea of the new claim concerning the facts relating to 1988–1989 and had the opportunity to contest these during the oral argument which took place in April 2010, the judges believe that the Court had evidence before it allowing it to pronounce on all the violations of international law committed by the DRC upon the person of Mr. Diallo. In their view, by adjudicating on the new claim, the Court would have met the requirements of legal security and the good administration of justice in a case based on the exercise of diplomatic protection, the scope of which includes internationally guaranteed human rights.

Joint dissenting opinion of Judges Al-Khasawneh and Yusuf

Judges Al-Khasawneh and Yusuf appended a joint dissenting opinion in which they outlined their reasons for not concurring in paragraph 6 of the *dispositif* which states that the Court "[f]inds that the [DRC] has not violated Mr. Diallo's direct rights as *associé* in Africom-Zaire and Africontainers-Zaire".

"On the contrary" the two judges argued, a great injustice to Mr. Diallo, not only with regard to his personal rights but also his rights as *associé*, was committed by his arrest and expulsion which intended/or at least had the effect of causing great loss to his companies.

This injustice was all the more enormous since in contradistinction to *Barcelona Traction* he was one and the same with his two companies being the sole *associé/gérant*.

This is a dangerous precedent for small investors unprotected by bilateral or multilateral treaties. All a State has to do is expel the sole *associé* or a number of them and the company will have no protector if it is incorporated in the same State that carried out the alleged wrongful act. In effect this is tantamount to an indirect expropriation without compensation, and even without the need to show a legitimizing public interest.

Investors protected by treaties on the other hand will be shielded, and while this may be lucky for them, it creates an unsatisfactory law where to some the reach of investment law is much greater than what Guinea has asked for, while the customary law standard is low for the wretched of the earth like Mr. Diallo.

Barcelona Traction on closer reading does not support the low standard of protection given in the 2007 Judgment and the present one. *Barcelona Traction* contemplated a triangular relationship (Spain, Canada, Belgium) where diplomatic protection was never in the realm of fiction. Here the relationship is bilateral and there is no possibility of diplomatic protection by the State of nationality of the company.

Moreover, the size of the company does matter and the relevant role of the *associé* and *gérant* are relevant. The Court followed a one-size-fits-all approach and this has led to some surrealistic results. The Court requires Mr. Diallo to have general meetings before it can pass judgment that his direct rights

as *associé* have been violated, but why should a destitute exiled sole *associé/gérant* hold a general meeting with himself?

With regard to the more central question of his right to "own his companies". The Court did not take into account major developments in investment treaty law and human rights law that would have provided Mr. Diallo with redress. The two judges explored this area of the law and came to the conclusion that the law was much more advanced and nuanced than the Court's Judgment. The Court missed a chance to give justice to Mr. Diallo and in doing so to bring the customary law standard into line with the standard under the modern law of foreign investments.

Joint declaration of Judges Keith and Greenwood

Judges Keith and Greenwood in their joint declaration give their reasons for disagreeing with the Court's interpretation of the provisions of the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights regulating the expulsion of non-citizens. The Court rules that those provisions prohibit expulsions which are arbitrary in nature, allowing review by a court of whether the expulsion was justified on the merits. The judges' reasons for disagreeing with that interpretation are based on the words of the particular provisions which impose no such limit, the contrasting terms of the provisions of the two treaties which do expressly place substantive arbitrariness limits on interference with the rights they affirm, the drafting history of the provisions of the Covenant, and the views of the Human Rights Committee and the African Commission.

Judges Keith and Greenwood emphasize that, by requiring the enactment and application of national law regulating expulsion and, in the case of the Covenant, by requiring particular procedural rights, the Covenant and Charter do provide important protections against arbitrary actions. "The history of freedom, it has been wisely said, is largely the history of the observance of procedural safeguards." The facts of the case, in the judges' opinion, demonstrate the force of that proposition: the arrests and detentions preceding the expulsion were unlawful for egregious breaches of the requirements of DRC law and the expulsion itself was, as well, in breach of the procedural requirements of the Covenant. Because of those breaches the judges agree with the Court's conclusions about the arrests, detentions and expulsion.

Dissenting opinion of Judge Bennouna

Judge Bennouna believes that the arbitrary character of Mr. Diallo's arrest, detention and ultimate expulsion from the Democratic Republic of the Congo resulted in the violation of his direct rights as sole *associé* in the two companies Africom-Zaire and Africontainers-Zaire. In his view, the Court did not accept that violation because it relapsed into a formalistic approach which has no connection with the reality of this case, the Congolese State having forced Mr. Diallo out of its territory so that he could no longer exercise his direct rights as sole *associé* in his two companies. According to Judge Bennouna, by hindering the exercise by Mr. Diallo of his direct rights as *associé*, the Democratic Republic of the Congo has thus committed wrongful acts which engage its international responsibility.

Separate opinion of Judge Cançado Trindade

1. In his Separate Opinion, composed of 13 parts, Judge Cançado Trindade presents the foundations of his personal position on the matters dealt with in the present Judgment of the Court, having supported its resolutory points 2, 3, 4, 7 and 8 of the *dispositif*, and dissented on points 1, 5 and 6 of the *dispositif*. He begins his Separate Opinion by identifying (part I) the *subject of the rights* and the *object of the claim* in the *cas d'espèce*: the present case concerns, in reality, the *individual* rights of Mr. A. S. Diallo, namely, his right to liberty and security of person, his right not to be expelled from a State without a legal basis, and his individual right to information on consular assistance in the framework of the guarantees of the due process of law.

2. His considerations then turn to the *applicable law* in the present case (part II), namely, the relevant provisions of the 1966 UN Covenant on Civil and Political Rights (Articles 9, paragraphs (1) to (4), and 13), of the 1981 African Charter on Human and Peoples´ Rights (Articles 6 and 12 (4)), and of the 1963 Vienna Convention on Consular Relations (Article 36 (1) *(b)*). Judge Cançado Trindade points out that the present case is, thus, significantly, an *inter-State contentious case before the ICJ*, pertaining entirely to *the rights of the individual concerned* (Mr. A. S. Diallo), and the legal consequences of their alleged violation, under a UN human rights treaty, a regional human rights treaty, and a UN codification Convention. This is a significant feature of the present case, unique in the history of the ICJ.

3. Moreover, this is the first time in its history that the ICJ has established violations of the two human rights treaties at issue *together* (the Covenant and the African Charter), as well as of the relevant provision of the 1963 Vienna Convention, all in the framework of the universality of human rights. He then moves his analysis (from the perspective of the *subject of rights*) on to Mr. A. S. Diallo's vindication of the protected rights (part III). These latter comprise, in his view, the right to liberty and security of person (in respect of Mr. A. S. Diallo's arrests and detentions of 1988–1989 as well as 1995–1996), the right not to be expelled from a State without a legal basis, the right not to be subjected to mistreatment, and the right to information on consular assistance in the framework of the guarantees of the due process of law.

4. Judge Cançado Trindade ponders that ours are the times of a new *jus gentium*, focused on the rights of the human person, individually or collectively. Much to the credit of both Guinea and the D.R. Congo, the ICJ has been called upon, in the course of the proceedings on the merits, to settle a dispute on the basis of two human rights treaties and a relevant provision of a UN codification Convention. In respect of the merits (and reparation), this became a case pertaining to *human rights* protection. Diplomatic protection was the *means* whereby the complaint was originally lodged with the Court. Yet, once diplomatic protection, ineluctably discretionary in character, played its *instrumental* role, the case before the Court became *substantively* one pertaining to human rights protection.

5. The next part (IV) of his Separate Opinion is devoted to the *hermeneutics* of human rights treaties (in so far as it has a bearing on the resolution of the *cas d'espèce*). While in traditional international law there has been a marked tendency to pursue a rather restrictive interpretation, in the International Law of Human Rights, somewhat distinctly, there has been a clear and special emphasis on the element of the object and purpose of the treaty, so as to ensure an effective protection *(effet utile)* of the guaranteed rights, without detracting from the general rule of Article 31 of the two Vienna Conventions on the Law of Treaties (1969 and 1986).

6. While in general international law the elements for the interpretation of treaties evolved primarily as guidelines for the process of interpretation by States Parties themselves, human rights treaties, in their turn, have called for an interpretation of their provisions bearing in mind the essentially *objective* character of the obligations entered into by States Parties: such obligations aim at the protection of human rights and not at the establishment of subjective and reciprocal rights for the States Parties. Human rights treaties have propounded the *autonomous* interpretation of their provisions (by reference to the respective domestic legal systems).

7. Moreover, the dynamic or *evolutive* interpretation of such treaties (the temporal dimension) has been followed in the *jurisprudence constante* of both the European and the Inter-American Courts of Human Rights, so as to fulfil the evolving needs of protection of human beings (under the European and the American Conventions on Human Rights, respectively). General international law itself bears witness of the principle (subsumed under the general rule of interpretation of Article 31 of the two Vienna Conventions on the Law of Treaties) whereby the interpretation is to enable a treaty to have appropriate effects. In the present domain of protection, International Law has been made use of in order to improve and strengthen—and never to weaken or undermine—the safeguard of recognized human rights (in pursuance of the *principle pro persona humana*, *pro victima*).

8. Judge Cançado Trindade adds that both the European and the Inter-American Courts of Human Rights have rightly set limits to State voluntarism, have safeguarded the integrity of the respective human rights Conventions and the primacy of considerations of *ordre public* over the "will" of individual States, have set higher standards of State behaviour and established some degree of control over the interposition of undue restrictions by States, and have reassuringly enhanced the position of individuals as subjects of the International Law of Human Rights, with full procedural capacity. The two international human rights Tribunals have aptly made use of the techniques of Public International Law in order to strengthen their respective jurisdictions of protection of the human person. As to substantive law, the contribution of the two international human rights Courts to this effect is illustrated by numerous examples of their respective case-law pertaining to the rights protected under the two regional Conventions.

9. The following part (V) of his Separate Opinion dwells upon the *principle of humanity*. Despite the current tendency to approach this principle in the framework of International Humanitarian Law, in the understanding of Judge Cançado Trindade the principle of humanity is endowed with an even wider dimension: it applies in the most distinct circumstances, both in times of armed conflict and in times of peace. In the former, it applies in the relations of public power with all persons subject to the jurisdiction of the State concerned. That principle has a notorious incidence when these latter are in a situation of vulnerability, or even *defencelessness*, as evidenced by relevant provisions of distinct treaties integrating the International Law of Human Rights (e.g., the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 17 (1); the 1989 UN Convention on the Rights of the Child, Article 37 *(b)*; the 1969 American Convention on Human Rights, Article 5; the 1981 African Charter on Human and Peoples' Rights, Article 5; the 1969 Convention on the Specific Aspects of Refugee Problems in Africa, Article II (2); among others).

10. Judge Cançado Trindade sustains that the principle of humanity permeates the whole *corpus juris* of the international protection of the rights of the human person (encompassing International Humanitarian Law, the International Law of Human Rights, and International Refugee Law), at global (UN) and regional levels. The principle at issue provides an illustration of the approximations or convergences between those complementary branches, at hermeneutic level, and also manifested at normative and operational levels. In respect of the present case *A. S. Diallo*, the principle of humanity underlies Article 7 of the Covenant on Civil and Political Rights, which protects the individual's personal integrity, against mistreatment, as well as Article 10 of the Covenant (concerning detainees), which begins by stating that "[a]11 persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person" (para. 1). This comprises not only the negative obligation not to mistreat (Article 7), but also the positive obligation to ensure that a detainee, under the custody of the State, is treated with humanity and due respect for his inherent dignity as a human person.

11. The principle of humanity has met with judicial recognition,—he proceeds,—as exemplified by some Judgments of the Inter-American Court of Human Rights and the *ad hoc* International Criminal Tribunal for the Former Yugoslavia. Furthermore, the principle at issue orients the way one treats the others, extending to all forms of human behaviour and the totality of the condition of human existence. In his vision, international law is not at all insensitive to that, and the principle at issue applies in any circumstances, so as to prohibit inhuman treatment and to secure protection to all, including those in a situation of great vulnerability. In sum, *humaneness* is to condition human behaviour in all circumstances.

12. Judge Cançado Trindade then points out that the principle of humanity is in line with natural law thinking; it underlies classic thinking on humane treatment and the maintenance of sociable relationships, also at international level. Humaneness comes to the fore even more forcefully in the treatment of persons in situation of vulnerability, or even defencelessness, such as those deprived of their personal freedom, for whatever reason. He recalls that the *jus gentium*,—when it began to correspond to the law of nations,—came then to be conceived by its "founding fathers" (F. de Vitoria, A.

Gentili, F. Suárez, H. Grotius, S. Pufendorf, C. Wolff, who propounded a *jus gentium* inspired by the principle of humanity *lato sensu*),—as regulating the international community constituted by human beings socially organized in the (emerging) States and co-extensive with humankind, thus conforming the *necessary* law of the *societas gentium*. This latter prevailed over the "will" of individual States, respectful of the human person, to the benefit of the common good. He concludes on this point that the legacy of natural law thinking, evoking the natural law of the right human reason *(recta ratio)*, has never faded away, and this should be stressed time and time again.

13. His next set of considerations (part VI) focuses on the key issue of the prohibition of *arbitrariness* in the framework of the International Law of Human Rights, for the consideration of the present case of *A. S. Diallo*. After reviewing the notion of "arbitrariness" in legal thinking, Judge Cançado Trindade considers it under human rights treaties and instruments, which conform a *Law of protection* (a *droit de protection*), oriented towards the safeguard of the ostensibly weaker party, the victim. Accordingly, the prohibition of *arbitrariness* covers today arrests and detentions, as well as other acts of the public power, such as expulsions. Bearing in mind the hermeneutics of human rights treaties *(supra)*, a merely exegetical or literal interpretation of treaty provisions would be wholly unwarranted.

14. He then reviews and assesses the position of the UN Human Rights Committee and of the African Commission on Human and Peoples' Rights, and the jurisprudential construction of the Inter-American and the European Courts of Human Rights, on the matter at issue. He concludes that they all point towards a firm prohibition of arbitrariness in distinct circumstances; that prohibition is not restricted to the right to personal liberty, but extends likewise to other protected rights under the respective human rights treaties or conventions. It covers, likewise, the right not to be expelled arbitrarily from a country, the right to a fair trial, the right to respect for private and family life, the right to an effective remedy, or any other protected right. In Judge Cançado Trindade's conception, this is, epistemologically, the correct posture in this respect, given the interrelatedness and indivisibility of all human rights.

15. To attempt to advance a restrictive view of the prohibition of arbitrariness, or an atomized approach to it, would be wholly unwarranted. And it would run against the outlook correctly pursued by international human rights supervisory organs such as the UN Human Rights Committee and the African Commission on Human and Peoples' Rights, and by international human rights tribunals such as the Inter-American and the European Courts. The letter together with the spirit of the relevant provisions under human rights treaties, converge in pointing to the same direction: the absolute prohibition of arbitrariness, under the International Law of Human Rights as a whole. In Judge Cançado Trindade's perception, underlying this whole matter is the imperative of access to justice *lato sensu*, the *right to the Law (le droit au Droit, el derecho al Derecho),* the right to the realization of justice in a democratic society.

16. In the following part of his Separate Opinion (VII), he examines the *material* content of the protected rights under the present Judgment (right to liberty and security of person, and right not to be expelled from a State without a legal basis), and the interrelationship between them; as to the right to information on consular assistance in the conceptual universe of human rights, he devotes an entire section (part VIII) of his Separate Opinion to its jurisprudential construction. In this respect, he dwells upon the individual right to information on consular assistance beyond the inter-State dimension, and examines and assesses what he perceives as the process of *humanization* of consular law in this connection, and what he regards as the *irreversibility* of such advance of humanization.

17. Despite the fact that the right to information on consular assistance was initially set forth in a provision (Article 36 (1) *(b)*) of the Vienna Convention on Consular Relations) having in mind consular relations, and celebrated in 1963 in pursuance of an apparently predominant inter-State optics, the fact remains that it came to be regarded in subsequent practice as an *individual right*, within the conceptual universe of human rights. In this respect, in order to clarify the legal nature and content of the right at issue, at the end of the public sitting of the Court held on 26.04.2010, Judge Cançado Trindade put to the two contending Parties in the present *A. S. Diallo* case, the question whether the provision of Article 36 (1) *(b)* of the 1963 Vienna Convention exhausted itself in the relations between the sending State (of nationality) and the receiving State (of residence); he further asked them whether the sending State (of nationality), or the individual concerned, was the subject *(titulaire)* of the right at issue. On the basis of the responses provided by the two contending Parties (Guinea and the D.R. Congo), Judge Cançado Trindade concluded that it was clearly an individual right, and that it had not been complied with in the present case.

18. He then proceeded to review and assess the jurisprudential construction of the right at issue to date. He recalled that, even before the pertinent *obiter dicta* of the ICJ in the *LaGrand* (2001) and the *Avena* (2004) cases, the first and pioneering articulation of the *individual*'s right to information on consular assistance was the one developed by the Inter-American Court of Human Rights (IACtHR) in its Advisory Opinion No. 16, of 01.10.1999, on the *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*. That Advisory Opinion of the IACtHR was expressly invoked by the contending Parties, and relied upon mainly by the complaining States, in the *LaGrand (Germany* v. *United States)* and the *Avena (Mexico* v. *United States)* cases before this Court.

19. He added that the IACtHR had adopted the proper approach, in considering the matter submitted to it within the framework of the evolution of the "fundamental rights of the human person" in contemporary international law. The IACtHR sustained the view that the individual right to information under Article 36 (1) *(b)* of the 1963 Vienna Convention renders effective the right to the due process of law. The IACtHR linked the right at issue to the evolving guarantees of due process of law,—an approach that has served as inspiration for the emerging international case-law, *in statu nascendi*, on the matter. Thus, if non-compliance with Article 36 (1) *(b)* of the 1963 Vienna Convention takes place, it occurs to the

detriment not only of a State Party but also of the human beings concerned.

20. That Advisory Opinion was followed, four years later, in the same line of thinking, by Advisory Opinion No. 18 of the IACtHR, of 17.09.2003, on the *Juridical Condition and Rights of Undocumented Migrants*. This latter opened new ground for the protection of migrants, in acknowledging the prevalence of the rights inherent to human beings, irrespective of their migratory status. The IACtHR made it clear that States ought to respect and ensure respect for human rights in the light of the general and basic principle of equality and non-discrimination, and that any discriminatory treatment with regard to the protection and exercise of human rights generates the international responsibility of the States. In the view of the IACtHR, the fundamental principle of equality and non-discrimination has entered into the domain of *jus cogens*, with corresponding obligations *erga omnes* of protection (in their horizontal and vertical dimensions). This jurisprudential construction pointed in a clear direction: consular assistance and protection became much closer to human rights protection.

21. It so happens that consular assistance and protection have indeed undergone a process of *jurisdictionalization*, integrating, in the light of the outlook advanced by the IACtHR, the enlarged conception of the *due process of law*, proper of our times. This is gradually being grasped nowadays, as while diplomatic protection remains ineluctably discretionary, pursuing an unsatisfactory inter-State dimension, consular assistance and protection are now linked to the obligatory guarantees of due process of law, in the framework of the International Law of Human Rights. The ultimate beneficiaries of this evolution are the individuals facing adversity, particularly those deprived of their personal liberty abroad.

22. Advisory Opinion No. 16 (of 1999) of the IACtHR, on the *Right to Information on Consular Assistance in the Framework of the Due Process of Law*, was extensively relied upon by the contending Parties in the proceedings (written and oral phases) before the ICJ in the *LaGrand* and *Avena* cases, although the ICJ preferred to guard silence on that judicial precedent, and in neither occasion referred to it. In the *Avena* case (Judgment of 31.03.2004), the ICJ was faced with Mexico's contention—well in conformity with the aforementioned Advisory Opinion No. 16 of 1999 of the IACtHR *(supra)*—that if the right at issue, under Article 36 (1) *(b)* of the 1963 Vienna Convention, is infringed, it "will *ipso facto* produce the effect of vitiating the entire process of the criminal proceedings conducted in violation of this fundamental right" (para. 124).

23. The ICJ stated that it did not need to decide that question, and that, in any case, in its view "neither the text nor the object and purpose of the Convention, nor any indication in the *travaux préparatoires*, support the conclusion that Mexico draws from its contention in that regard" (para. 124). And the ICJ promptly concluded that Mexico's submission could not therefore be upheld (para. 125). The present case of *A. S. Diallo* provided, in Judge Cançado Trindade's view, a unique opportunity for the Court to clarify and sustain its position on this particular point. After all, the point was again raised before it.

24. This being so, contrary to what the Court said in the *Avena* case, Judge Cançado Trindade upheld, in relation to the debates raised in the present *A. S. Diallo* case, that the view that Article 36 (1) *(b)* links the individual right at issue—in the framework of human rights protection—to the guarantees of the due process of law, is supported by the text of Article 36 (1) *(b)* of the 1963 Vienna Convention, by the *object and purpose* of that Convention, as well as by its *travaux préparatoires*. As to the *text*, the last phrase of Article 36 (1) *(b)* leaves no doubt that *it is the individual, and not the State*, who is the *titulaire* of the right to be informed on consular assistance; however intertwined may this provision be with States Parties' obligations, this is clearly an *individual right*. If this individual right is breached, the guarantees of the due process of law will ineluctably be affected.

25. As to the *object and purpose* of the 1963 Vienna Convention,—Judge Cançado Trindade proceeds,—they lie in the *commonality* of interests of all the States Parties to the 1963 Vienna Convention, in the sense that compliance by the States Parties with all the obligations set forth thereunder,—including the obligation of compliance with the individual right at issue,—is to be secured. Accordingly, in so far as consular assistance is concerned, the preservation of, and compliance with, the individual right to information on it (Article 36 (1) *(b)*) becomes essential to the fulfilment of the object and purpose of the Vienna Convention on Consular Relations.

26. Last but not least, on this particular matter, Judge Cançado Trindade surveys in his Separate Opinion the *travaux préparatoires* of that provision of the 1963 Vienna Convention, finding valuable indications to the same effect, particularly in the debates of the 1963 UN Conference on Consular Relations, held in Vienna. Already at that time (three years before the adoption of the two UN Covenants on Human Rights (on Civil and Political Rights, as well as on Economic, Social and Cultural Rights, respectively), in the debates of 1963 at the Vienna Conference, no less than 19 interventions pointed in the same direction, namely, that there was already awareness among participating Delegations as to the need to insert the right to information on consular assistance into the conceptual universe of human rights.

27. In addition to those interventions, the UN High Commissioner for Refugees submitted a memorandum to the 1963 Vienna Conference, wherein it singled out that draft Article 36 of the Draft Convention was one of its two provisions that had a direct bearing upon its own work, in so far as the protection of the rights of nationals of the sending State in the State of residence were concerned. There was indeed an awareness of the imperative of human rights protection, *even before the adoption of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) in 1965 and of the two UN Covenants on Human Rights in 1966*, at the early stage of the legislative phase of UN human rights treaties.

28. Such awareness, captured more than three decades later by the IACtHR in its Advisory Opinion No. 16 (1999),—consolidated by its Advisory Opinion No. 18 (2003),—contributed decisively for the process of *humanization* of consular law, going well beyond the inter-State dimension. Such advance of humanization of consular law is, in Judge Cançado Trindade's assessment, bound to be an irreversible one. Human conscience, the *universal juridical conscience* (as the ultimate

material source of International Law), was soon awakened so as to fulfil a pressing need to this effect, that of protection of human beings in all circumstances, including in situations of deprivation of personal liberty abroad.

29. It leaves no room for steps backwards, or hesitations. A clear statement from this Court in the same direction—namely, that the right to information on consular assistance belongs to the conceptual universe of human rights, and non-compliance with it ineluctably affects judicial guarantees vitiating the due process of law,—would be indeed reassuring. The Court could have done so in the present *A. S. Diallo* case,—since the point was raised before it in the course of the oral phase of the proceedings in the *cas d'espèce*,—but it preferred to give a rather summary treatment to the consideration of Article 36 (1) *(b)* of the 1963 Vienna Convention in the present Judgment.

30. In the following part (IX) of his Separate Opinion, Judge Cançado Trindade examines the notion of "continuing situation", in the light of the projection of human rights violations in time, and of the decisions of the African Commission on Human and Peoples' Rights and the pronouncements of the UN Human Rights Committee on the matter, as well as the case-law of the Inter-American and the European Courts of Human Rights in this respect. In the view of Judge Cançado Trindade, the griefs suffered by Mr. A. S. Diallo in the present case disclose a *factual nexus* between the arrests and detentions of 1988–1989 and those of 1995–1996, prior to his expulsion from the country of residence in 1996. Those griefs, *extended in time*, were in breach of the applicable law in the present case (Articles 9 and 13 of the Covenant on Civil and Political Rights, Articles 6 and 12 (4) of the African Charter on Human and Peoples' Rights, Article 36 (1) *(b)* of the Vienna Convention on Consular Relations), as interpreted in pursuance of the hermeneutics of human rights treaties *(supra)*.

31. At the time of his arrests and detention, Mr. A. S. Diallo was not informed of the charges against him, nor could he have availed himself without delay of his right to information on consular assistance. His griefs were surrounded by arbitrariness on the part of State authorities. Moreover, there was a chain of causation, a *causal nexus*, in that *continuity* of occurrences, to be borne in mind (with a direct incidence on the reparation due to Mr. A. S. Diallo), which the Court's majority regrettably failed to consider. The projection of human rights in time also raises the issue of the prolonged lack of access to justice.

32. This *causal nexus* could at least have been considered as evidence put before the Court, but was simply discarded by the Court's majority. The Court could at least have taken into account—in his view it should have—the circumstances of the arrests and detention in 1988–1989 in its consideration of the arrests and detention of 1995–1996, prior to Mr. A. S. Diallo's expulsion from the D.R. Congo in 1996. Keeping the aforementioned *factual nexus* and *causal nexus* in mind,—Judge Cançado Trindade concludes on this point,—it could hardly be denied that there was a *continuing situation* of breaches of Mr. A. S. Diallo's individual rights, in the period extending from 1988 to 1996.

33. The next line of his reflections (part X) pertains to the individual concerned as victim and as *titulaire* of the right to reparation. As resolutory points 7 and 8 (duty to make appropriate reparation) of the *dispositif* of the Court's Judgment in the present *A. S. Diallo* case, were adopted with his concurring vote, Judge Cançado Trindade feels obliged, in addition, to express his concern that the provision of adequate reparation is still to wait further, till the Court eventually decides later on this aspect (pursuant to resolutory point 7), in case the contending Parties fail to reach an agreement on this issue within the forthcoming six months. To his mind, this resembles an arbitral, rather than a truly judicial procedure, and looks somewhat disquieting to him.

34. This is particular so, if one bears in mind the prolonged length of time that the handling of this case by the Court has taken (almost 12 years, from the end of December 1998 to this end of November 2010), for reasons not attributable to the Court itself. In any case, such delays are to be avoided, *particularly when reparation for human rights breaches is at stake*. The further extension of the determination of reparation, for another period of up to six months, does not appear reasonable, as the subject *(titulaire)* of the rights breached in the present case is not the applicant State, but the individual concerned, Mr. A. S. Diallo, who is also the ultimate beneficiary of the reparations due.

35. It is thus all too proper to keep in mind the *individual*'s right to reparation in the light of the applicable law in the *cas d'espèce*, the International Law of Human Rights. This issue takes one beyond the domain of international procedural law, into that of juridical epistemology, encompassing one's own conception of international law in our times. In Judge Cançado Trindade's conception, in the present case *A. S. Diallo*, the applicant State is the claimant, but the victim is the individual. The applicant State claims for reparation, but the *titulaire* of the right to reparation is the individual, whose rights have been breached. The applicant State suffered no damage at all, it rather incurred into costs and expenses, in espousing the cause of its national abroad. The damage was suffered by the individual himself (subjected to arbitrary arrests and detention, and expulsion from the State of residence), not by his State of nationality.

36. The individual concerned is at the *beginning* and at the *end* of the present case, and his saga has not yet ended, as a result also of the unreasonable prolongation of the proceedings before this Court. It is about time for this Court—he adds—to overcome an undue reliance on the old Vattelian fiction, revived by the PCIJ in the *Mavrommatis* fiction (not a principle, simply a largely surpassed fiction). The ICJ can no longer keep on reasoning within the hermetic parameters of the exclusively inter-State dimension. The recognition of the damage suffered by the individual (para. 98 of the Judgment) has rendered unsustainable the old theory of the State's assertion of its "own rights" *(droits propres)*, with its underlying voluntarist approach.

37. The *titulaire* of the right to reparation is the individual, who suffered the damage, and State action in diplomatic protection is to secure the reparation due to the individual concerned. Such action in diplomatic protection aims at reparation for a

damage, usually already consummated, to the detriment of the individual; consular assistance and protection, much closer nowadays to human rights protection, are exercised in a rather *preventive* way, so as to avoid a probable or a new damage to the individual concerned. This affinity of contemporary consular assistance and protection with human rights protection is largely due to the historical rescue of the individual, of the human person, as subject of international law.

38. Had the Court pursued the hermeneutics of the human rights treaties, invoked by the contending States throughout the *whole* of its proceedings, in the *whole* Judgment, this latter, in Judge Cançado Trindade's assessment, would have been entirely a much more consistent and satisfactory one. As for the determination of an appropriate reparation for the breaches of the rights under the Covenant suffered by the victim, it may ultimately amount to a proper compensation (in the unlikelihood of *restitutio in integrum*),—among other forms of reparation (such as satisfaction, public apology, rehabilitation of the victim, guarantees of non-repetition of the harmful acts, among others),—for the violations of the rights thereunder, that is, for material and moral damages, fixed to some extent on the basis of considerations of equity.

39. In cases of the kind, such reparations are to be granted *from the perspective of the victims*, human beings (their original claims, needs and aspirations), and not States. This discloses a wider horizon in the matter of reparations, when human rights are at stake. Article 2 of the UN Covenant on Civil and Political Rights sets forth a *general* obligation on the States Parties, which is added to the specific obligations in relation to each of the rights guaranteed thereunder. The aforementioned general formula allows for flexibility, in the determination of the measures of compensation or other forms of reparation to the victim(s) concerned. The ultimate aim is, naturally, whenever possible, the *restitutio in integrum*, but, when that is not possible, recourse is to be made to the provision of other adequate forms of reparation.

40. In any case, and whatever the circumstances might be, it is to be borne in mind,—Judge Cançado Trindade further ponders,—that the duty to make reparation reflects a fundamental principle of general international law, promptly captured by the Permanent Court of International Justice (PCIJ), early in its case-law, and endorsed by the case-law of the ICJ. That obligation to make reparation is governed by international law in all its aspects (such as, e.g., its scope, forms and characteristics, and the determination of the beneficiaries). Accordingly, compliance with it cannot be made subject to modification or suspension, in any circumstances, by any respondent States, through the invocation of provisions (or difficulties) of their own domestic law.

41. In the following part (XI) of his Separate Opinion, Judge Cançado Trindade contends that the present *A. S. Diallo* case shows that diplomatic protection was initially resorted to herein, keeping in mind property rights or investments, but the case, at the stage of its merits, underwent a metamorphosis, and it reassuringly turned out to be a case, ultimately, of human rights protection, of the rights inherent to the human person, concerning his or her liberty and legal security. The handling of each case in the course of international adjudication has a dynamics of its own. Yet, the outcome of the *cas d'espèce* is reassuring, in so far as the rights protected are concerned, and it contains a couple of lessons that cannot here pass unnoticed.

42. To start with, attempts to revitalize traditional diplomatic protection, with its ineluctable discretionary nature, should not be undertaken underestimating human rights protection. In Judge Cançado Trindade's understanding, the greatest legacy of the international legal thinking of the XXth century, to that of this new century, lies in the historical rescue of the human person as subject of rights emanating directly from the law of nations (the *droit des gens*), as a true subject (not only "actor") of contemporary international law. The emergence of the International Law of Human Rights has considerably enriched contemporary international law, at both substantive and procedural levels.

43. In order to provide adequate reparation to the victims of violated rights, one has to move into the domain of the International Law of Human Rights, one cannot at all remain in the strict and short-sighted confines of diplomatic protection, as a result of not only its ineluctable discretionary nature, but also its static inter-State dimension. Reparations, here, require an understanding of the conception of the law of nations centred on the *human person (pro persona humana)*. Human beings,—and not the States,—are indeed the ultimate beneficiaries of reparations for human rights breaches to their detriment.

44. Judge Cançado Trindade ponders that the Vattelian fiction of 1758 (expressed in the formula—"*Quiconque maltraite un citoyen offense indirectement l'État, qui doit protéger ce citoyen*") has already played its role in the history and evolution of international law. The challenge faced today by the World Court is of a different nature, going well beyond such inter-State dimension. It requires from the Court preparedness to explore the ways of incorporating, in its *modus operandi*—starting with its own reasoning,—the acknowledgement of the consolidation of the international legal personality of individuals, and the gradual assertion of their international legal capacity,—to vindicate rights which are theirs and not their own State's,—as subjects of rights and bearers of duties emanating directly from international law, in sum, as true subjects of international law.

45. In this perspective, and as a starting-point in this direction,—Judge Cançado Trindade adds in his concluding observations (part XII),—in its present Judgment in the *A. S. Diallo* case the Court was right in concentrating its attention, in particular, in the breaches found of Articles 9 and 13 of the UN Covenant on Civil and Political Rights, and of Articles 6 and 12 (4) of the African Charter of Human and Peoples' Rights, as well as of Article 36 (1) *(b)* of the Vienna Convention on Consular Relations. They concern the rights of Mr. A. S. Diallo as an individual, as a human person. The breaches of his individual rights as *associé* of the two companies come to the fore by way of consequence, having been likewise affected.

46. The subject of the rights breached in the present case is Mr. A. S. Diallo, an individual. The procedure for the vindication of the claim originally utilized (by the applicant State) was originally that of diplomatic protection, but the substan-

tive law applicable in the present case is the International Law of Human Rights. This latter applies in the framework of *intra-State* relations (such as, in the present case, the relations between the D.R. Congo and Mr. A. S. Diallo). In properly interpreting and applying human rights treaties, the Court is thereby giving its contribution to the development of the aptitude of international law to regulate relations at *intra-State*, as well as *inter-State*, levels.

47. Judge Cançado Trindade argues that the fact that the contentious procedure before the ICJ keeps on being exclusively an inter-State one,—not by an intrinsic necessity, nor by a juridical impossibility of being of another form,—does not mean that the *reasoning* of the Court ought to develop within an essentially and exclusively inter-State optics, above all when it is called to pronounce, in the peaceful settlement of the corresponding disputes, on questions which go beyond the interests of the contending States, and which pertain to the fundamental rights of the human person, and even to the international community as a whole.

48. The relations governed by contemporary international law, in distinct domains of regulation, transcend to a large extent the purely inter-State dimension (e.g., in the international protection of human rights, in the international protection of the environment, in international humanitarian law, in international refugee law, in the law of international institutions, among others), and the ICJ, called upon to pronounce upon those relations, is not bound to restrain itself to an anachronistic inter-State optics. The anachronism of its mechanism of operation ought not to, and cannot, condition its *reasoning*, so as to enable it to exert faithfully and fully its functions of principal judicial organ of the United Nations in our times.

49. The present Judgment, in so far as resolutory points 2, 3, 4 and 7 of its *dispositif* are concerned, with which Judge Cançado Trindade concurs, constitutes in his view a valuable contribution of the Court's case-law to the settlement of disputes originated at *intra-State* level, when human rights are at stake. The fact that a human rights case has at last been decided by the ICJ itself is particularly significant to him. It further shows that contemporary international law has notably developed to such an extent that States themselves see it fit to make use of a contentious procedure of the kind, originally devised in 1920 and confirmed in 1945 for their own and exclusive utilization, in order to obtain from the Court its decision on human rights, on rights inherent to the human person, ontologically anterior and superior to the State itself. This is in line with the evolving international law for the human person *(pro persona humana)*, the new *jus gentium* of this beginning of the XXIst century.

50. Having endeavoured to identify the lessons extracted from the present *A. S. Diallo* case, Judge Cançado Trindade concludes his Separate Opinion with a brief epilogue (part XIII) on its historical transcendence. The case just resolved by the ICJ had as claimant a State, and as victim—and beneficiary of reparation—an individual. He reiterates that this is the first time in its history that the World Court has resolved a case on the basis of the applicable law conformed by two human rights treaties together, one at universal level (the UN Covenant on Civil and Political Rights) and the other at regional level (the African Charter on Human and Peoples' Rights), in addition to the relevant provision (Article 36 (1) *(b)*) of the Vienna Convention on Consular Relations, situated also in the domain of the international protection of human rights.

51. It is reassuring that, due originally to the exercise of diplomatic protection, the cause of Mr. A. S. Diallo reached this Court. This was as far as diplomatic protection, a traditional instrument, went, and could go. One cannot expect more from it than what it can provide. It is, after all, as traditional as the *rationale* of the procedure before the ICJ. Individuals keep suffering a *capitis diminutio*, as they still need to rely on that traditional instrument to reach this Court, whilst they already have *locus standi in judicio*, or even *jus standi*, before other contemporary international tribunals. This shows that there is epistemologically no impediment for individuals to have either *locus standi* or *jus standi* before the World Court as well; what is lacking is the *animus* to render that possible.

52. Notwithstanding, there is something both reassuring and novel in the present case *A. S. Diallo* now resolved by this Court: as from the proceedings on the merits (written and oral phases), the case of *A. S. Diallo* has been to a large extent heard, and adjudicated upon, in the conceptual framework of the International Law of Human Rights. It is this latter, and not diplomatic protection, that is apt to safeguard the rights of persons under adversity, or socially marginalized or excluded, or in situations of the utmost vulnerability. This reflects a great challenge to international justice today, a challenge that can effectively be faced only in the realm of the International Law of Human Rights, beyond the purely inter-State dimension.

53. Moreover, this is the first time in its history that the World Court has expressly taken into account the contribution of the case-law of two international human rights tribunals, the European and the Inter-American Courts (para. 68), to the perennial struggle of human beings against *arbitrariness* (para. 65), encompassing the prohibition of arbitrary expulsion. This discloses a new mentality in relation to another relevant issue. The co-existence of multiple international tribunals, fostering access to international justice on the part of a growing number of *justiciables* around the world in distinct domains of human activity, bears evidence of the way contemporary international law has developed in the old search for the realization of international justice. Contemporary international tribunals have much to learn from each other.

54. Article 92 of the UN Charter states that this Court, the ICJ, is "the principal judicial organ of the United Nations". In addition, Article 95 of the UN Charter leaves the door open to member States to entrust the solution of their differences to "other tribunals by virtue of agreements already in existence or which may be concluded in the future". Ours has become the age of international tribunals, and this is a highly positive phenomenon, as what ultimately matters is the enlarged or expanded access to justice, *lato sensu*, comprising the realization of justice.

55. This is another lesson that can be extracted from the adjudication of the present case *A. S. Diallo*, and it is indeed reassuring that the ICJ has disclosed a new vision of this particular issue, in so far as international human rights tribunals are concerned. This is particularly important at a time when States rely, in their submissions to this Court, on relevant

provisions of human rights conventions, as both Guinea and the D.R. Congo have done in the present case. Judge Cançado Trindade deems it reassuring that States begin to rely on human rights treaties before the ICJ, heralding a move towards an era of possible adjudication of human rights cases by the ICJ itself. The *international juridical conscience* has at last awakened to the fulfilment of this need.

56. The ICJ, in the exercise of its contentious as well as advisory functions in recent years, has referred either to relevant provisions of a human rights treaty such as the Covenant on Civil and Political Rights, or to the work of its supervisory organ, the Human Rights Committee. The Court, in its Judgment in the present case of *A. S. Diallo*, 30 November 2010, has gone much further, beyond the United Nations system, in acknowledging the contribution of the jurisprudential construction of two other international tribunals, the Inter-American and the European Courts of Human Rights. It has also dwelt upon the contribution of an international human rights supervisory organ, the African Commission on Human and Peoples' Rights. The three regional human rights systems operate within the framework of the universality of human rights.

57. Judge Cançado Trindade concludes that contemporary international tribunals should pursue their common mission—the realization of international justice—in a spirit of respectful dialogue, learning from each other. By cultivating this dialogue, attentive to each other's work in pursuance of a common mission, contemporary international tribunals will provide avenues not only for States, but also for human beings, everywhere, and in respect of distinct domains of international law, to recover their faith in human justice. They will thus be enlarging and strengthening the aptitude of contemporary international law to resolve disputes occurred not only at *inter*-State level, but also at *intra*-State level. And they will thus be striving towards securing to States, as well as to human beings, what they are after: the realization of justice.

Dissenting opinion of Judge *ad hoc* Mahiou

While subscribing to many of the conclusions reached by the Court in the present case, Judge *ad hoc* Mahiou nevertheless remains unconvinced by both the conclusions adopted and the reasoning relied on to justify them in respect of the two most important points, those concerning, first, the admissibility of the claim relating to Mr. Diallo's arrest and detention in 1988–1989 and, second, the violation of Mr. Diallo's rights as *associé* in Africom-Zaire and Africontainers-Zaire. His reasons for being unable to join the Court on these points therefore call for a summary explanation.

As for the claim regarding the arrests and detentions in 1988–1989, there is no difference between them and those in 1995–1996 in respect of either the legal form they took or their purpose (to prevent Mr. Diallo from recovering debts owed by certain Congolese public or private organizations). It is true that the claim was raised late, but under the Court's jurisprudence, as we know, all new claims are not *ipso facto* inadmissible, since "the mere fact that a claim is new is not in itself decisive for the issue of admissibility"; a new claim is admissible thereunder if it satisfies either of the following two conditions: it is implicit in the Application or it arises directly out of the question which is the subject-matter of the Application. In his view, the claim in respect of the arrests and detentions in 1988–1989 meets one or the other condition and even both; these were in fact merely the first in a series of actions taken by the Congolese authorities in a continuum of unlawful acts which should have been declared admissible by the Court.

As for Mr. Diallo's direct rights, the Court considers that, while the arbitrary expulsion he suffered did give rise to certain impediments, these neither hindered nor prevented the exercise of those rights. This analysis and the conclusions to which it has led can be criticized for having failed to take account of the specific context of this case, in which changes in the factual situation over time resulted in a single individual coming to be the sole shareholder in the two companies, which he managed and operated to such a point as to become one with them. Thus, any constraint imposed on the various rights of the *associé*, such as the rights to take part in general meetings, to be *gérant* of the companies, to oversee and monitor the operation and management of the companies, and to liquidate them and realize the residual assets, results in preventing the exercise of these rights and ultimately in infringing them.

Accordingly, while the Court rightly recognizes that Mr. Diallo's human rights have been violated and provides for reparation in this connection, it should also have found at least some, if not all, of the violations of Mr. Diallo's direct rights and have provided for compensation for them.

Separate opinion of Judge *ad hoc* Mampuya

Before setting out his views on the substantive positions taken in the Judgment, Judge *ad hoc Mampuya* expresses his more general reservations in respect of certain questions raised by the Judgment. First of all, in respect of an issue of international adjective law, he notes that, while the Court appeared to have turned its back on its traditional jurisprudence on the subject by agreeing to adjudicate the case even though no dispute had arisen beforehand between Guinea and the Democratic Republic of the Congo, the two States concerned, over the matters referred to the Court, the situation has fortunately been rectified in the practice between parties. As evidence, Judge *ad hoc* Mampuya cites Russia's preliminary objection in the pending case between it and Georgia concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, wherein Russia is challenging the admissibility of Georgia's Application and arguing that "the Court can exercise its jurisdiction in contentious proceedings only when *a dispute genuinely exists between the parties* . . ." and that there was no inter-State dispute over the facts concerning the interpretation or application of the Convention on the Elimination of All Forms of Racial Discrimination, to which the two States are parties. Judge *ad hoc* Mampuya then sets out his reservations in respect of certain language used by the Court in evaluating the conduct of the Congolese authorities, and of certain judgments made by the Court on that subject, language which appears highly prejudicial to the honour of the Congolese State. Without showing this to be the case, the majority insinuates, as in the Judgment on the preliminary objections, that

the Congo deliberately issued a notice of "refoulement" rather than expulsion for the purpose of making it impossible to appeal against its decision, or that it must be shown that there was "a link between Mr. Diallo's expulsion and the fact that he had attempted to recover debts . . . bringing cases for this purpose before the civil courts" (para. 82). While one might expect to hear such serious accusations from the Applicant, the World Court cannot rely on an unfounded presumption to take them to be true.

On the substance, Judge *ad hoc* Mampuya explains his reasons for having voted with the majority of the Court on the violations by the Congo of Article 9, paragraphs 1 and 2, and Article 13, paragraph 4, of the International Covenant on Civil and Political Rights and of Articles 6 and 12 of the African Charter on Human and Peoples' Rights in connection with Mr. Diallo's arrest, detention and expulsion, especially given that these measures were taken in violation of Congolese law itself. However, his interpretation of the meaning of these Articles differs from that of the Court where the Judgment imposes an additional requirement, one not laid down, on top of that of the formal propriety of the expulsion: it adds that the expulsion must be not only in accordance with the law but also "not arbitrary" in nature. This is not to say that such a measure may be arbitrary, but only that the provisions applicable here do not impose such a requirement. Article 13 merely requires that the decision to expel have been taken "in accordance with the law" and that the individual concerned have been allowed "to submit the reasons against his expulsion" to "the competent authority or a person or persons especially designated by the competent authority". The same is true of Article 12, paragraph 4, of the African Charter, which states that an alien "legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law". The Court's interpretation treats these provisions like Article 9 of the Covenant, which links this requirement not to the expulsion but to the arrest and detention. There is no justification for such treatment, notwithstanding the "jurisprudence" cited by the Court on the basis of United Nations Human Rights Committee practice, it too concerned in its entirety with arrest and detention, not expulsion. Further, he finds on the basis of Article 1, paragraph 2, of Protocol No. 7 to the European Convention for the Protection of Human Rights that territorial authorities are recognized to enjoy a certain latitude in exercising a prerogative of such a discretionary nature as that of a State in deciding to allow or bar entry, in accordance with its law, by aliens into its territory; and implicit limitations cannot be placed on the exercise of this prerogative, even by implying that it is "arbitrary".

On the other hand, he does not join in finding the Democratic Republic of the Congo responsible for the alleged violation of Article 36, paragraph 1 *(b)*, of the Vienna Convention on Consular Relations, which lays down an obligation to inform an arrested or detained alien of his right to contact with the consular authorities of his national State. His view is that the Court has omitted to take into consideration its own prior conclusions (in the *LaGrand* and *Avena* cases): that Article 36, paragraph 1 *(b)* contains three "interrelated" elements; and that "*[t]he legal conclusions to be drawn from that interrelationship necessarily depend upon the facts of each case*"; or that this provision "contains three separate but interrelated elements"; and that "*[i]t is necessary to revisit the interrelationship of the three subparagraphs of Article 36, paragraph 1, in the light of the particular facts and circumstances of the present case*". Had it done this, it would have applied a teleological interpretation and would have found that, unlike in the two above-mentioned cases, the facts and circumstances of the present case show that the Democratic Republic of the Congo's alleged omission to inform Mr. Diallo of his rights did not prevent Guinea from exercising the right conferred upon it by Article 36, paragraph 1. When the question is seen from this angle, being that of the purpose underlying the obligation, i.e., to enable the national State to perform its consular function, one cannot ignore the facts that the Guinean authorities were indisputably aware of the situation and, more importantly, that, as they themselves admit, they were able to perform their consular function. Thus, the failure to inform could not have rendered Guinea unable to exercise its rights to afford consular protection to its national. In the light of all this, Judge *ad hoc* Mampuya could not subscribe to the majority's finding that the Democratic Republic of the Congo violated this provision of the Vienna Convention on Consular Relations. In any case, in all logic he voted in favour of the operative subparagraph of the Judgment concerning the reparation owed to Guinea by the Congo, while regretting that the Court has not provided helpful clarification of the judicially formulated principle that the injury—one exclusively non-pecuniary and non-material—found in respect of the claimed violation by the Respondent of the obligation under Article 36 (1) *(b)* of the Vienna Convention on Consular Relations—a violation which gave rise to no material injury—calls only for "declaratory", non-material, and non-pecuniary relief.

Finally, while agreeing with the Court's finding that the Democratic Republic of the Congo has not violated Mr. Diallo's direct rights as *associé*, Judge *ad hoc* Mampuya has considered it necessary to set out his reasoning, which differs from the majority's. The majority has confined itself to asserting that the Guinean national's expulsion did not breach his rights as *associé* "as such", yet it seems to him that it would have been helpful and legally correct to state that, beyond the interpretation of the facts, which may be open to criticism or challenge, there are legal principles justifying that conclusion. An *associé*'s direct rights come into being, take effect and are exercised in regard to the operation of the company and in the relations between the company and its *associés*. As a result, they may be asserted, and are therefore operable, only against the company and it alone. Accordingly, a third party's acts can violate these rights "as such" only if those acts amount to interference by the third party in the operation of the company or in its relations with its *associés*; thus, these acts, aimed as they, like the arrest, detention and expulsion, were exclusively at Mr. Diallo in his individual capacity, could not have infringed his rights as *associé* "as such".

183. CERTAIN ACTIVITIES CARRIED OUT BY NICARAGUA IN THE BORDER AREA (COSTA RICA *v.* NICARAGUA) (REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES)

Order of 8 March 2011

On 8 March 2011, the International Court of Justice delivered its Order regarding the request for the indication of provisional measures submitted by Costa Rica in the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)*. The Court requested the Parties to refrain from sending to, or maintaining in the disputed territory, including the *caño*, any personnel, whether civilian, police or security; it authorized Costa Rica, in certain specific circumstances, to dispatch civilian personnel there charged with the protection of the environment; and it called on the Parties not to aggravate or extend the dispute before the Court or make it more difficult to resolve and to inform the Court as to their compliance with the provisional measures indicated.

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

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The operative paragraph (para. 86) of the Order reads as follows:

" . . .

The Court,

Indicates the following provisional measures:

(1) Unanimously,

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

(2) By thirteen votes to four,

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;

In favour: President Owada; Vice-President Tomka; Judges Koroma, Al-Khasawneh, Simma, Abraham, Keith, Bennouna, Cançado Trindade, Yusuf, Greenwood, Donoghue; Judge *ad hoc* Dugard;

Against: Judges Sepúlveda-Amor, Skotnikov, Xue; Judge *ad hoc* Guillaume;

(3) Unanimously,

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) Unanimously,

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

*

* *

Judges Koroma and Sepúlveda-Amor appended separate opinions to the Order. Judges Skotnikov, Greenwood and Xue appended declarations to the Order. Judge *ad hoc* Guillaume appended a declaration to the Order. Judge *ad hoc* Dugard appended a separate opinion to the Order.

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Application and request for the indication of provisional measures
(paras. 1–48)

1. Application instituting proceedings
(paras. 1–10)

The Court begins by recalling that by an Application filed in the Registry of the Court on 18 November 2010, the Republic of Costa Rica (hereinafter "Costa Rica") instituted proceedings against the Republic of Nicaragua (hereinafter "Nicaragua") on the basis of the four following allegations: "the incursion into, occupation of and use by Nicaragua's Army of Costa Rican territory as well as breaches of Nicaragua's obligations towards Costa Rica" under several international law instruments.

Costa Rica maintains that the alleged violations concern "an initial area of around three square kilometres of Costa Rican territory, located at the northeast Caribbean tip of Costa Rica", at the mouth of the San Juan border river, and more specifically in Laguna los Portillos (also known as "Harbor Head lagoon"), on the sea coast of Isla Portillos.

As a basis for the jurisdiction of the Court, the Applicant refers to Article XXXI of the American Treaty on Pacific Settlement signed at Bogotá on 30 April 1948 (hereinafter the "Pact of Bogotá") and to the declarations made under Article 36, paragraph 2, of the Statute of the Court, by Costa Rica on 20 February 1973 and by Nicaragua on 24 September 1929 (as amended on 23 October 2001).

In its Application, Costa Rica contends that

"[b]y sending contingents of its armed forces to Costa Rican territory and establishing military camps therein, Nicaragua is not only acting in outright breach of the established boundary regime between the two States, but

also of the core founding principles of the United Nations, namely the principle of territorial integrity and the prohibition of the threat or use of force against any State in accordance with Article 2 (4) of the Charter; also endorsed between the parties in Articles 1, 19 and 29 of the Charter of the Organization of American States."

Costa Rica charges Nicaragua with having occupied, in two separate incidents, the territory of Costa Rica in connection with the construction of a canal (hereinafter also referred to as the "*caño*") across Costa Rican territory from the San Juan river to Laguna los Portillos (also known as "Harbor Head lagoon"), and certain related works of dredging on the San Juan river.

Costa Rica states that the

"ongoing and planned dredging and the construction of the canal will seriously affect the flow of water to the Colorado River of Costa Rica, and will cause further damage to Costa Rican territory, including the wetlands and national wildlife protected areas located in the region".

Costa Rica accordingly requests the Court

"to adjudge and declare that Nicaragua is in breach of its international obligations . . . as regards the incursion into and occupation of Costa Rican territory, the serious damage inflicted to its protected rainforests and wetlands, and the damage intended to the Colorado River, wetlands and protected ecosystems, as well as the dredging and canalization activities being carried out by Nicaragua on the San Juan River. In particular the Court is requested to adjudge and declare that, by its conduct, Nicaragua has breached:

(a) the territory of the Republic of Costa Rica, as agreed and delimited by the 1858 Treaty of Limits, the Cleveland Award and the first and second Alexander Awards;

(b) the fundamental principles of territorial integrity and the prohibition of use of force under the Charter of the United Nations and the Charter of the Organization of American States;

(c) the obligation imposed upon Nicaragua by Article IX of the 1858 Treaty of Limits not to use the San Juan River to carry out hostile acts;

(d) the obligation not to damage Costa Rican territory;

(e) the obligation not to artificially channel the San Juan River away from its natural watercourse without the consent of Costa Rica;

(f) the obligation not to prohibit the navigation on the San Juan River by Costa Rican nationals;

(g) the obligation not to dredge the San Juan River if this causes damage to Costa Rican territory (including the Colorado River), in accordance with the 1888 Cleveland Award;

(h) the obligations under the Ramsar Convention on Wetlands;

(i) the obligation not to aggravate and extend the dispute by adopting measures against Costa Rica, including the expansion of the invaded and occupied Costa Rican territory or by adopting any further measure or carrying out any further actions that would infringe Costa Rica's territorial integrity under international law."

At the end of the Application, the Court is also requested to determine the reparation which must be made by Nicaragua, in particular in relation to any measures of the kind referred to in the paragraph above.

2. Request for the indication of provisional measures (paras. 11–48)

The Court recalls that 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.

Costa Rica's Request for the indication of provisional measures is aimed at two separate Nicaraguan activities, namely:

1. the construction of an artificial canal (the *caño*) across Isla Portillos, over the entirety of which Costa Rica believes it is sovereign;

2. the dredging operations on the San Juan river, over which Nicaragua is sovereign.

First, as regards the alleged construction of the *caño*, Costa Rica contends in its Request for the indication of provisional measures that

"Nicaragua is currently destroying an area of primary rainforests and fragile wetlands on Costa Rican territory (listed as such under the Ramsar Convention's List of Wetlands of International Importance) for the purpose of facilitating the construction of a canal through Costa Rican territory, intended to deviate the waters of the San Juan River from its natural historical course into Laguna los Portillos (the Harbor Head Lagoon)".

Second, with respect to the dredging works on the San Juan river, Costa Rica states that it has regularly protested to Nicaragua and called on it not to carry out such works "until it can be established that the dredging operation will not damage the Colorado River or other Costa Rican territory". Costa Rica asserts that Nicaragua has nevertheless continued with its dredging activities on the San Juan river and that it "even announced on 8 November 2010 that it would deploy two additional dredges to the San Juan River", one of which is reportedly still under construction.

In its Request for the indication of provisional measures, Costa Rica affirms that Nicaragua's statements demonstrate "the likelihood of damage to Costa Rica's Colorado River, and to Costa Rica's lagoons, rivers, herbaceous swamps and woodlands", the dredging operation posing more specifically "a threat to wildlife refuges in Laguna Maquenque, Barra del Colorado, Corredor Fronterizo and the Tortuguero National Park". Costa Rica also refers to the adoption on 12 November 2010 of a resolution of the Permanent Council of the Organization of American States (CP/RES. 978 (1777/10)), welcoming and endorsing the recommendations made by the Secretary-General of that Organization in his report of 9 November 2010 (CP/doc. 4521/10). It states that the Permanent Council called on the Parties to comply with those recommendations, in particular that requesting "the avoidance of the presence of mili-

tary or security forces in the area where their existence might rouse tension". Costa Rica asserts that Nicaragua's "immediate response to the Resolution of the Permanent Council of the OAS was to state [its] intention not to comply with [it]" and that Nicaragua has "consistently refused all requests to remove its armed forces from the Costa Rican territory in Isla Portillos".

Costa Rica further affirms that "its rights to sovereignty and territorial integrity form the subject of its Request for the indication of provisional measures" (para. 18 of the Order).

At the end of its written Request for the indication of provisional measures, Costa Rica asks the Court

"as a matter of urgency to order the following provisional measures so as to rectify the presently ongoing breach of Costa Rica's territorial integrity and to prevent further irreparable harm to Costa Rica's territory, pending its determination of this case on the merits:

(1) the immediate and unconditional withdrawal of all Nicaraguan troops from the unlawfully invaded and occupied Costa Rican territories;

(2) the immediate cessation of the construction of a canal across Costa Rican territory;

(3) the immediate cessation of the felling of trees, removal of vegetation and soil from Costa Rican territory, including its wetlands and forests;

(4) the immediate cessation of the dumping of sediment in Costa Rican territory;

(5) the suspension of Nicaragua's ongoing dredging programme, aimed at the occupation, flooding and damage of Costa Rican territory, as well as at the serious damage to and impairment of the navigation of the Colorado River, giving full effect to the Cleveland Award and pending the determination of the merits of this dispute;

(6) that Nicaragua shall refrain from any other action which might prejudice the rights of Costa Rica, or which may aggravate or extend the dispute before the Court".

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At the public hearings held on 11, 12 and 13 January 2011 on the Request for the indication of provisional measures, oral observations were presented by the Agents and Counsel of the Governments of Costa Rica and Nicaragua.

During the hearings, Costa Rica reiterated the arguments developed in its Application and its Request for the indication of provisional measures, and argued that the conditions necessary for the Court to indicate the requested measures had been fulfilled.

The Applicant reaffirmed that,

"without its consent, Nicaragua has constructed an artificial canal across an area of Costa Rican territory unlawfully occupied by Nicaraguan armed forces; [that], to this end, Nicaragua is said to have illegally deforested areas of internationally protected primary forests; and [that], according to Costa Rica, Nicaragua's actions have caused serious damage to a fragile ecosystem and are aimed at establishing a fait accompli, modifying unilaterally the boundary between the two Parties, by attempting to deviate the course of the San Juan river, in spite of the Respondent's 'constant, unambiguous [and] incontestable' recognition of the Applicant's sovereignty over Isla Portillos, which the said canal would henceforth intersect" (para. 31 of the Order).

During its oral argument, Costa Rica declared that

"it is not opposed to Nicaragua carrying out works to clean the San Juan river, provided that these works do not affect Costa Rica's territory, including the Colorado river, or its navigation rights on the San Juan river, or its rights in the Bay of San Juan del Norte" (para. 32 of the Order).

The Applicant also

"asserted that the dredging works carried out by Nicaragua on the San Juan river did not comply with these conditions, firstly because Nicaragua has deposited large amounts of sediment from the river in the Costa Rican territory it is occupying and has proceeded to deforest certain areas; secondly, because these works, and those relating to the cutting of the disputed canal, have as a consequence the significant deviation of the waters of the Colorado river, which is situated entirely in Costa Rican territory; and, thirdly, because these dredging works will spoil portions of Costa Rica's northern coast on the Caribbean Sea" (para. 32 of the Order).

At the end of its second round of oral argument, Costa Rica presented the following submissions:

"Costa Rica requests the Court to order the following provisional measures:

A. Pending the determination of this case on the merits, Nicaragua shall not, in the area comprising the entirety of Isla Portillos, that is to say, across the right bank of the San Juan river and between the banks of the Laguna Los Portillos (also known as Harbor Head Lagoon) and the Taura river ('the relevant area'):

(1) station any of its troops or other personnel;

(2) engage in the construction or enlargement of a canal;

(3) fell trees or remove vegetation or soil;

(4) dump sediment.

B. Pending the determination of this case on the merits, Nicaragua shall suspend its ongoing dredging programme in the River San Juan adjacent to the relevant area.

C. Pending the determination of this case on the merits, Nicaragua shall refrain from any other action which might prejudice the rights of Costa Rica, or which may aggravate or extend the dispute before the Court."

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For its part, during its first round of oral observations, Nicaragua stated that the activities it is accused of by Costa Rica took place on Nicaraguan territory and that they did not cause, nor did they risk causing, irreparable harm to the other Party.

Referring to the first Alexander Award, dated 30 September 1897, Nicaragua maintained that, in the region in question, its boundary with Costa Rica follows the eastern edge of the Harbor Head lagoon before joining the San Juan river by the

first natural channel in a south-westerly and then a southerly direction. According to Nicaragua, that first channel is the *caño*. Nicaragua added that its title to sovereignty over the northern part of Isla Portillos delimited by the said *caño* is confirmed by the exercise of various sovereign prerogatives.

The Respondent indicated that in its view the *caño* was a "natural channel [which] had become obstructed over the years, [and that] it had undertaken to make it once more navigable for small vessels", adding that "the works condemned by Costa Rica were not therefore aimed at the cutting of an artificial canal [and that] the cleaning and clearing of the channel had been carried out manually in Nicaraguan territory, the right bank of the said channel constituting the boundary between the two Parties" (para. 38 of the Order).

Nicaragua further asserted that "the number of trees felled was limited and that it has undertaken to replant the affected areas, all located on the left bank of the said channel"—that is, according to Nicaragua, in Nicaraguan territory—"with ten trees for every one felled", and affirmed that "the works to clean the channel are over and finished" (para. 39 of the Order).

Moreover, "Nicaragua disputed that elements of its armed forces had occupied an area of Costa Rican territory" (para. 42 of the Order). And although it did state that it had assigned some of its troops to the protection of staff engaged in the cleaning of the channel and the dredging of the river, it nevertheless maintained that "these troops had remained in Nicaraguan territory and that they were no longer present in the border region where those activities took place".

In its second round of oral observations, Nicaragua once more

> "contended that, contrary to Costa Rica's affirmations, the *caño* existed before it was the subject of the clean-up operation; that this fact was evidenced by various maps, satellite photographs, the environmental impact assessment conducted by Nicaragua and affidavits, all of which pre-date the disputed works; and that the boundary between the Parties in the contested area does indeed follow this *caño*, in view of the specific hydrological characteristics of the region" (para. 46 of the Order).

Furthermore, the Respondent "reaffirmed that it has the right to dredge the San Juan river without having to obtain Costa Rica's permission to do so", before confirming that

> "this limited operation, like that relating to the cleaning and clearing of the *caño*, had not caused any damage to Costa Rica and did not risk causing any, since, according to Nicaragua, there is no evidence to substantiate the Applicant's claims" (para. 47 of the Order).

Nicaragua concluded that there was nothing to justify the indication by the Court of the provisional measures sought by Costa Rica and asked the Court "to dismiss the Request for provisional measures filed by the Republic of Costa Rica".

Reasoning of the Court

1. Prima facie *jurisdiction*
(paras. 49–52)

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 is seeking to found the jurisdiction of the Court on Article XXXI of the Pact of Bogotá and on the declarations made by the two States pursuant to Article 36, paragraph 2, of the Statute. Costa Rica also refers to a communication sent by the Nicaraguan Minister for Foreign Affairs to his Costa Rican counterpart dated 30 November 2010, in which the Court is presented as "the judicial organ of the United Nations competent to discern over" the questions raised by the present dispute.

The Court points out that, in the present proceedings, Nicaragua did not contest its jurisdiction to entertain the dispute.

The Court concludes from the foregoing 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. Accordingly, it finds that it is not obliged, at this stage of the proceedings, to determine with greater precision which instrument or instruments invoked by Costa Rica afford a basis for its jurisdiction to entertain the various claims submitted to it.

2. Plausible character of the rights whose protection is being sought and link between these rights and the measures requested
(paras. 53–62)

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 of the parties pending its decision. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by a party are at least plausible, and that a link exists 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.

Plausible character of the rights whose protection is being sought
(paras. 55–59)

The Court notes that whereas Costa Rica alleges that the rights claimed by it and forming the subject of the case on the merits are, on the one hand, its right to assert sovereignty over the entirety of Isla Portillos and over the Colorado river and, on the other hand, its right to protect the environment in those areas over which it is sovereign, Nicaragua, for its part, contends that it holds the title to sovereignty over the northern part of Isla Portillos, that is to say, the area of wetland of some three square kilometres between the right bank of the disputed *caño*, the right bank of the San Juan river up to

its mouth at the Caribbean Sea and the Harbor Head lagoon (hereinafter the "disputed territory"), and argues that its dredging of the San Juan river, over which it has sovereignty, has only a negligible impact on the flow of the Colorado river, over which Costa Rica has sovereignty.

As regards the right to assert sovereignty over the disputed territory, the Court states that, at this stage of the proceedings, it cannot settle the Parties' competing claims and is not called upon to determine once and for all whether the rights claimed by each of them exist; for the purposes of considering the request for the indication of provisional measures, the Court needs only to decide whether the rights claimed by the Applicant on the merits, and for which it is seeking protection, are plausible.

After a careful examination of the evidence and arguments presented by the Parties, the Court concludes that the title to sovereignty claimed by Costa Rica over the entirety of Isla Portillos is plausible. It adds that it is not called upon to rule on the plausibility of the title to sovereignty over the disputed territory advanced by Nicaragua. The Court points out further that the provisional measures it may indicate would not prejudge any title, and that the Parties' conflicting claims cannot hinder the exercise of the Court's power under its Statute to indicate such measures.

As regards the right to protect the environment, the Court also finds that, at this stage of the proceedings, the right claimed by Costa Rica to request the suspension of the dredging operations on the San Juan river if they threaten seriously to impair navigation on the Colorado river or to damage Costa Rican territory is plausible.

Link between the rights whose protection is being sought and the measures requested
(paras. 60–62)

Taking the view that the continuation or resumption of the disputed activities by Nicaragua on Isla Portillos would be likely to affect the rights of sovereignty which might be adjudged on the merits to belong to Costa Rica, the Court considers that a link exists between these rights and the first provisional measure being sought, which is aimed at ensuring that Nicaragua will refrain from any activity "in the area comprising the entirety of Isla Portillos".

The Court further believes that, since there is a risk that the rights which might be adjudged on the merits to belong to Costa Rica would be affected if it were established that the continuation of the Nicaraguan dredging operations on the San Juan river threatened seriously to impair navigation on the Colorado river or to cause damage to Costa Rica's territory, a link exists between these rights and the second provisional measure being sought, which concerns the suspension of Nicaragua's "dredging programme in the River San Juan adjacent to the relevant area".

Lastly, the Court considers that the final provisional measure sought by Costa Rica, aimed at ensuring that Nicaragua refrains "from any other action which might prejudice the rights of Costa Rica, or which may aggravate or extend the dispute before the Court" pending the "determination of this case on the merits", being very broadly worded, is linked to the rights which form the subject of the case before the Court on the merits, in so far as it is a measure complementing more specific measures protecting those same rights.

3. Risk of irreparable prejudice and urgency
(paras. 63–72)

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 Costa Rica maintains: (i) that "Nicaraguan armed forces continue to be present on Isla Portillos in breach of Costa Rica's sovereign rights"; (ii) that Nicaragua "is continuing to damage the territory of Costa Rica, posing a serious threat to its internationally protected wetlands and forests"; and (iii) that "Nicaragua[, which] is attempting to unilaterally adjust, to its own benefit, a River the right bank of which forms a valid, lawful and agreed border . . . cannot be permitted to continue to deviate the San Juan River through Costa Rica's territory in this manner, so as to impose on Costa Rica and the Court a fait accompli".

The Court points out that Costa Rica wishes the *status quo ante* to be restored, pending the Court's judgment on the merits, and has indicated that the following rights, which it considers itself to possess, are under threat of irreparable prejudice as a result of Nicaragua's activities: the right to sovereignty and territorial integrity, the right not to have its territory occupied, the right not to have its trees chopped down by a foreign force, the right not to have its territory used for depositing dredging sediment or as the site for the unauthorized digging of a canal, and the several rights corresponding to Nicaragua's obligation not to dredge the San Juan if this affects or damages Costa Rica's land, environment or the integrity and flow of the Colorado river.

The Court notes that Costa Rica adds that the works undertaken by Nicaragua in the disputed territory will have the effect of causing flooding and damage to Costa Rican territory, as well as geomorphological changes, and that the dredging of the San Juan river carried out by Nicaragua will result in similar effects, as well as significantly reducing the flow of the Colorado river.

It further observes that Costa Rica bases the urgency of its Request for the indication of provisional measures on the need to prevent the pursuit of action prejudicial to the rights of Costa Rica significantly altering the factual situation on the ground before the Court has the opportunity to render its final decision on the merits of the case, and contends that the ongoing presence of Nicaraguan armed forces on Costa Rica's territory is contributing to a political situation of extreme hostility and tension which may lead to the aggravation and/or extension of the dispute.

The Court also notes that Nicaragua, having maintained that the activities carried out within its own territory, the environmental impact of which had been duly assessed beforehand, were not likely to cause imminent damage to Costa Rica, asserted that the cleaning and clearing operations

in respect of the *caño* were over and finished, that none of its armed forces were presently stationed on Isla Portillos, and that it did not intend to send any troops or other personnel to the disputed area, nor to establish a military post there in the future.

However, the Court points out that Nicaragua has stated that, in connection with the current replanting of trees, its Ministry of the Environment "will send inspectors to the site periodically in order to monitor the reforestation process and any changes which might occur in the region, including the Harbor Head lagoon", and that since "[t]he *caño* is no longer obstructed", "[i]t is possible to patrol the area on the river, as has always been the case, for the purposes of enforcing the law, combating drug trafficking and organized crime, and protecting the environment".

4. Consideration of the provisional measures requested by Costa Rica, and decision of the Court
(paras. 73–85)

The Court states that it is in the light of this information that the first provisional measure requested by Costa Rica in its submissions presented at the end of its second round of oral observations should be considered, namely, that

> "[p]ending the determination of this case on the merits, Nicaragua shall not, in the area comprising the entirety of Isla Portillos, that is to say, across the right bank of the San Juan river and between the banks of the Laguna Los Portillos (also known as Harbor Head Lagoon) and the Taura river ('the relevant area'): (1) station any of its troops or other personnel; (2) engage in the construction or enlargement of a canal; (3) fell trees or remove vegetation or soil; (4) dump sediment".

Taking note of Nicaragua's statements concerning the ending of the works in the area of the *caño*, the Court concludes that, in the circumstances of the case as they now stand, there is no need to indicate the measures numbered (2), (3) and (4) requested by Costa Rica in its submissions presented at the end of the second round of oral observations (see paragraph above).

Given that Nicaragua intends to carry out certain activities, if only occasionally, in the disputed territory, the Court finds that provisional measures should be indicated, since this situation creates an imminent risk of irreparable prejudice to Costa Rica's claimed title to sovereignty over the said territory and to the rights deriving therefrom, and gives rise to a real and present risk of incidents liable to cause irremediable harm in the form of bodily injury or death.

The Court therefore considers that each Party must refrain from sending to, or maintaining in the disputed territory, including the *caño*, any personnel, whether civilian, police or security, until such time as the dispute on the merits has been decided or the Parties have come to an agreement on this subject. The Court further concludes that each Party has the responsibility to monitor that territory from the territory over which it unquestionably holds sovereignty, and that it is for the Parties' police or security forces to co-operate with each other in a spirit of good neighbourliness, in particular to combat any criminal activity which may develop in the disputed territory.

Having observed that, in the disputed border area, Costa Rica and Nicaragua have respectively designated, under the Ramsar Convention, the "Humedal Caribe Noreste" and the "Refugio de Vida Silvestre Río San Juan" as wetlands of international importance, the Court considers that, pending delivery of the Judgment on the merits, "Costa Rica must be in a position to avoid irreparable prejudice being caused" to that part of the "Humedal Caribe Noreste" wetland where the disputed territory is situated. It finds that, for this purpose, "Costa Rica must be able to dispatch civilian personnel charged with the protection of the environment to the said territory, including the *caño*, but only in so far as it is necessary to ensure that no such prejudice be caused". It adds that "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".

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As regards the second provisional measure requested by Costa Rica, requiring Nicaragua to suspend its dredging programme in the San Juan river adjacent to the relevant area, the Court finds that it cannot be concluded at this stage from the evidence adduced by the Parties that the dredging of the San Juan river is creating a risk of irreparable prejudice to Costa Rica's environment or to the flow of the Colorado river; nor has it been shown that, even if there were such a risk of prejudice to rights Costa Rica claims in the present case, the risk would be imminent. The Court concludes from the foregoing that in the circumstances of the case as they now stand the second provisional measure requested by Costa Rica should not be indicated.

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Having pointed out that it has the power under its Statute to indicate provisional measures that are in whole or in part other than those requested, or measures that are addressed to the party which has itself made the request, and that its orders on provisional measures have binding effect and thus create international legal obligations which both Parties are required to comply with, the Court considers it appropriate in the circumstances to indicate complementary measures, calling on both Parties to refrain from any act which may aggravate or extend the dispute or render it more difficult of solution.

The Court adds that the decision given in the present proceedings in no way prejudges the question of its jurisdiction 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 Costa Rica and Nicaragua to submit arguments in respect of those questions.

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Separate opinion of Judge Koroma

In his separate opinion, Judge Koroma states that, although he has voted in favour of the Order, he has misgivings about the Court's decision to use "plausibility" as a criterion for indicating provisional measures. Judge Koroma notes that the Court's ability to indicate provisional measures under Article 41 of its Statute is vital to ensuring that parties' legal rights are preserved pending the Court's decision on the merits. He agrees with both the outcome and the bulk of the reasoning in the Order, but decided to write a separate opinion on the issue of "plausibility", which is raised in the Order.

Judge Koroma recalls that this "plausibility standard" was first enunciated in *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*. He maintains that the plausibility criterion seems to have appeared out of nowhere in that case, without any supporting citations or explanation. He also emphasizes that the plausibility standard would appear inconsistent with the settled jurisprudence of the Court, which requires the applicant to *demonstrate* that an existing right needs to be protected.

Judge Koroma expresses two concerns with the plausibility standard: its ambiguity and the fact that it is unclear whether the standard applies to legal rights, factual claims, or both. With regard to the first concern, Judge Koroma notes that the word "plausible" in English can have multiple meanings. "Plausible" often carries a negative connotation: an implication that, although a plausible claim basically sounds truthful, it is in reality deceitful, specious, only partially true, or completely false. Judge Koroma points out that this makes "plausible" unreliable as a legal standard that the parties must meet to obtain provisional measures from the Court. The Court's use of the plausibility standard also, in his view, gives the impression that the threshold for the indication of provisional measures has been lowered. He notes, however, that the word "plausible" in French appears not to have a negative connotation and may therefore have better reflected the Court's intention when the term was initially used in the *Belgium* v. *Senegal* case.

With regard to the second concern, Judge Koroma maintains that the Court has not clarified whether the plausibility standard requires an applicant to show that its legal claims are plausible or that its factual claims are plausible. He points out that the Court has applied the standard to both legal and factual claims. In *Belgium* v. *Senegal*, the Court, after articulating the plausibility standard, stated that "the rights asserted by Belgium, being grounded in a possible interpretation of the Convention against Torture, therefore appear to be plausible". Judge Koroma writes that this implies that the Court engaged solely in a legal analysis. He observes that in the present Order, however, the Court evaluates the plausibility of Costa Rica's *factual claims*. He finds that the actual legal rights at issue, including Costa Rica's rights to sovereignty and territorial integrity, are self-evident. What the Order examines instead is whether "the title to sovereignty claimed by Costa Rica over the entirety of Isla Portillos is plausible" (Order, paragraph 58).

Judge Koroma believes that it would have been worth articulating a *clear* standard of some sort to evaluate, prima facie, the legitimacy of an applicant's claims at the provisional measures stage. He notes that such a standard would be similar to the Court's existing prima facie jurisdiction requirement, and would help ensure that parties do not abuse the provisional measures process by bringing claims that are patently without merit. He further observes that the Court has on occasion informally evaluated the legitimacy of a party's claim when deciding to indicate provisional measures, often within its analysis of jurisdictional questions or irreparable prejudice. The more difficult question, according to Judge Koroma, is what the precise standard should be. He states that one option would be to require a party to establish, prima facie, that it enjoys certain rights. Another possibility would be to require that the rights asserted by a party be grounded in a *reasonable* interpretation of the law or of the facts.

Judge Koroma concludes that, if the Court does decide to adopt a new standard, it should do so in a transparent manner that explains the rationale behind it. He emphasizes that adopting an order indicating provisional measures by reference to plausibility may prove a mistake.

Separate opinion of Judge Sepúlveda-Amor

In his separate opinion, Judge Sepúlveda-Amor agrees that interim measures of protection should be afforded by the Court in the present case. He recalls that the Court has the power to indicate *any* provisional measure it may deem necessary in order to preserve the respective rights of either party, and that the measures indicated may be different, in whole or in part, from those originally requested. Judge Sepúlveda-Amor considers useful to reaffirm that an Order on the indication of provisional measures has a binding effect and that the Parties to the case must comply with any international obligation arising under the Order.

According to Judge Sepúlveda-Amor, the Court addresses an important concern: the risk of criminal activity in the disputed territory. The Court has decided, and rightly so, to give each Party the responsibility for policing the area over which it unquestionably has sovereignty. It is to be hoped that the effectiveness of the bilateral collaboration required will be sufficient to keep the operation of organized crime away from this transitory no-man's land.

On a different note, Judge Sepúlveda-Amor believes the Court should have seized the opportunity to elucidate further the "plausibility requirement" for the purposes of Article 41 of the Statute. The indeterminacy surrounding the concept of plausibility in the Order could prove problematic in future requests for the indication of provisional measures, as will be shown in his opinion.

Although concurring with the need to grant measures of interim protection in the present case, Judge Sepúlveda-Amor does not subscribe to the second paragraph of the operative clause of the Order, nor does he share some of the reasons adduced in it as a basis for the Court's decision. He considers insufficient and unsatisfactory the treatment given by the Court in the Order to the imminent risk of irreparable prejudice to the possible rights of Costa Rica. His view is that the provisional measures indicated fall far short of what is needed to properly preserve and protect the Humedal Caribe Noreste. It must be recalled that the Humedal is intimately linked to

the Refugio de Vida Silvestre Corredor Fronterizo and the Refugio de Vida Silvestre Río San Juan Ramsar site. The fact that these wetlands are interconnected means that their environmental protection requires a wider bilateral collaboration and the full assistance of the Ramsar Secretariat.

Declaration of Judge Skotnikov

Judge Skotnikov fully supports the Court's decision directing both Parties to "refrain from sending to, or maintaining in the disputed territory, including the *caño*, any personnel, whether civilian, police or security". However, he is unable to concur in the second provisional measure indicated by the Court.

He points out that two conditions, well established by the jurisprudence of the Court, namely the existence of a risk of irreparable harm to the rights in dispute and urgency, have not been met in this instance. He is also of the view that the majority voting in favour of the second provisional measure has treated the Court's duty not to prejudge the outcome of the merits of the case rather lightly. Moreover, this provisional measure, according to Judge Skotnikov, may contribute to aggravating or extending the dispute.

The following reason is given for indicating the second provisional measure, which allows Costa Rica to dispatch civilian personnel charged with protecting the environment to the disputed territory: "the disputed territory is . . . situated in the 'Humedal Caribe Noreste' wetland, in respect of which Costa Rica bears obligations under the Ramsar Convention" and, therefore, "pending delivery of the Judgment on the merits, Costa Rica must be in a position to avoid irreparable prejudice being caused to the part of that wetland where that territory is situated".

Judge Skotnikov agrees that Costa Rica bears obligations under the Ramsar Convention in respect of "Humedal Caribe Noreste". However, in his view, the question as to whether those obligations extend to the disputed territory can only be answered at the merits stage.

The Court has decided that Nicaragua must cease the replanting of the trees in the disputed territory and must not send inspectors to periodically monitor the reforestation process and any changes which might occur in the region, because "this situation creates an imminent risk of irreparable prejudice to Costa Rica's claimed title to sovereignty over the said territory and to the rights deriving therefrom". However, the presence in the disputed territory of Costa Rica's personnel charged with protecting the environment can only be equally prejudicial to Nicaragua's claimed title to sovereignty over that territory.

Actions which may be taken by Costa Rica under the second provisional measure potentially go well beyond the reforestation and monitoring contemplated by Nicaragua. Unfortunately, this does create a risk of aggravating and extending the dispute before the Court and making it more difficult to resolve.

In the view of the Court, Nicaragua's activities in the disputed territory give rise "to a real and present risk of incidents liable to cause irremediable harm in the form of bodily injury or death". However, Costa Rica's activities, which the Court is allowing in the disputed territory by indicating the second provisional measure, may pose the same danger.

Judge Skotnikov notes that it has not been shown that any presence of either Party's personnel in the tiny disputed territory is necessary in order to avoid irreparable prejudice being caused to the part of the wetland where this territory is situated. It is clear from the case file that no personnel were present in the disputed territory before Nicaragua embarked on its *caño* operation in October 2010.

Costa Rica itself did not request the Court to indicate a provisional measure allowing it to send personnel to the disputed territory. The second provisional measure is indicated purely on the Court's initiative.

In Judge Skotnikov's view, the Court should have dealt with the issue of protection of the environment in exactly the same way as it dealt with the issue concerning the prevention of criminal activity in the disputed territory: it should have called on the Parties to co-operate in a spirit of good neighbourliness in the area protected under the Ramsar Convention irrespective of their competing claims to sovereignty over the disputed territory.

Declaration of Judge Greenwood

Judge Greenwood considers the criteria to be applied when the Court is asked to indicate provisional measures of protection and concludes that the Court must be satisfied that the rights claimed by a party are plausible, i.e., that there is a reasonable prospect that the Court will find on the merits that those rights exist and are applicable in the instant case. The Court must also be satisfied that there is a real risk of irreparable prejudice being caused to those rights before any judgment on the merits. He finds that the first requirement is satisfied in respect of Costa Rica's claims, but the second is satisfied only in respect of possible prejudice to rights which might be adjudged to belong to Costa Rica in respect of the Isla Portillos. He would have preferred that the second operative paragraph of the Order be more explicit in calling upon the Parties to adopt a concerted approach to prevent environmental damage to the Isla Portillos and Harbor Head lagoon in accordance with the Ramsar Convention.

Declaration of Judge Xue

Judge Xue declared that she voted against the second operative paragraph of the Order because she considers that the present case essentially relates to territorial dispute over the area in question. Unless otherwise provided, the territorial application of an international treaty is bound with the territorial sovereignty of the State parties. To allow one Party to dispatch to the disputed area personnel, even civilian and for environmental purpose, would very likely lead to undesired interpretation of the Order prejudging on the merits of the case and, more seriously, it may incline to aggravate the situation on the ground. In accordance with Article 41 of the Statute of the Court and its case law, the interim procedure for provisional measures must not prejudge any question relating to the merits of the case before the Court, and must leave intact the rights of the Parties in that respect.

In her view, the Court could have, pending the final decision on the merits, indicated the measure to both Parties with the assistance of the Secretariat of the Ramsar Convention, if any actions have to be taken to prevent possible irreparable harm to the environment. Her vote is intended to remind the Parties that the second operative paragraph should in no way be construed as affecting the substance of the case.

Declaration of Judge *ad hoc* Guillaume

1. In his declaration, Judge *ad hoc* Gilbert Guillaume recalls firstly that, according to the Judgment delivered by the Court on 13 July 2009, Nicaragua may execute at its own expense such works to improve navigation on the San Juan river as it deems suitable, provided such works do not seriously impair navigation on the river or on tributaries of the San Juan belonging to Costa Rica. He adds that if, in the course of such works, damage is caused to the territory of Costa Rica, the latter is not entitled to prevent the continuation of the works on Nicaragua's territory, but to obtain reparation for the damage suffered. He goes on to observe that, without ruling on the merits, the Court has found that the dredging envisaged by Nicaragua was not "creating a risk of irreparable prejudice to Costa Rica's environment or to the flow of the Colorado river". Supporting this finding, he endorses the Court's decision to reject the request for provisional measures submitted on this point by Costa Rica.

2. Turning to the dispute regarding the activities carried out by Nicaragua on the territory of some three square kilometres claimed by both States, Judge *ad hoc* Guillaume likewise endorses the decision of the Court to instruct each Party to refrain from sending to, or maintaining in that territory any personnel, whether civilian, police or security. In his view, this solution clearly preserves the rights to sovereignty put forward by both Nicaragua and Costa Rica, whilst at the same time helping to safeguard peace in the region.

3. There remains the environmental impact of the works carried out in this area by Nicaragua. In this respect, Judge *ad hoc* Guillaume takes note, as does the Court, of Nicaragua's assertion that the works are finished, and therefore concludes, like the Court, that there is no need to request Nicaragua not to continue with those works. He shares the Court's opinion that the existence of the disputed *caño* does not create an imminent risk of irreparable prejudice to the environment.

4. On the other hand, Judge *ad hoc* Guillaume differs from the Court with regard to subparagraph (2) of the operative part of the Order. In this subparagraph, the Court contemplates the somewhat unlikely situation in which a risk of irreparable prejudice to the wetlands protected by the Ramsar Convention might appear in future because of the disputed works. It has given Costa Rica, and Costa Rica alone, the right in such circumstances to dispatch civilian personnel charged with the protection of the environment to the disputed territory, in order to establish whether any measures need to be taken.

5. Before acting in this way, Costa Rica must indeed consult with the Secretariat of the Ramsar Convention and endeavour to reach agreement with Nicaragua; should the negotiations fail, however, the final decision rests with Costa Rica. Judge *ad hoc* Guillaume regrets this fact, since he believes that protection of the environment in the disputed territory cannot be separated from protection of the environment in the adjacent territories falling under the undisputed sovereignty of one State or the other. It would therefore have been preferable to entrust that protection to both States acting jointly. Such a solution would also have made it possible to avoid giving the impression that the Court intended to favour Costa Rica's rights to the disputed territory, which is obviously not the case, since the Order specifically states that it in no way prejudges the merits of the case, nor in particular sovereignty over the territory at issue.

Separate opinion of Judge *ad hoc* Dugard

Judge *ad hoc* Dugard voted in favour of the *dispositif* in its entirety. Nevertheless he expressed misgivings about the first paragraph of the *dispositif* which requires the civilian, police or security personnel of both Parties to keep out of the disputed territory.

In his Opinion Judge *ad hoc* Dugard examines the need for the Applicant to demonstrate a "plausible right" as a requirement for provisional measures and shows that this right can only be proved by some consideration of the merits of the case. The 1858 Treaty of Limits, the First Alexander Award of 1897, and a number of maps provide evidence of such a plausible right to sovereignty and territorial integrity on the part of Costa Rica.

Respect for the territorial integrity of a State by other States, a norm of *jus cogens*, and the principle of respect for the stability of boundaries, requires an order for provisional measures which vindicates the right of the invaded State, Costa Rica, to its territorial sovereignty. The nature of the territory does not justify a different conclusion as a State has full sovereignty over both inhabited and uninhabited portions of its territory. The appropriate order in such a case is one that restores the *status quo ante*.

Judge *ad hoc* Dugard warns that an even-handed order of the kind contained in the first paragraph of the *dispositif* requiring both Parties to refrain from sending to, or maintaining in the disputed territory, any personnel, whether civilian, police or military, will give unwarranted credibility and legitimacy to the Respondent's claim to the territory and create a dangerous precedent.

Judge *ad hoc* Dugard's misgivings about the first paragraph of the *dispositif* are to some extent remedied by the second paragraph of the *dispositif* which, in allowing Costa Rica to take measures to protect the environment of the disputed territory, recognizes the stronger claim of Costa Rica to the territory. This allowed him to vote for the *dispositif* as a whole.

184. APPLICATION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (GEORGIA *v.* RUSSIAN FEDERATION)

Judgment of 1 April 2011

On 1 April 2011, the International Court of Justice rendered its Judgment on the preliminary objections raised by the Russian Federation in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discimination (Georgia* v. *Russian Federation)*. The Court concluded that it had no jurisdiction to decide the dispute.

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

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The operative paragraph (para. 187) of the Judgment reads as follows:

" . . .

The Court,

(1) *(a)* by twelve votes to four,

Rejects the first preliminary objection raised by the Russian Federation;

In favour: President Owada; Judges Al-Khasawneh, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Cançado Trindade, Yusuf, Greenwood, Donoghue; Judge *ad hoc* Gaja;

Against: Vice-President Tomka; Judges Koroma, Skotnikov, Xue;

(b) by ten votes to six,

Upholds the second preliminary objection raised by the Russian Federation;

In favour: Vice-President Tomka; Judges Koroma, Al-Khasawneh, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Yusuf, Greenwood, Xue;

Against: President Owada; Judges Simma, Abraham, Cançado Trindade, Donoghue; Judge *ad hoc* Gaja;

(2) by ten votes to six,

Finds that it has no jurisdiction to entertain the Application filed by Georgia on 12 August 2008.

In favour: Vice-President Tomka; Judges Koroma, Al-Khasawneh, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Yusuf, Greenwood, Xue;

Against: President Owada; Judges Simma, Abraham, Cançado Trindade, Donoghue; Judge *ad hoc* Gaja."

*

* *

President Owada and Judges Simma, Abraham, Donoghue and Judge *ad hoc* Gaja appended a joint dissenting opinion to the Judgment of the Court; President Owada appended a separate opinion to the Judgment of the Court; Vice-President Tomka appended a declaration to the Judgment of the Court; Judges Koroma, Simma and Abraham appended separate opinions to the Judgment of the Court; Judge Skotnikov appended a declaration to the Judgment of the Court; Judge Cançado Trindade appended a dissenting opinion to the Judgment of the Court; Judges Greenwood and Donoghue appended separate opinions to the Judgment of the Court.

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* *

Chronology of the Procedure
(paras. 1–19)

The Court begins by recalling that, on 12 August 2008, the Government of Georgia filed in the Registry of the Court an Application instituting proceedings against the Russian Federation in respect of a dispute concerning "actions on and around the territory of Georgia" in breach of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD") of 21 December 1965. In order to found the jurisdiction of the Court, the Application relied on Article 22 of CERD, which entered into force as between the Parties on 2 July 1999.

A complete history of the proceedings follows, in which the Court refers, *inter alia*, to the Request for the indication of provisional measures filed by the Applicant on 14 August 2008, to the "Amended Request for the Indication of Provisional Measures of Protection" filed by Georgia on 25 August 2008, and to the Order of 15 October 2008, by which the Court, after hearing the Parties, indicated certain provisional measures to both Parties.

The Court also recalls that, on 1 December 2009, the Russian Federation raised preliminary objections to the jurisdiction of the Court, and that, consequently, by an Order of 11 December 2009, the Court, noting that the proceedings on the merits were suspended, fixed 1 April 2010 as the time-limit for the presentation by Georgia of a written statement of its observations and submissions on the preliminary objections made by the Russian Federation. Georgia filed such a statement within the time-limit so prescribed, and the case thus became ready for hearing in respect of the preliminary objections. Public hearings on the preliminary objections raised by the Russian Federation were held from Monday 13 September to Friday 17 September 2010, at which the Court heard the oral arguments and replies of both Parties.

In its preliminary objections, the following submissions were presented on behalf of the Government of the Russian Federation:

"For the reasons advanced above, the Russian Federation requests the Court to adjudge and declare that it lacks jurisdiction over the claims brought against the Russian

Federation by Georgia, referred to it by the Application of Georgia of 12 August 2008."

In the written statement of its observations and submissions on the preliminary objections, the following submissions were presented on behalf of the Government of Georgia:

"For these reasons Georgia respectfully requests the Court:

1. to dismiss the *Preliminary Objections* presented by the Russian Federation;

2. to hold that it has jurisdiction to hear the claims presented by Georgia, and that these claims are admissible."

The Court further recalls that at the oral proceedings on the preliminary objections, the following submissions were presented by the Parties:

On behalf of the Government of the Russian Federation,

at the hearing of 15 September 2010:

"The Russian Federation requests the Court to adjudge and declare that it lacks jurisdiction over the claims brought against the Russian Federation by Georgia, referred to it by the Application of Georgia of 12 August 2008."

On behalf of the Government of Georgia,

at the hearing of 17 September 2010:

"Georgia respectfully requests the Court:

to dismiss the preliminary objections presented by the Russian Federation;

to hold that the Court has jurisdiction to hear the claims presented by Georgia and that these claims are admissible."

Reasoning of the Court

I. Introduction
(paras. 20–22)

It is recalled that in its Application, Georgia relied on Article 22 of CERD to found the jurisdiction of the Court. Article 22 of CERD reads as follows:

"[a]ny dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement".

The Russian Federation has raised four preliminary objections to the Court's jurisdiction under Article 22 of CERD. According to the first preliminary objection put forward by the Russian Federation, there was no dispute between the Parties regarding the interpretation or application of CERD at the date Georgia filed its Application. In its second preliminary objection, the Russian Federation argues that the procedural requirements of Article 22 of CERD for recourse to the Court have not been fulfilled. The Russian Federation contends in its third objection that the alleged wrongful conduct took place outside its territory and therefore the Court lacks jurisdiction *ratione loci* to entertain the case. During the oral proceedings, the Russian Federation stated that this objection did not possess an exclusively preliminary character. Finally, according to the Russian Federation's fourth objection, any jurisdiction the Court might have is limited *ratione temporis* to the events which occurred after the entry into force of CERD as between the Parties, that is 2 July 1999.

II. First preliminary objection—Existence of a dispute
(paras. 23–114)

The Court begins by considering the Russian Federation's first preliminary objection that "there was no dispute between Georgia and Russia with respect to the interpretation or application of CERD concerning the situation in and around Abkhazia and South Ossetia prior to 12 August 2008, i.e., the date Georgia submitted its application". In brief, it presented two arguments in support of that objection. First, if there was any dispute involving any allegations of racial discrimination committed in the territory of Abkhazia and South Ossetia, the parties to that dispute were Georgia on the one side and Abkhazia and South Ossetia on the other, but not the Russian Federation. Secondly, even if there was a dispute between Georgia and the Russian Federation, any such dispute was not one related to the application or interpretation of CERD.

The Court notes that Georgia, in response, contends that the record shows that, over a period of more than a decade prior to the filing of its Application, it has consistently raised its serious concerns with the Russian Federation over unlawful acts of racial discrimination that are attributable to that State, making it clear that there exists a long-standing dispute between the two States with regard to matters falling under CERD.

1. The meaning of "dispute"
(paras. 26–30)

The Court points out that, on the law, the Russian Federation contends in the first place that the word "dispute" in Article 22 of CERD has a special meaning which is narrower than that to be found in general international law and accordingly more difficult to satisfy. The Russian Federation submits that, under CERD, States Parties are not considered to be in "dispute" until a "matter" between those parties has crystallized through a five-stage process involving the procedures established under the Convention. This contention depends on the wording of Articles 11 to 16 of CERD and the distinctions they are said to make between "matter", "complaints" and "disputes".

The Court also notes that Georgia, in its submissions, rejects the argument that the term "dispute" in Article 22 has a special meaning. It contends that the relevant provisions of CERD, particularly Articles 12 and 13, use the terms "matter", "issue" and "dispute" without distinction or any trace of any special meaning.

The Court does not consider that the words "matter", "complaint", "dispute" and "issue" are used in Articles 11 to 16 in such a systematic way that requires that a narrower interpretation than usual be given to the word "dispute" in Article 22. Further, the word "dispute" appears in the first part of Article 22 in exactly the same way as it appears in several other compromissory clauses adopted around the time

CERD was being prepared: "Any dispute between two or more States Parties with respect to the interpretation or application of this Convention . . ." (e.g., Optional Protocol of Signature to the Conventions on the Law of the Sea of 1958 concerning the Compulsory Settlement of Disputes, Article 1; Single Convention on Narcotic Drugs of 1961, Article 48; Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965, Article 64). That consistency of usage suggests that there is no reason to depart from the generally understood meaning of "dispute" in the compromissory clause contained in Article 22 of CERD. Finally, the submissions made by the Russian Federation on this matter did not in any event indicate the particular form that narrower interpretation was to take. Accordingly, the Court rejects this first contention of the Russian Federation and turns to the general meaning of the word "dispute" when used in relation to the jurisdiction of the Court.

The Court recalls its established case law on that matter, beginning with the frequently quoted statement by the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case in 1924: "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons." The International Court of Justice has indicated that whether there is a dispute in a given case is a matter for "objective determination" by the Court, and that "[i]t must be shown that the claim of one party is positively opposed by the other". The Court's determination must turn on an examination of the facts. The matter is one of substance, not of form. As the Court has recognized in its case law, 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. While the existence of a dispute and the undertaking of negotiations are distinct as a matter of principle, the negotiations may help demonstrate the existence of the dispute and delineate its subject-matter.

The dispute must in principle exist at the time the Application is submitted to the Court; the Parties were in agreement with this proposition. Further, in terms of the subject-matter of the dispute, to return to the terms of Article 22 of CERD, the dispute must be "with respect to the interpretation or application of [the] Convention". While it is not necessary that a State must expressly refer to a specific treaty in its exchanges with the other State to enable it later to invoke that instrument before the Court, the exchanges must refer to the subject-matter of the treaty with sufficient clarity to enable the State against which a claim is made to identify that there is, or may be, a dispute with regard to that subject-matter. An express specification would remove any doubt about one State's understanding of the subject-matter in issue and put the other on notice. The Parties agree that that express specification does not appear in this case.

2. The evidence about the existence of a dispute
(paras. 31–39)

The Court then turns to the evidence submitted to it by the Parties to determine whether it demonstrates, as Georgia contends, that at the time it filed its Application, on 12 August 2008, it had a dispute with the Russian Federation with respect to the interpretation or application of CERD. The Court needs to determine (1) whether the record shows a disagreement on a point of law or fact between the two States; (2) whether that disagreement is with respect to "the interpretation or application" of CERD, as required by Article 22 of CERD; and (3) whether that disagreement existed as of the date of the Application. To that effect, it needs to determine whether Georgia made such a claim and whether the Russian Federation positively opposed it with the result that there is a dispute between them in terms of Article 22 of CERD.

Before the Court considers the evidence bearing on the answers to those issues, it observes that disputes undoubtedly did arise between June 1992 and August 2008 in relation to events in Abkhazia and South Ossetia. Those disputes involved a range of matters including the status of Abkhazia and South Ossetia, outbreaks of armed conflict and alleged breaches of international humanitarian law and of human rights, including the rights of minorities. It is within that complex situation that the dispute which Georgia alleges to exist and which the Russian Federation denies is to be identified. One situation may contain disputes which relate to more than one body of law and which are subject to different dispute settlement procedures; the Parties accepted that proposition.

The Parties referred the Court to many documents and statements relating to events in Abkhazia and South Ossetia from 1990 to the time of the filing by Georgia of its Application and beyond. In their submissions they emphasized those with an official character. The Court limits itself to official documents and statements.

The Parties also distinguished between documents and statements issued before 2 July 1999 when Georgia became party to CERD, thus establishing a treaty relationship between Georgia and the Russian Federation under CERD, and the later documents and statements, and, in respect of those later documents and statements, between those issued before the armed conflict which began on the night of 7 to 8 August 2008 and those in the following days up to 12 August when the Application was filed. Georgia cited statements relating to events before 1999 "not as a basis for Georgia's claims against Russia in this action, but as evidence that the dispute with Russia over ethnic cleansing is long-standing and legitimate and not of recent invention". The Court also makes a distinction between documents issued and statements made before and after Georgia became party to CERD.

The documents and statements also vary in their authors, their intended, likely and actual recipients or audience, the occasion of their delivery and their content. Some are issued by the Executive or members of the Executive of one Party or the other—the President, the Foreign Minister, the Foreign Ministry and other Ministries—and others by Parliament, particularly of Georgia, and members of Parliament. Some are press statements or records of interviews, others are internal minutes of meetings prepared by one Party. Some are directed to particular recipients, particularly by a member of the Executive (the President or Foreign Minister) to the counterpart of the other Party or to an international organization or official such as the United Nations Secretary-General or the President of the Security Council. The other Party may or may not be a member of the organization or body. One particular

category consists of reports submitted to treaty monitoring bodies, such as the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, and the Committee against Torture. Another category is made up of Security Council resolutions adopted between 1993 and April 2008 relating to Abkhazia. Other documents record agreements between various parties or are formal minutes of their meetings. The parties sometimes include the "Abkhaz side", the "South Ossetian side", the "North Ossetian side", in some cases with Georgia alone and in the others with Georgia and Russia and both "Ossetian sides". The reference to "parties" may sometimes be elaborated as "parties to the conflict" or "parties to the agreement". The United Nations High Commissioner for Refugees (UNHCR) and the Organization for Security and Co-operation in Europe (OSCE) have also been signatories in appropriate cases, but are not named as parties to the agreements.

The Parties gave their main attention to the contents of the documents and statements and the Court does likewise. It observes at this stage that a dispute is more likely to be evidenced by a direct clash of positions stated by the two Parties about their respective rights and obligations in respect of the elimination of racial discrimination, in an exchange between them, but, as the Court has already noted, there are circumstances in which the existence of a dispute may be inferred from the failure to respond to a claim. Further, in general, in international law and practice, it is the Executive of the State that represents the State in its international relations and speaks for it at the international level. Accordingly, primary attention is given to statements made or endorsed by the Executives of the two Parties.

The Russian Federation states that the primary dispute that existed between it and Georgia was about the allegedly unlawful use of force by the Russian Federation after 7 August 2008. Georgia by contrast emphasized the references in the statements to "ethnic cleansing" and to the obstacles in the way of the return of refugees and internally displaced persons (IDPs). The Court takes account of those matters as it reviews the legal significance of the documents and statements to which the Parties gave their principal attention.

Before it considers those documents and statements, the Court addresses the agreements reached in the 1990s and the Security Council resolutions adopted from the 1990s until early 2008. Those agreements and resolutions provide an important part of the context in which the statements which the Parties invoke were made. In particular they help define the different roles which the Russian Federation was playing during that period.

3. Relevant agreements and Security Council resolutions
(paras. 40–49)

The Court recalls, *inter alia*, that so far as South Ossetia is concerned, Georgia and the Russian Federation on 24 June 1992 concluded an agreement on principles of settlement of the Georgian-Ossetian conflict (the Sochi Agreement). The agreement provided for a ceasefire and a withdrawal of armed formations (with particular contingents of the Russian Federation identified); and, to exercise control over the implementation of those measures, a joint control commission was to be established, consisting of representatives of all parties involved in the conflict. The Court gives an account of the meetings and decisions of the Joint Control Commission (JCC).

So far as Abkhazia is concerned, the Court recalls that the President of the Russian Federation and the Chairman of the State Council of the Republic of Georgia on 3 September 1992 signed the Moscow Agreement. Their discussions, they recorded, had involved "leaders of Abkhazia, the North Caucasus Republics, Regions and Districts of the Russian Federation". The agreement provided for a ceasefire, confirmed the necessity of observing the international norms in the sphere of human rights and minority rights, the inadmissibility of discrimination, and provided that "[t]he Troops of the Russian Federation, temporarily deployed on the territory of Georgia, including in Abkhazia, shall firmly observe neutrality". On 9 July 1993 the Security Council requested the Secretary-General to make the necessary preparations for a military observer mission once the ceasefire between the Government of Georgia and the Abkhaz authorities was implemented (Security Council resolution 849 (1993)). The ceasefire agreement was signed on 27 July 1993 with the mediation of the Deputy Foreign Minister of the Russian Federation in the role of facilitator and the joint commission was established. The parties considered it necessary to invite international peacekeeping forces in the conflict zones; "[t]his task may be shared, subject to consultation with the United Nations, by the Russian military contingent temporarily deployed in the zone". The United Nations Observer Mission in Georgia (UNOMIG) was established by Security Council resolution 858 (1993) on 24 August 1993. The Court reviews other relevant agreements and Security Council resolutions (including resolutions 876 (1993), 934 (1994), 901 (1994), 937 (1994) and 1036 (1996)) as well as the negotiations between the Georgian and Abkhaz sides, held in Geneva from 30 November to 1 December 1993, under the aegis of the United Nations, with the Russian Federation as facilitator and a representative of the CSCE—known as the "Geneva process". The Court recalls that this Geneva process was assisted by the Group of Friends of the Secretary-General (France, Germany, the Russian Federation, the United Kingdom and the United States). The Court recalls that it was only after the armed conflict of August 2008 that Georgia requested, on 1 September 2008, that the operation of the collective peacekeeping forces be discontinued.

4. Documents and statements from the period before CERD entered into force between the Parties on 2 July 1999
(paras. 50–64)

The Court reviews the documents and statements issued before 2 July 1999 and invoked by Georgia to demonstrate that in the period before it became bound by CERD it had a dispute with the Russian Federation about racial discrimination by the latter, especially Russian Federation forces, against ethnic Georgians. In that regard, the Court recalls that these earlier documents and statements may help to put into context those documents or statements which were issued or made after the entry into force of CERD between the Parties.

The Court concludes that none of the documents or statements provides any basis for a finding that there was a dispute about racial discrimination by July 1999. The reasons appear in the foregoing paragraphs in respect of each document or statement. They relate to the author of the statement or document, their intended or actual addressee, and their content. Several of the documents and statements emanated from the Georgian Parliament or Parliamentary Officers and were neither endorsed nor acted upon by the Executive. Finally, so far as the subject-matter of each document or statement is concerned, it complains of actions by the Abkhaz authorities, often referred to as "separatists", rather than by the Russian Federation; or the subject-matter of the complaints is the alleged unlawful use of force, or the status of Abkhazia, rather than racial discrimination; and, where there is a possibly relevant reference, usually to the impeding of return of refugees and IDPs, it is as an incidental element in a larger claim—about the status of Abkhazia, the withdrawal of the Russian Federation troops or the alleged unlawful use of force by them.

It follows from this general finding of the Court and the specific findings made with regard to each document and statement, that Georgia has not, in the Court's opinion, cited any document or statement made before it became party to CERD in July 1999 which provides support for its contention that "the dispute with Russia over ethnic cleansing is long-standing and legitimate and not of recent invention". The Court adds that even if this were the case, such dispute, though about racial discrimination, could not have been a dispute with respect to the interpretation or application of CERD, the only kind of dispute in respect of which the Court is given jurisdiction by Article 22 of that Convention.

5. Documents and statements from the period after CERD entered into force between the Parties and before August 2008
(paras. 65–105)

The Court finds it convenient first of all to consider as a group the reports made after 1999 by the two Parties to treaty monitoring committees. These reports relate to CERD, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

The Court observes that a State may claim that another State is in breach of its obligations under CERD without initiating that process. It also observes that in general the process under which States report on a regular basis to the monitoring committees operates between the reporting State and the committee in question; it is a process in which the State reports on the steps which it has taken to implement the treaty. The process is not designed to involve other States and their obligations. Taking account of those features and of the actual reports referred to in this case, the discussions of and the observations on them, the Court does not consider that in this particular case the reports to the committees are significant in determining the existence of a dispute.

Turning to the documents and statements in the case file from the period after CERD entered into force between the Parties and before August 2008, the Court refers, *inter alia*, to a resolution adopted by the Georgian Parliament in October 2001. This resolution begins with a reference to the suffering arising "from the tragic results of separatism, international terrorism and aggression". It alleged that since the deployment of Russian Federation peacekeepers under the auspices of the CIS, the policies of ethnic cleansing had not stopped. In this resolution, the Russian Federation now appeared as a party involved in the conflict.

The Court notes that, in assessing the October 2001 Parliamentary resolution, as with the other documents and statements invoked by the Parties, it must have regard, among other matters, to the distinct roles of the Russian Federation, in the CIS peacekeeping forces, as facilitator and as one of the Friends of the Secretary-General. In that context and given that the Georgian Parliamentary resolution of October 2001 had not been endorsed by the Georgian Government, the Court cannot give it any legal significance for the purposes of the present case.

The Court continues its analysis of the documents and statements from the period under review, among which Security Council resolution 1393 (2002), documents relating to the outcome of high-level meetings between representatives of the Parties, various exchanges between the Parties as well as a number of resolutions adopted by the Georgian Parliament and forwarded to the Secretary-General by the Georgian Permanent Representative, including a resolution dated 11 October 2005. With regard to this latter Parliamentary resolution, the Court notes that it was referred to in a letter of 27 October 2005 by the Permanent Representative of Georgia to the President of the Security Council. That letter did not contain any endorsement of the Parliamentary resolution. The Court finds that it is unable to see in this letter any claim against the Russian Federation by the Georgian Government of breaches of obligations under CERD.

The Court recalls Georgia's emphasis on the Parliamentary resolutions which were transmitted to the United Nations, and sees it as significant that on all those occasions when the Georgian Government transmitted Parliamentary resolutions to the Secretary-General to be circulated as official United Nations documents, that Government did not refer to those agenda items which relate to the subject-matter of CERD, such as racial discrimination, or, as the case may be, refugees and IDPs, or, indeed, human rights instruments more generally. Similarly the Court finds that statements about the conflict zones emanating from the Georgian Government and transmitted by the Georgian Permanent Representative to the Secretary-General and President of the Security Council in August and September 2006, in September and October 2007 and in March and April 2008 do not, except in one case, make any reference to the Russian Federation as being responsible for acts of racial discrimination.

The Court, on the basis of its review of the documents and statements issued by the Parties and others between 1999 and July 2008 concludes, for the reasons given in relation to each of them, that no legal dispute arose between Georgia and the

Russian Federation during that period with respect to the Russian Federation's compliance with its obligations under CERD.

6. August 2008
(paras. 106–114)

Turning to the events that unfolded in early August 2008, in particular the armed hostilities in South Ossetia that began during the night of 7 to 8 August 2009, the Court observes that, while the claims levelled against the Russian Federation by Georgia between 9 and 12 August 2008 (the day on which Georgia submitted its Application) were primarily claims about the unlawful use of force, they also expressly referred to ethnic cleansing by Russian forces.

The first statement cited by Georgia from this period is its Presidential Decree on the Declaration of a State of War and Full Scale Mobilization of 9 August 2008. The Court observes that this decree does not allege that the Russian Federation was in breach of its obligations relating to the elimination of racial discrimination. Its concern is with the allegedly unlawful use of armed force.

The Court then considers a press conference with foreign journalists held on 9 August 2008, during which President Saakashvili made a statement which began with allegations about "Russia . . . launch[ing] a full scale military invasion of Georgia". The President said that he also had to indicate the Russian troops had "committed the ethnic cleansing in all areas they control in South Ossetia" and that they were also "trying to set up the ethnic cleansing of ethnic Georgians from upper Abkhazia". On the following day, 10 August 2008, the Georgian representative, at a meeting of the Security Council called at Georgia's request, in his initial statement referred to "the process of exterminating the Georgian population", but the first explicit reference to racial discrimination came in the initial statement by the representative of the Russian Federation, when he referred to the high number of refugees fleeing to the Russian Federation from South Ossetia as a result of the "ethnic cleansing" being carried out by the Georgian leadership. The Georgian representative responded that "[w]e cannot [turn a blind eye] now because that is exactly Russia's intention: to erase Georgian statehood and to exterminate the Georgian people". The representative of the Russian Federation in the next statement in the debate countered that "the intention of the Russian Federation in this case is to ensure that the people of South Ossetia and Abkhazia not fear for their lives or for their identity". The Court observes that civilians in regions directly affected by ongoing military conflict will in many cases try to flee—in this case Georgians to other areas of Georgia and Ossetians to the Russian Federation.

On 11 August 2008 the Georgian Ministry of Foreign Affairs released a statement to the effect that:

> "According to the reliable information held by the Ministry of Foreign Affairs of Georgia, Russian servicemen and separatists carry out mass arrests of peaceful civilians of Georgian origin still remaining on the territory of the Tskhinvali region and subsequently concentrate them on the territory of the village of Kurta."

On that same day, 11 August, President Saakashvili in a CNN interview made further allegations of "ethnic cleansing" by Russian troops of the ethnic Georgian population of Abkhazia and South Ossetia.

On the following day, 12 August 2008, the Foreign Minister of the Russian Federation in a Joint Press Conference with the Minister for Foreign Affairs of Finland in his capacity as Chairman-in-Office of the OSCE, said the following:

> "A couple of days after [US Secretary of State] Rice had urgently asked me not to use such expressions, Mr. Saakashvili . . . claimed hysterically that the Russian side wanted to annex the whole of Georgia and, in general, he did not feel shy of using the term ethnic cleansings, although, true, it was Russia that he accused of carrying out those ethnic cleansings."

The Court observes that while the Georgian claims of 9 to 12 August 2008 were primarily claims about the allegedly unlawful use of force, they also expressly referred to alleged ethnic cleansing by Russian forces. These claims were made against the Russian Federation directly and not against one or other of the parties to the earlier conflicts, and were rejected by the Russian Federation. The Court concludes that the exchanges between the Georgian and Russian representatives in the Security Council on 10 August 2008, the claims made by the Georgian President on 9 and 11 August and the response on 12 August by the Russian Foreign Minister establish that by that day, the day on which Georgia submitted its Application, there was a dispute between Georgia and the Russian Federation about the latter's compliance with its obligations under CERD as invoked by Georgia in this case.

The first preliminary objection of the Russian Federation is accordingly dismissed.

III. Second preliminary objection—procedural conditions in Article 22 of CERD
(paras. 115–184)

1. Introduction
(paras. 115–121)

The Court next examines the second preliminary objection according to which the Russian Federation asserts that Georgia is precluded from having recourse to the Court as it has failed to satisfy two procedural preconditions contained in Article 22 of CERD, namely, negotiations and referral to procedures expressly provided for in the Convention. For its part, Georgia maintains that Article 22 does not establish any express obligation to negotiate nor does it establish any obligation to have recourse to the procedures provided for in CERD before the seisin of the Court.

2. Whether Article 22 of CERD establishes procedural conditions for the seisin of the Court
(paras. 122–147)

The Parties deploy a number of arguments in support of their respective interpretations of Article 22 of CERD, relating to: *(a)* the ordinary meaning of its terms in their context and in light of the object and purpose of the Convention, invoking, in support of their respective positions, the Court's jurispru-

dence dealing with compromissory clauses of a similar nature; and *(b)* the *travaux préparatoires* of CERD.

(a) Ordinary meaning of Article 22 of CERD (paras. 123–141)

The Court begins by recalling the positions of the Parties. The Court then states that before providing its interpretation of Article 22 of CERD, it wishes, as a preliminary matter, to make three observations.

First, the Court recalls that in paragraph 114 of its Order of 15 October 2008 it stated that "the phrase 'any dispute . . . which is not settled by negotiation . . . ' does not, in its plain meaning, suggest that formal negotiations in the framework of the Convention . . . constitute preconditions to be fulfilled before the seisin of the Court". However, the Court also observed that "Article 22 does suggest that some attempt should have been made by the claimant party to initiate, with the respondent party, discussions on issues that would fall under CERD".

The Court further recalls that, in the same Order, it also indicated that this provisional conclusion is without prejudice to the Court's definitive decision on the question of whether it has jurisdiction to deal with the merits of the case, which is to be addressed after consideration of the written and oral pleadings of both Parties.

Secondly, the Court is called upon to determine whether a State must resort to certain procedures before seising the Court. In this context, it notes that the terms "condition", "precondition", "prior condition", "condition precedent" are sometimes used as synonyms and sometimes as different from each other. There is in essence no difference between those expressions save for the fact that, when unqualified, the term "condition" may encompass, in addition to prior conditions, other conditions to be fulfilled concurrently with or subsequent to an event. To the extent that the procedural requirements of Article 22 may be conditions, they must be conditions precedent to the seisin of the Court even when the term is not qualified by a temporal element.

Thirdly, it is not unusual in compromissory clauses conferring jurisdiction on the Court and other international jurisdictions to refer to resort to negotiations. Such resort fulfils three distinct functions. In the first place, it gives notice to the respondent State that a dispute exists and delimits the scope of the dispute and its subject-matter. The Permanent Court of International Justice was aware of this when it stated in the *Mavrommatis* case that "before a dispute can be made the subject of an action in law, its subject-matter should have been clearly defined by means of diplomatic negotiations".

In the second place, it encourages the Parties to attempt to settle their dispute by mutual agreement, thus avoiding recourse to binding third-party adjudication.

In the third place, prior resort to negotiations or other methods of peaceful dispute settlement performs an important function in indicating the limit of consent given by States.

The Court then proceeds to the determination of the ordinary meaning of the terms used in Article 22 of CERD with a view to ascertaining whether this Article contains preconditions to be met before the seisin of the Court. Leaving aside the question of whether the two modes of peaceful resolution are alternative or cumulative, the Court notes that Article 22 of CERD qualifies the right to submit "a dispute" to the jurisdiction of the Court by the words "which is not settled" by the means of peaceful resolution specified therein. Those words must be given effect. By interpreting Article 22 of CERD to mean, as Georgia contends, that all that is needed is that, as a matter of fact, the dispute had not been resolved (through negotiations or through the procedures established by CERD), a key phrase of this provision would become devoid of any effect.

Moreover, it stands to reason that if, as a matter of fact, a dispute had been settled, it is no longer a dispute. Therefore, if the phrase "which is not settled" is to be interpreted as requiring only that the dispute referred to the Court must in fact exist, that phrase would have no usefulness. Similarly, the express choice of two modes of dispute settlement, namely, negotiations or resort to the special procedures under CERD, suggests an affirmative duty to resort to them prior to the seisin of the Court.

The Court also observes that, in its French version, the above-mentioned expression employs the future perfect tense ("[t]out différend . . . qui n'aura pas été réglé par voie de négociation ou au moyen des procédures expressément prévues par la convention"), whereas the simple present tense is used in the English version. The Court notes that the use of the future perfect tense further reinforces the idea that a previous action (an attempt to settle the dispute) must have taken place before another action (referral to the Court) can be pursued. The other three authentic texts of CERD, namely the Chinese, the Russian and the Spanish texts, do not contradict this interpretation.

The Court further recalls that, like its predecessor, the Permanent Court of International Justice, it has had to consider on several occasions whether the reference to negotiations in compromissory clauses establishes a precondition to the seisin of the Court. As a preliminary matter, the Court notes that though similar in character, compromissory clauses containing a reference to negotiation (and sometimes additional methods of dispute settlement) are not always uniform. Some contain a time-element for negotiations, the expiry of which would trigger a duty to arbitrate or to have recourse to the Court. Furthermore, the language used contains variations such as "is not settled by" or "cannot be settled by". Sometimes, especially in older compromissory clauses, the expression used is "which is not" or "cannot be adjusted by negotiation" or "by diplomacy".

The Court then considers its jurisprudence concerning compromissory clauses comparable to Article 22 of CERD. Both Parties rely on this jurisprudence as supportive of their respective interpretations of the ordinary meaning of Article 22. The Court observes that in each of these earlier cases, it has interpreted the reference to negotiations as constituting a precondition to seisin.

Accordingly, the Court concludes that in their ordinary meaning, the terms of Article 22 of CERD, namely "[a]ny dispute . . . which is not settled by negotiation or by the pro-

cedures expressly provided for in this Convention", establish preconditions to be fulfilled before the seisin of the Court.

(b) Travaux préparatoires
(paras. 142–147)

In light of this conclusion, the Court need not resort to supplementary means of interpretation such as the *travaux préparatoires* of CERD and the circumstances of its conclusion, to determine the meaning of Article 22. However, the Court notes that both Parties have made extensive arguments relating to the *travaux préparatoires*, citing them in support of their respective interpretations of the phrase "a dispute which is not settled . . .". Given this and the further fact that in other cases, the Court had resorted to the *travaux préparatoires* in order to confirm its reading of the relevant texts, the Court considers that in this case a presentation of the Parties' positions and an examination of the *travaux préparatoires* is warranted.

After reviewing the Parties' arguments on the question, the Court notes that at the time when CERD was being elaborated, the idea of submitting to the compulsory settlement of disputes by the Court was not readily acceptable to a number of States. Whilst States could make reservations to the compulsory dispute settlement provisions of the Convention, it is reasonable to assume that additional limitations to resort to judicial settlement in the form of prior negotiations and other settlement procedures without fixed time-limits were provided for with a view to facilitating wider acceptance of CERD by States.

Beyond this general observation relating to the circumstances in which CERD was elaborated, the Court notes that the usefulness of the *travaux préparatoires* in shedding light on the meaning of Article 22 is limited by the fact that there was very little discussion of the expression "a dispute which is not settled". A notable exception and one to which some significance must be attached is the statement by the Ghanaian delegate, one of the sponsors of the "Three-Power" amendment on the basis of which the final wording of Article 22 of CERD was agreed. He stated: "[T]he Three-Power amendment was self-explanatory. Provision has been made in the draft Convention for machinery *which should be used in the settlement of disputes before recourse was had to the International Court of Justice*." The Court adds that it should be borne in mind that this machinery encompassed negotiation which was already mentioned expressly in the text proposed by the Officers of the Third Committee.

The Court notes that whilst no firm inferences can be drawn from the drafting history of CERD as to whether negotiations or the procedures expressly provided for in the Convention were meant as preconditions for recourse to the Court, it is possible nevertheless to conclude that the *travaux préparatoires* do not suggest a different conclusion from that at which the Court has already arrived through the main method of ordinary meaning interpretation.

3. Whether the conditions for the seisin of the Court under Article 22 of CERD have been fulfilled
(paras. 148–184)

Having thus interpreted Article 22 of CERD to the effect that it imposes preconditions which must be satisfied before resorting to the Court, the next question is whether these preconditions were complied with. First of all, the Court notes that Georgia did not claim that, prior to seising the Court, it used or attempted to use the procedures expressly provided for in CERD. The Court therefore limits its examination to the question of whether the precondition of negotiations was fulfilled.

(a) The concept of negotiations
(paras. 150–162)

After reviewing the Parties' arguments on the concept of negotiations, the Court first addresses a series of issues involving the nature of the precondition of negotiations, namely: assessing what constitutes negotiations; considering their adequate form and substance; and determining to what extent they should be pursued before it can be said that the precondition has been met.

In determining what constitutes negotiations, the Court observes that negotiations are distinct from mere protests or disputations. Negotiations entail more than the plain opposition of legal views or interests between two parties, or the existence of a series of accusations and rebuttals, or even the exchange of claims and directly opposed counter-claims. As such, the concept of "negotiations" differs from the concept of "dispute", and requires—at the very least—a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute.

The Court further notes that, clearly, evidence of such an attempt to negotiate—or of the conduct of negotiations—does not require the reaching of an actual agreement between the disputing parties. The Court adds that, manifestly, in the absence of evidence of a genuine attempt to negotiate, the precondition of negotiation is not met. However, where negotiations are attempted or have commenced, the jurisprudence of this Court and of the Permanent Court of International Justice clearly reveals that the precondition of negotiation is met only when there has been a failure of negotiations, or when negotiations have become futile or deadlocked.

Furthermore, ascertainment of whether negotiations, as distinct from mere protests or disputations, have taken place, and whether they have failed or become futile or deadlocked, are essentially questions of fact "for consideration in each case". Notwithstanding this observation, the jurisprudence of the Court has outlined general criteria against which to ascertain whether negotiations have taken place. In this regard, the Court has come to accept less formalism in what can be considered negotiations and has recognized "diplomacy by conference or parliamentary diplomacy".

Concerning the substance of negotiations, the Court recalls that it has accepted that the absence of an express reference to the treaty in question does not bar the invocation of the compromissory clause to establish jurisdiction. However, to meet the precondition of negotiation in the compromissory clause

of a treaty, these negotiations must relate to the subject-matter of the treaty containing the compromissory clause. In other words, 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.

In the present case, the Court is therefore assessing whether Georgia genuinely attempted to engage in negotiations with the Russian Federation, with a view to resolving their dispute concerning the Russian Federation's compliance with its substantive obligations under CERD. Should it find that Georgia genuinely attempted to engage in such negotiations with the Russian Federation, the Court would examine whether Georgia pursued these negotiations as far as possible with a view to settling the dispute. To make this determination, the Court needs to ascertain whether the negotiations failed, became futile, or reached a deadlock before Georgia submitted its claim to the Court.

(b) Whether the Parties have held negotiations on matters concerning the interpretation or application of CERD
(paras. 163–184)

Against the background of these criteria, the Court then turns to the evidence submitted to it by the Parties to determine whether this evidence demonstrates, as stated by Georgia, that at the time it filed its Application on 12 August 2008, there had been negotiations between itself and the Russian Federation concerning the subject-matter of their legal dispute under CERD, and that these negotiations had been unsuccessful.

After considering the Parties' arguments on the question, the Court recalls its conclusions regarding the Russian Federation's first preliminary objection, as it is directly connected to the Russian Federation's second preliminary objection. After examination of the evidence submitted by the Parties, the Court concluded that a dispute between Georgia and the Russian Federation falling within the ambit of CERD arose only in the period immediately before the filing of the Application. Specifically, the evidence put forth by Georgia which pre-dates the beginning of armed hostilities in South Ossetia during the night of 7 to 8 August 2008 failed to demonstrate the existence of a legal dispute between Georgia and the Russian Federation on matters falling under CERD.

The Court finds that it stands to reason that it was only possible for the Parties to be negotiating the matters in dispute, namely, the Russian Federation's compliance with its obligations relating to the elimination of racial discrimination, between 9 August 2008 and the date of the filing of the Application, on 12 August 2008, i.e., the period during which the Court found that a dispute capable of falling under CERD had arisen between the Parties.

The Court's task at this point is therefore twofold: first, to determine whether the facts in the record show that, during this circumscribed period, Georgia and the Russian Federation engaged in negotiations with respect to the matters in dispute concerning the interpretation or application of CERD; and secondly, if the Parties did engage in such negotiations, to determine whether those negotiations failed, therefore enabling the Court to be seised of the dispute under Article 22.

Before the Court considers the evidence bearing on the answers to those two questions, it observes that negotiations did take place between Georgia and the Russian Federation before the start of the relevant dispute. These negotiations involved several matters of importance to the relationship between Georgia and the Russian Federation, namely, the status of South Ossetia and Abkhazia, the territorial integrity of Georgia, the threat or use of force, the alleged breaches of international humanitarian law and of human rights law by Abkhaz or South Ossetian authorities and the role of the Russian Federation's peacekeepers. However, in the absence of a dispute relating to matters falling under CERD prior to 9 August 2008, these negotiations cannot be said to have covered such matters, and are thus of no relevance to the Court's examination of the Russian Federation's second preliminary objection.

The Court examines the evidence presented to it by the Parties. In particular, the Court takes note of certain significant elements of the content of the transcript of a press conference held in Moscow on 12 August 2008—the date of Georgia's filing of its Application—by the Russian Federation's Minister for Foreign Affairs and the Minister for Foreign Affairs of Finland and Chairman-in-Office of the OSCE. First, the Court observes that the Russian Federation places the blame for the outbreak of armed activities on the present Georgian leadership. Secondly, the Russian Federation asserts that it has "no trust in Mikhail Nikolayevich Saakashvili", and that "mov[ing] to mutually respectful relations . . . is hardly possible with the present Georgian leadership". Thirdly, the Russian Federation announces that its "approaches toward the negotiation process will undergo substantial change". Fourthly, the Russian Federation proposes its view of the essential next steps in the restoration of peace, including the cessation of armed activities, and the "signing of a legally binding agreement on the non-use of force" between Georgia, Abkhazia and South Ossetia. Fifthly, the Russian Federation has received confirmation from the Chairman-in-Office of the OSCE that Georgia is ready for the conclusion of such a pledge on the non-use of force. Additionally, the Russian Federation's Foreign Minister declared that "As a matter of fact, it will be no exaggeration to say that the talk is about ethnic cleansings, genocide and war crimes [committed by Georgia]."

The Court makes two observations on the basis of the Russian Federation's Foreign Minister's remarks. First, with regard to the subject-matter of CERD, the Court notes that the topic of ethnic cleansing had not become the subject of genuine negotiations or attempts at negotiation between the Parties. The Court is of the view that although the claims and counter-claims concerning ethnic cleansing may evidence the existence of a dispute as to the interpretation and application of CERD, they do not constitute attempts at negotiations by either Party.

Secondly, the Court observes that the issue of negotiations between Georgia and the Russian Federation is complex. On the one hand, the Russian Federation's Foreign Minister manifested his discontent with regard to President Saakashvili personally, and stated that he "do[es] not think that Russia will have the mindset not only to negotiate, but even to speak with Mr. Saakashvili". On the other hand, the Foreign Minister did

not make his desire to see President Saakashvili "repent" for his "crime against our citizens" a "condition for ending this stage of the military operation", and for resuming talks on the non-use of force. He further stated that "As to Georgia, we have always treated and continue to treat the Georgian people with deep respect."

Notwithstanding the tone of certain remarks made by the Foreign Minister of the Russian Federation about President Saakashvili, the Court considers that overall the Russian Federation did not dismiss the possibility of future negotiations on the armed activities in which it was engaged at the time, and on the restoration of peace between Georgia, Abkhazia and South Ossetia. However, the Court considers that the subject-matter of such negotiations was not the compliance by the Russian Federation with its obligations relating to the elimination of racial discrimination. Therefore, regardless of the Russian Federation's ambiguous and perhaps conflicting statements on the subject of negotiations with Georgia as a whole, and President Saakashvili personally, these negotiations did not pertain to CERD-related matters. As such, whether the Russian Federation wanted to end or to continue negotiations with Georgia on the matter of the armed conflict is of no relevance for the Court in the present case. Consequently, remarks by the President and by the Foreign Minister of the Russian Federation regarding the prospects of talks with the Georgian President did not terminate the possibility of CERD-related negotiations, as those were never genuinely or specifically attempted.

In sum, the Court is unable to consider these statements—whether in the Georgian presidential press briefing or at the Security Council meeting—as genuine attempts by Georgia to negotiate matters falling under CERD. As outlined in detail with regard to the Russian Federation's first preliminary objection, the Court considers that these accusations and replies by both Parties on the issues of "extermination" and "ethnic cleansing" attest to the existence of a dispute between them on a subject-matter capable of falling under CERD. However, they fail to demonstrate an attempt at negotiating these matters.

The Court is thus also unable to agree with Georgia's submission when it claims that "Russia's refusal to negotiate with Georgia in the midst of its ethnic cleansing campaign, and two days prior to the filing of the Application is sufficient to vest the Court with jurisdiction under Article 22". The Court concludes that the facts in the record show that, between 9 August and 12 August 2008, Georgia did not attempt to negotiate CERD-related matters with the Russian Federation, and that, consequently, Georgia and the Russian Federation did not engage in negotiations with respect to the latter's compliance with its substantive obligations under CERD.

The Court has already observed the fact that Georgia did not claim that, prior to the seisin of the Court, it used or attempted to use the other mode of dispute resolution contained at Article 22, namely the procedures expressly provided for in CERD. Considering the Court's conclusion, at paragraph 141, that under Article 22 of CERD, negotiations and the procedures expressly provided for in CERD constitute preconditions to the exercise of its jurisdiction, and considering the factual finding that neither of these two modes of dispute settlement was attempted by Georgia, the Court does not need to examine whether the two preconditions are cumulative or alternative.

The Court accordingly concludes that neither requirement contained in Article 22 has been satisfied. Article 22 of CERD thus cannot serve to found the Court's jurisdiction in the present case. The second preliminary objection of the Russian Federation is therefore upheld.

IV. Third and fourth preliminary objections
(para. 185)

Having upheld the second preliminary objection of the Russian Federation, the Court finds that it is required neither to consider nor to rule on the other objections to its jurisdiction raised by the Respondent and that the case cannot proceed to the merits phase.

Lapse of the Court's Order of 15 October 2008
(para. 186)

The Court in its Order of 15 October 2008 indicated certain provisional measures. This Order ceases to be operative upon the delivery of this Judgment. The Parties are under a duty to comply with their obligations under CERD, of which they were reminded in that Order.

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Joint dissenting opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge *ad hoc* Gaja

President Owada, Judges Simma, Abraham and Donoghue and Judge *ad hoc* Gaja disagree with the Court's decision to uphold the Second Preliminary Objection of the Russian Federation and have submitted a joint dissenting opinion. The Court concludes that it lacks jurisdiction under Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD") because, in the Court's view, Georgia was required, but failed to, enter into negotiations with Russia with respect to its claims under the CERD prior to the filing of its Application. The authors of the joint dissenting opinion disagree.

The joint dissenters question the Judgment's conclusion that Article 22 of the CERD sets forth a requirement of prior negotiations and maintain that the Judgment fails to consider arguments that could lead to a different interpretation of that clause. They also consider that even if Article 22 establishes preconditions to the seisin of the Court, those preconditions—prior negotiations or recourse to the procedures set forth in the CERD—must be read as alternative, rather than cumulative, requirements.

The authors of the joint dissenting opinion also take issue with the application of the requirement of prior negotiations that the Judgment applies under Article 22, which they consider to be formalistic and at odds with the Court's recent jurisprudence. They point out that, in the Judgment, the Court concludes for the first time that it lacks jurisdiction on the sole basis that the Applicant has failed to satisfy a prior negotia-

tion requirement—despite the fact that when Georgia filed its Application, any attempt by Georgia to resolve the dispute through negotiations had no chance of success.

Does Article 22 of the CERD set forth procedural "preconditions" that must be satisfied prior to seisin of the Court?

The Judgment considers that the "ordinary meaning" of Article 22 establishes preconditions that must be fulfilled before the seisin of the Court. The Court concludes that its jurisprudence supports this interpretation and that the *travaux préparatoires* "do not suggest a different conclusion". The dissenting judges believe that this interpretation is subject to serious question and that, in certain regards, it departs from the Court's most recent jurisprudence.

The joint dissenting opinion notes that although the Judgment states that the Court has consulted the *travaux préparatoires* in order to "confirm" its interpretation of the text, in fact the Court only goes so far as to conclude that the *travaux préparatoires* "do not suggest a different conclusion". In addition, the joint dissenting opinion is critical of the Judgment's approach to the question of the "ordinary meaning" of Article 22, noting in particular the Court's sole reliance on its application of the principle of effectiveness as a means of interpreting the text.

The authors of the joint dissenting opinion then set forth several factors that cast doubt on the Judgment's conclusion that Article 22 imposes a precondition of negotiation. First, the Judgment does not grapple with the literal meaning of the text, which, on its face, neither requires nor suggests an attempt at settlement prior to the seisin of the Court. Second, the authors of the joint dissenting opinion point out that there is no general requirement that a State pursue diplomatic negotiations prior to seising the Court and that, as a consequence, a compromissory clause departing from that general rule should be formulated in a sufficiently clear manner. They further explain that, although at the time of the drafting of the CERD other formulations existed in treaties in force and were considered by the CERD's drafters, including compromissory clauses that set forth express preconditions to the Court's jurisdiction, the drafters of the CERD chose the formulation least likely to be interpreted literally as requiring prior attempts to settle the dispute.

The authors of the joint dissenting opinion are also critical of the Judgment's treatment of the Court's prior jurisprudence. After citing two cases in which the Court previously interpreted compromissory clauses with wording similar to Article 22 of the CERD, the Judgment states that "in each of the above-mentioned cases . . . the Court has interpreted the reference to negotiations as imposing a precondition to the seisin". According to the authors of the joint dissenting opinion, this leaves the reader with the incorrect impression that the Court's prior jurisprudence on the issue is clear and consistent, when, in fact, it has not been.

In addition, while agreeing that the Court is not bound by the finding of prima facie jurisdiction in its Order of 15 October 2008 on provisional measures in this case, according to which Article 22 "does not, in its plain meaning, suggest that formal negotiations . . . or recourse to the [CERD Committee] procedure . . . constitute preconditions to be fulfilled before the seisin of the Court", the dissenting judges note that this 2008 finding further demonstrates that there is no well-settled practice of treating clauses referring to negotiations as imposing a precondition.

In sum, the authors of the joint dissenting opinion emphasize that all of the factors leading to the Judgment's conclusion that Article 22 imposes preconditions are subject to serious flaws: neither the literal analysis of the text, which is ambiguous, nor the Court's prior jurisprudence, which has fluctuated, nor an examination of the *travaux préparatoires*, which are inconclusive, necessarily leads to the position adopted by the Court.

Moreover, the authors of the joint dissenting opinion reject the Judgment's adoption of a strict requirement that any preconditions must be fulfilled "before the seisin of the Court", as opposed to at any point up until the Court decides on its jurisdiction. The joint dissenters view this approach as out of step with the Court's recent decision in *Croatia* v. *Serbia* (in 2008), which allowed a condition not met when the proceedings were instituted to be fulfilled after that date, but before the Court ruled on its jurisdiction. The dissenters criticize the Judgment for discarding its most recent jurisprudence—which would allow for a more flexible approach—without providing the least justification.

Are the two means of settlement set forth in Article 22 alternative or cumulative?

Because the authors of the joint dissenting opinion also conclude (as summarized below) that Georgia has satisfied any precondition of negotiation, they also evaluate whether the two means of settlement referred to in Article 22—negotiations or the use of the CERD Committee procedures—would be alternative or cumulative preconditions. For the authors of the joint dissenting opinion, the decisive argument is drawn from logic: the text of Article 22 cannot impose on a State cumulative procedures that serve no purpose other than delaying access to the Court. Thus, pointing out that direct negotiations and the CERD Committee procedures are two different ways to allow the parties to a dispute to state their views and attempt to come to an agreement outside of the Court, the authors of the joint dissenting opinion conclude that the conditions in Article 22 cannot have been intended to operate as cumulative requirements.

What would be the requirements of the precondition of negotiation?

Turning next to the substance of the requirement that the Parties engage in negotiations prior to seising the Court, the authors of the joint dissenting opinion conclude that the Judgment has applied the requirement in an overly formalistic and unrealistic way. The dissenting judges take the view that there is no—and there can be no—general criterion for determining at what point a State will be regarded as having fulfilled an obligation to negotiate. Instead, in their view, the Court must make that assessment on a case-by-case basis and should approach the issue not in formal or procedural terms,

but as a matter of substance. The dissenting judges note that the purpose of negotiations is not to erect unnecessary procedural barriers that are likely to delay or impede the applicant's access to international justice, but to allow the Court to ensure, before turning to the merits, that a sufficient effort was made to settle the dispute by the requisite non-judicial means. If the Court finds that there is no reasonable prospect that the dispute can be settled by such means, the Court should accept its jurisdiction. As the joint dissenting opinion points out, this has been the Court's approach to the question of negotiations in its past cases.

Was there a sufficient effort to resolve the dispute by negotiations?

Finally, assuming that Article 22 does impose a precondition of negotiation, the authors of the joint dissenting opinion address the question whether Georgia has satisfied such a precondition in this case. They answer in the affirmative and contend that the Judgment finds otherwise by adopting an overly formalistic and unrealistic approach to a requirement of negotiations. They criticize the fact that the Judgment considers only the period of 9–12 August 2008, which is a consequence of the Judgment's conclusion that there was no dispute before that date.

In light of the circumstances of this case, the dissenting judges find completely unrealistic the Judgment's conclusion that Georgia has not exhausted the possibilities of a negotiated settlement with Russia. In the dissenters' view, no one could seriously believe that, as of the date of the filing of the Application, there remained a reasonable prospect of settling the dispute that Georgia submitted to the Court. The authors of the joint dissenting opinion discuss various documents and statements demonstrating that, over the years, Georgia reproached Russia for being responsible, by action or omission, for ethnic cleansing committed, according to Georgia, against ethnic Georgians in Abkhazia and South Ossetia. The authors of the joint dissenting opinion take the view that one cannot expect the Applicant to make a formal offer to negotiate under such circumstances; rather, it is sufficient that Georgia has clearly made known the existence and nature of its claims and that Russia has made known unequivocally that it categorically rejects the complaints as formulated (including, for that matter, that a dispute even exists between it and Georgia). The authors of the joint dissenting opinion conclude that on the date of the filing of the Application, it was clearly established that there was no reasonable prospect of a negotiated settlement and, therefore, that any condition imposed by Article 22 had been satisfied.

For these reasons, the authors of the joint dissenting opinion conclude that the Court should have rejected the Second Preliminary Objection of the Russian Federation and found that it has jurisdiction to proceed to the merits in this case.

Separate opinion of President Owada

In a separate opinion, President Owada explains that although he concurs with the Judgment's conclusion to reject Russia's First Preliminary Objection, he disagrees with certain aspects of the Judgment's treatment of the question whether there is a "dispute" between Georgia and Russia relating to the interpretation or application of the Convention on the Elimination of All Forms of Racial Discrimination (CERD). Specifically, President Owada disagrees with the Judgment's introduction of a higher threshold of the existence of *positive opposition* by the opposing party, going beyond the established jurisprudence of the Court on the existence of a dispute. He also takes issue with the Judgment's treatment of the evidence and, in particular, the Judgment's suggestion that the Applicant need to have given the Respondent prior notice of its claims. The President suggests that the Court could not have come to its stated conclusion on jurisdiction without going into the merits of the Parties' contentions and that, if that were the case, the Court should have declared that Russia's First Preliminary Objection does not possess an exclusively preliminary character under Article 79 of the Rules of Court.

President Owada begins by noting that, at the preliminary jurisdiction phase of the proceedings, the Court does not have to, and indeed cannot, pass judgment on whether Georgia's claims against Russia on the merits were well-founded. The Court need only to determine whether a dispute existed between the Parties; whether that dispute relates to the interpretation or application of the CERD; and whether that dispute existed at the time Georgia filed its Application.

On the issue of whether a dispute existed between the Parties, the President considers that the Judgment applies a stringent requirement unsupported in the Court's jurisprudence as established by the *Mavrommatis* Judgment of the Permanent Court of International Justice and by the *South West Africa* cases of the International Court of Justice.

Next, President Owada takes issue with several aspects of the Judgment's approach to the question whether a dispute existed between the Parties *relating to the interpretation or application of the CERD*. In his view the Judgment, which concludes that a dispute under the CERD existed between the Parties only as from 9 August 2008, is not correct in light of the evidence. President Owada notes that, while it is not necessary to pinpoint a precise date on which the dispute emerged, the Judgment's conclusion that a dispute under the CERD did not emerge until 9 August 2008 is too restrictive and has significant ramifications for the Judgment's treatment of the evidence relating to the Second Preliminary Objection. The President points out that Georgia time and again made abundantly clear to Russia that its concerns related to "ethnic cleansing" and the "return of refugees"—issues clearly falling within the subject-matter of the CERD.

President Owada also criticizes the methodology employed by the Judgment in its evaluation of the evidence in the case. He observes that the Judgment dissects each document in evidence "on a piecemeal basis" in an attempt to determine whether each piece of evidence—in itself—contains a claim by Georgia under CERD and a positive act of opposition to that claim by Russia.

Lastly, the President notes that the contention of Georgia is that Russia is responsible for acts or omissions that would amount to violations of obligations under the CERD, whereas Russia has categorically rejected these claims, on the ground that the acts or omissions complained of are primarily attrib-

utable to the separatist authorities in Abkhazia and South Ossetia and have nothing to do with Russia. In the President's view, "these two opposing perceptions" of the dispute reflect a difference between the Parties as to the essential nature of the dispute. Without going into a substantive examination of the merits of these opposing contentions, it could be said that this amounts to a "conflict of legal views" and a "disagreement on a point of law" relating to the interpretation or application of the CERD. The President reiterates that the Court cannot and should not, at this preliminary stage of jurisdiction, evaluate the arguments of the Parties relating to the merits without hearing the full exposition of the Parties' positions. If the Court were of the view that it could not decide the issue of jurisdiction without examining some of these aspects relating to the merits of the case, it should have declared, pursuant to Article 79, paragraph 9, of the Rules of Court, that Russia's First Preliminary Objection "does not possess, in the circumstances of the case, an exclusively preliminary character", thus joining in effect this objection to its consideration of the case on the merits.

Declaration of Vice-President Tomka

The Vice-President has voted in favour of the majority's overall conclusion that the Court lacks jurisdiction over Georgia's Application. He also agrees with the majority's conclusions that neither precondition of Article 22 has been met and that no legal dispute arose between Georgia and the Russian Federation in the period between 1999 and July 2008.

However, the Vice-President does not share the majority's view on the evidence it finds in support of the existence of a dispute arising in August 2008. The majority identifies statements made by Georgia's President and the Russian Federation's Foreign Minister in separate press conferences and statements made by representatives of both States during an emotionally-charged Security Council meeting. In relying on these statements, the majority has satisfied itself with a rather formalistic juxtaposition of the words used by the representatives of the Parties during the short period of open military hostilities between the two countries. In this context, references to "ethnic cleansing" should be considered merely a feature of war-time rhetoric. Georgia presented no claim to the Russian Federation with regard to its obligations under CERD, and neither held nor attempted to hold negotiations or consultations. This would have assisted in properly articulating the dispute. Nonetheless, in finding a dispute to have arisen in August 2008, the Court has lowered the standard in the determination of the existence of a dispute.

Separate opinion of Judge Koroma

In his separate opinion, Judge Koroma states that he has voted in favour of the second dispositive paragraph of the Judgment in view of the fact that the Court must ensure that the terms and conditions set out in the compromissory clause of the treaty invoked have been complied with before it can exercise jurisdiction. Judge Koroma adds that there must also exist a link between a dispute and the treaty involved. Given the importance of the Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), however, Judge Koroma considered it necessary to explain his vote.

Judge Koroma notes CERD's continuing importance in the fight against racial discrimination and racial intolerance. Accordingly, he states that any alleged breach by a State party of its legal obligations under CERD deserves careful and objective scrutiny by the Court. Judge Koroma emphasizes, however, that the Court cannot undertake any such investigation if the Application seising the Court does not meet the requirements of CERD's jurisdictional clause, namely, that the dispute must be "with respect to the interpretation or application" of CERD.

Judge Koroma notes that, in considering Russia's second preliminary objection, the Court applied the canons of interpretation embodied in Article 31 of the Vienna Convention on the Law of Treaties. He states that, under Article 31, the ordinary meaning of the treaty is the starting-point. He adds that if the ordinary meaning is unclear or would lead to an absurd result, the object and purpose of the treaty can then be considered to determine precisely what was intended. Thus, Judge Koroma emphasizes that the object and purpose of a treaty cannot take precedence over its plain meaning.

Judge Koroma asserts that CERD's compromissory clause establishes clear conditions or limitations on the right of a State party to refer a dispute with another State to the Court. First, in his view, there must be a "dispute" between the parties, meaning that, at the very least, one party must have expressed a position and the other party must have disagreed with that position or expressed a different position. Second, a link must exist between the substantive provisions of the treaty invoked and the dispute. In this case, Judge Koroma emphasizes that the dispute must be a *bona fide* dispute between the parties about the *interpretation* or *application* of CERD. He points out that this limitation is vital, because without it, States could use the compromissory clause as a vehicle for forcing an unrelated dispute with another State before the Court. Other types of disputes, in his view, including those relating to territorial integrity, armed conflict, etc., do not fall under CERD's compromissory clause.

Judge Koroma adds that CERD's compromissory clause imposes the additional requirement that parties attempt to resolve the dispute by negotiation or by procedures set out in the Convention. He emphasizes that the plain meaning of the compromissory clause does not permit any other conclusion. Judge Koroma states that, according to the principle of effectiveness, a treaty or statute must be read in a manner that gives *effect* to its provisions in accordance with the intention of the parties. He believes that, by inserting the phrase "which is not settled by negotiation or by the procedures expressly provided for in this Convention" into the compromissory clause, the drafters clearly intended to place a precondition on the power of State parties to refer disputes to the Court.

Judge Koroma finds that the object and purpose of the compromissory clause confirm and support the clause's ordinary meaning. He notes that during the negotiation of the Convention, Ghana, Mauritania and the Philippines introduced an amendment adding the phrase "or by the procedures expressly provided for in this Convention" to the

language of the compromissory clause. Judge Koroma notes that, in explaining their amendment, the representatives of those States made clear that they believed the amendment required parties to use the dispute resolution mechanism in the Convention before resorting to the Court. He adds that the amendment was adopted unanimously. He accordingly is of the opinion that the drafters of the compromissory clause viewed its object and purpose to be to establish preconditions that must be fulfilled before the Court could be seised by a party to CERD. Judge Koroma affirms that the Judgment has correctly reflected this interpretation.

Judge Koroma concludes by stating that his vote in favour of the second paragraph of the *dispositif* should be seen as in conformity with the meaning of the jurisdictional clause invoked. He emphasizes that his vote in no way diminishes the importance of CERD as an important legal instrument in combating racial discrimination and racial hatred.

Separate opinion of Judge Simma

Judge Simma partly concurs in the Judgment's rejection of the first preliminary objection of the Russian Federation. However, he disagrees with the Judgment's conclusion that the dispute between Georgia and the Russian Federation only arose between 9 and 12 August 2008. Based on this determination of the relevant time span, and with Russia's second preliminary objection in mind, the Court wholly ignores all pre-August 2008 documentary evidence, limits its analysis to only four pieces of such evidence stemming from the period 9 to 12 August 2008, thus, manages to find no traces of negotiations between the Parties—and arrives at the result that the preconditions for its jurisdiction in the case according to Article 22 of CERD are not fulfilled. This is a matter on which Judge Simma has expressed his disagreement by participating in the joint dissenting opinion, together with his colleagues Owada, Abraham, Donoghue and Gaja. The present separate opinion is devoted to the problematic ways of the Court with Russia's First Preliminary Objection, which Judge Simma then sets out to expose in detail.

Judge Simma finds that the relevant dispute had been under way long before the armed hostilities between Georgia and the Russian Federation broke out in August 2008. In his view, the dispute commenced as early as 1992 on subject-matters that already then could have fallen under CERD, and continued after 1999 when both Georgia and the Russian Federation became parties to the Convention. Had the bulk of pre-August 2008 documentary evidence on the existence of a dispute and Georgian attempts at settling it been admitted, the Court could not have accepted the Russian Federation's Second Preliminary Objection.

Judge Simma then analyses the Judgment's method of dismissing all pre-August 2008 documentary evidence for lack of "legal significance". He identifies five alleged faults or defects that the Judgment adduces and invokes, singly or collectively, for rejecting each piece of documentary evidence dated before August 2008. He shows that the Judgment dismissed evidence on the basis of alleged defects relating to formal designation, authorship, inaction, attribution, and matters of notice. According to Judge Simma, in this process the Judgment failed to accept possible differences in the degree of probative value—whether best, primary, direct, secondary, indirect, corroborative, or supplementary—that have long been acknowledged in the settled jurisprudence of the Court on the determination of the weight of evidence.

Judge Simma then demonstrates the incompatibility of each of these alleged defects with the rules of international law and the Court's settled practices on the assessment of evidence. First, he shows that alleged formal defects—such as missing literal designations in the documentary evidence of phrases such as "racial discrimination", or "ethnic cleansing", explicit allusions to the Russian Federation's specific CERD obligations, or the circulation of documents in the United Nations under agenda item headings other than "racial discrimination"—do not render documentary evidence legally insignificant. For purposes of determining the existence of a dispute, it is sufficient that the documentary evidence refer to CERD-related subject-matter (such as alleged support, facilitation, or toleration by Russian peacekeepers of ethnic cleansing being committed against Georgian civilians within their areas of responsibility; alleged Russian conduct in relation to the right of return of refugees and IDPs to Georgian territory; and the alleged failure of Russian peacekeepers to prevent human rights violations being committed against Georgian civilians).

Secondly, Judge Simma critically assesses the Judgment's invocation of alleged authorship defects—such as the lack of authorship, endorsement, or approval by the Georgian Executive of specific documentary evidence, in particular, resolutions of the Parliament of Georgia—to justify discarding parliamentary material. In its earlier case law the Court never hesitated to admit national legislation as evidence. In any event, the resolutions, decrees, and statements of the Parliament of Georgia were officially transmitted to the Security Council or the General Assembly by the Permanent Representative of Georgia to the United Nations—an official who cannot be assumed to have acted *ultra vires* or without the knowledge of the Georgian Executive.

Thirdly, Judge Simma scrutinizes the Judgment's claim of alleged defects of inaction, that is, instances where the Judgment rejects documentary evidence such as parliamentary resolutions, because their contents do not indicate that the Georgian Executive acted upon or followed up complaints expressed in these resolutions. This mode of rejection of documentary evidence appears particularly improper at the jurisdictional stage because in so doing the Court ends up reaching directly into the merits of the dispute. More importantly, the actual texts of the documentary evidence and the circumstances surrounding it do not bear out the Judgment's speculations that the Georgian Executive could have called for the outright withdrawal of Russian troops from Georgian territory.

Fourthly, Judge Simma refutes the Judgment's findings of alleged defects due to the failure of documentary evidence to categorically attribute violations to the Russian Federation. In Part B of his opinion, he shows that the documentary evidence clearly establishes the attributability of the conduct of Russian peacekeepers to the Russian Federation. Lastly, Judge Simma

rejects the Judgment's dismissal of documentary evidence due to alleged defects relating to matters of notice, such as lack of proof that Russia received, could have received, or had the opportunity to receive or be informed of the allegations contained in certain documentary evidence. Judge Simma notes that the Court has hitherto never imposed a requirement of actual notice of complaints by an applicant State against a respondent State in order to determine the existence of a dispute.

According to Judge Simma, the Court's amorphous usage of the concept of "legal significance" in the present Judgment represents a distinct departure from the Court's settled practice of admitting differentiations in the assessment of the probative weight of evidence, demonstrated in *Armed Activities on the Territory of the Congo*, the *Genocide* case, *Corfu Channel*, *Frontier Dispute*, *Nicaragua*, and *Tehran Hostages*. Judge Simma fears that the Court could in future cases deny probative weight to evidence for similarly flawed reasons of formality, authorship, inaction, attribution, and notice. He cautions that this problematic methodology could inhibit States in their selection and control of the presentation of evidence to the Court. More importantly, Judge Simma finds that in the present case the Court did not discharge its judicial function in a thorough manner. Rather, the present Judgment engages in unwarranted factual inferences instead of making full use of its fact-finding powers under Articles 49 to 51 of the Statute in order to avoid having to resort to such inferences in the first place.

Part B of Judge Simma's opinion then proceeds to set out the impressive amount of documentary evidence in the record that establishes the existence of a dispute well before August 2008. In categorizing these texts, Judge Simma distinguishes between bilateral exchanges between Georgia and the Russian Federation; Georgian statements made before international organizations of which the Russian Federation is a member; and public statements of Georgia on other occasions.

Finally, Judge Simma emphasizes that his separate opinion does not intend to contradict in any way the joint dissenting opinion that he co-authored. The intention he pursues in his separate opinion is to give an account of the facts which not only allows a more informed conclusion on Russia's First Preliminary Objection, but also extends into the realm of the Second Preliminary Objection by broadening the factual basis for the joint dissent. Judge Simma concludes that the way in which the present Judgment handled the issues of relevance and legal significance of facts is unacceptable—allowing serious deficiencies to serve as blinders, as it were, in the examination of facts.

Separate opinion of Judge Abraham

In addition to being one of the co-signatories of the joint dissenting opinion which focuses on the second preliminary objection raised by the Russian Federation, Judge Abraham has set out in a separate opinion the reasons why, despite voting in favour of the decision reached on the first preliminary objection raised by Russia, he does not agree with the reasoning which led the Court to conclude that a dispute between the Parties arose in August 2008.

Judge Abraham believes that the Court's Judgment is open to criticism, in particular because its concept of a "dispute" is too far removed from that which emerges from a study of the Court's earlier jurisprudence, and which he considers to be more accurate.

Judge Abraham contends that an examination of the Court's jurisprudence reveals three characteristic features of the approach taken by the Court when it has to respond to an objection based on the absence of a dispute between the Parties. Firstly, Judge Abraham points out that identifying the dispute is a purely realistic and practical task: the Court does not need to establish whether formal exchanges took place between the Parties before the institution of the proceedings; all that matters is that it should be persuaded that the Parties hold conflicting views on the questions which form the object of the Application, and that those questions fall under the compromissory clause *ratione materiae*. Secondly, Judge Abraham notes that when determining the existence of a dispute between the Parties, the Court assesses the situation at the time of its decision and can therefore take account of the Parties' arguments on the merits of the case during the judicial process. Finally, Judge Abraham recalls that, except in certain specific circumstances, the Court does not determine when the dispute arose; it is sufficient for the dispute to be established when the Court is seised (which can be demonstrated by the subsequent facts) and for it still to be ongoing when the Court considers its jurisdiction.

In Judge Abraham's view, the Court's Judgment moves away from the concept of a dispute previously used in its jurisprudence in two respects. First, the Judgment needlessly endeavours to determine exactly when the dispute arose between the Parties, by conducting a long and drawn-out study of the documents produced by them. Moreover, the Judgment breaks with the Court's past jurisprudence by adopting a formalistic approach in identifying the dispute; that approach appears to require the Applicant, before bringing legal proceedings, to have transmitted a complaint to the Respondent, stating why it believes the latter's actions to be unlawful, and the Respondent to have rejected such a complaint. In Judge Abraham's eyes, this reflects a confusion between the question of the existence of the dispute and that of prior negotiation.

In conclusion, Judge Abraham believes that there is clearly a dispute in this case, and that that dispute undoubtedly concerns the interpretation and application of CERD, since it can be more than plausibly argued that ethnic cleansing is one of the activities prohibited by that Convention, and that the States parties to it are under an obligation not only to abstain from such activities, but also to do their best to put an end to them. Finally, Judge Abraham points out that, were it necessary to establish when the dispute arose—an exercise which he considers to be entirely without legal purpose—it could perhaps be dated back to 2004, and certainly to 2006.

Declaration of Judge Skotnikov

Judge Skotnikov supports the Court's overall conclusion that it has no jurisdiction to entertain the Application filed by Georgia. However, he is unable to concur with the Court's

findings that a dispute with respect to the interpretation and application of CERD between Georgia and Russia emerged on 9 August 2008 in the course of the armed conflict which broke out on the night of 7 to 8 August 2008.

As the Court has stated on many occasions, "[o]ne situation may contain disputes which relate to more than one body of law and which are subject to different settlement procedures". The Court observes throughout the Judgment that in the situation prevailing at the outbreak of hostilities on 7/8 August 2008 there were disputes involving a range of different matters, but not the question of interpreting or applying CERD.

The Court is under a duty to determine whether or not the August 2008 dispute was about compliance with CERD, rather than with the provisions of the United Nations Charter relating to the non-use of force or with the rules of international humanitarian law. This task is admittedly not an easy one. Indeed, some acts prohibited by international humanitarian law may also be capable of contravening rights provided by CERD. In order to determine the existence of a dispute under CERD, the Court must nevertheless satisfy itself that an alleged dispute relates to establishing a "discrimination, exclusion, restriction or preference based on race, colour, descent or national or ethnical origin" (Art. 1, CERD).

Given this difficulty, it may not always be possible for the Court to determine at the preliminary stage of the proceedings whether a CERD dispute exists in a situation of armed conflict. However, the Court always has the option of declaring that the objection as to the existence of a dispute does not possess, in the circumstances of the case, an exclusively preliminary character. Had the Court resorted to that option in the present case, it would have found itself on much safer ground.

The Court begins its consideration of that period in August 2008 by quoting the Report of the Independent International Fact-Finding Mission on the Conflict in Georgia, established by the Council of the European Union, to the effect that on the night of 7 to 8 August:

> "a sustained Georgian artillery attack struck the town of Tskhinvali. Other movements of the Georgian armed forces targeting Tskhinvali and the surrounding areas were under way, and soon the fighting involved Russian, South Ossetian and Abkhaz military units and armed elements. It did not take long, however, before the Georgian advance into South Ossetia was stopped. In a counter-movement, Russian armed forces, covered by air strikes and by elements of its Black Sea fleet, penetrated deep into Georgia, cutting across the country's main east-west road, reaching the port of Poti and stopping short of Georgia's capital city, Tbilisi. The confrontation developed into a combined inter-state and intra-state conflict, opposing Georgian and Russian forces at one level of confrontation as well as South Ossetians together with Abkhas fighters and the Georgians at another." (Report, Vol. 1, para. 2 [PORF, Ann. 75]; see Judgment, paragraph 106)

It would have been useful to consider at least two other observations in the Mission's Report:

> "There is the question of whether the use of force by Georgia in South Ossetia, beginning with the shelling of Tskhinvali during the night of 7/8 August 2008, was justifiable under international law. It was not." (Vol. I, para. 19.)
>
> "At least as far as the initial phase of the conflict is concerned, an additional legal question is whether the Georgian use of force against Russian peacekeeping forces on Georgian territory, i.e. in South Ossetia, might have been justified. Again the answer is negative . . . There is . . . no evidence to support any claims that Russian peacekeeping units in South Ossetia were in flagrant breach of their obligations under relevant international agreements such as the Sochi Agreement and thus may have forfeited their international legal status. Consequently, the use of force by Georgia against Russian peacekeeping forces in Tskhinvali in the night of 7/8 August 2008 was contrary to international law." (Vol. I, para. 20.)

The factual context emerging from the Report is quite clear: it appears highly unlikely, to say the least, that the Russian response to Georgia's attack was in contravention of CERD.

The Court, in addressing the exchange of accusations by the Parties, should have assessed them within the context of the armed conflict in progress when those accusations were made. Whenever the Court deals with a situation of armed conflict and the issue of compliance with CERD, it has to distinguish between wartime propaganda, on the one hand, and statements which may indeed point to the emergence and crystallization of a dispute under CERD, on the other. This may not be easy, but the Court is perceptive enough to handle this task. It should have concluded that the claims made by Georgia between 10 and 12 August 2008 belong in the category of war rhetoric and thus are of no probative value on the issue of the existence of a dispute under CERD.

Judge Skotnikov concludes that Georgia made no credible claim which could have been positively opposed by the Russian Federation within the meaning of the Court's settled jurisprudence. The exchange of accusations by the Parties, given the context of the armed conflict, simply cannot suffice in determining the existence of a legal dispute with respect to the interpretation or application of CERD.

Dissenting opinion of Judge Cançado Trindade

1. In his Dissenting Opinion, composed of 13 parts, Judge Cançado Trindade presents the foundations of his personal position on the matters dealt with in the present Judgment of the Court. He dissents in respect of the whole of the Court's reasoning, and its conclusions on the second preliminary objection and on jurisdiction, as well as its treatment of issues of substance and procedure raised before the Court. He begins his Dissenting Opinion by identifying (part I) the wider framework of the settlement of the dispute at issue, ineluctably linked to the imperative of the *realization of justice* under a United Nations human rights treaty of the historical importance of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD Convention).

2. In his understanding, compromissory clauses such as the one of the CERD Convention (Article 22) can only be properly considered in the ambit of the endeavours to achieve compulsory jurisdiction of the Court. To that end, Judge Cançado Trindade undertakes an examination (part II) of the genesis

of the Court's compulsory jurisdiction, in the work on the PCIJ Statute of the Advisory Committee of Jurists (in 1920), which supported compulsory jurisdiction. That position of the Committee of Jurists found an obstacle in the distinct posture taken by the political organs of the League of Nations. A compromise was reached in the debates of the Assembly of the League of Nations and subsidiary organs (also in 1920), resulting in the amended jurisdictional clause (the optional clause), and the following co-existence of the optional clause and the compromissory clauses of various kinds as basis for the exercise of compulsory jurisdiction by the Hague Court.

3. Judge Cançado Trindade then considers the following debates on the ICJ Statute of the United Nations Conference on International Organization and subsidiary organs (in 1945). Having examined the legislative history, he proceeds to a critical review of the practice concerning the optional clause of compulsory jurisdiction of the Hague Court (PCIJ and ICJ). Judge Cançado Trindade regrets the importance that a distorted practice came to ascribe to individual State *consent*, placing it even above the imperatives of the realization of justice at international level (part III), and making abstraction of the old ideal of automatism of compulsory jurisdiction of the Hague Court (part IV).

4. The ensuing State practice disclosed the dissatisfaction of international legal doctrine with the States' reliance on their own terms of consent in approaching the optional clause, accompanied by greater hope that compromissory clauses would, in turn, contribute more effectively to the realization of international justice. To Judge Cançado Trindade, neither the optional clause, nor compromissory clauses, can be properly considered outside the framework of compulsory jurisdiction; this latter is what is aimed at.

5. He recalls that, from the fifties to the eighties, international legal doctrine endeavoured to overcome the vicissitudes of the "will" of States and to secure broader acceptance of the Court's compulsory jurisdiction, on the basis of compromissory clauses. Subsequently (from the late eighties onwards), a more lucid trend of international legal doctrine continued to pursue the same old ideal, relating the compromissory clauses at issue to the *nature* and *substance* of the corresponding treaties. Such legal thinking benefitted from the gradual accumulation of experience in the interpretation and application of human rights treaties, such as the CERD Convention in the present case.

6. Judge Cançado Trindade proceeds (part V) to the consideration of the relationship between the optional clause/compromissory clauses and the *nature* and *substance* of the corresponding treaties wherein they are enshrined. He sustains that human rights treaties (such as the CERD Convention) are ineluctably *victim-oriented*, and that the acknowledgement of the special nature of those treaties has much contributed to their hermeneutics, which has led to their implementation to the ultimate benefit of human beings, in need of protection.

7. Judge Cançado Trindade argues that despite the undeniable advances attained by the ideal of compulsory jurisdiction in the domain of the International Law of Human Rights, the picture appears somewhat distinct in the sphere of purely inter-State relations, wherein compulsory jurisdiction has made a rather modest progress in recent decades. Contemporary international law itself has slowly, but gradually evolved, at least putting limits to the manifestations of a State voluntarism, which revealed itself as belonging to another era.

8. This is a point which cannot pass unnoticed in the present case,—he adds,—as it concerns the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, and, in particular, the compromissory clause enshrined into a UN human rights treaty. Judge Cançado Trindade then addresses the methodology of interpretation of human rights treaties.

9. Judge Cançado Trindade advances the view that the methodology of interpretation of human rights treaties (as from the rules of treaty interpretation enunciated in Articles 31–33 of the two Vienna Conventions on the Law of Treaties, of 1969 and 1986), first, places greater weight, understandably and necessarily, on the realization of their object and purpose, so as to secure protection to human beings, the ostensibly weaker party; and secondly, it encompasses, in his understanding, all the provisions of those treaties, taken as a whole, comprising not only the *substantive ones* (on the protected rights) but *also the procedural ones*, those that *regulate the mechanisms of international protection*, including the compromissory clauses conferring jurisdiction upon international human rights tribunals.

10. The hermeneutics of human rights treaties, faithful to the general rule of interpretation *bona fides* of treaties (Article 31 (1) of the two Vienna Conventions on the Law of Treaties, of 1969 and 1986), bears in mind the three component elements of the text in the current meaning, the context, and the object and purpose of the treaty at issue, *as well as* the *nature* of the treaty wherein that clause (optional or compromissory) for compulsory jurisdiction appears. In the interpretation of human rights treaties,—he proceeds,—there is a primacy of considerations of *ordre public*, of the collective guarantee exercised by all the States Parties, of the accomplishment of a common goal, superior to the individual interests of each Contracting Party.

11. One can hardly make abstraction of the nature and substance of a treaty when considering the optional clause, or else the compromissory clause, enshrined therein. The advent of human rights treaties—Judge Cançado Trindade adds—thus contributed to enrich the contemporary *jus gentium*, in enlarging its aptitude to regulate relations not only at inter-State level, but also at *intra*-State level. In the present case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, the *punctum pruriens judicii* is the proper understanding of the compromissory clause (Article 22) of the CERD Convention.

12. Judge Cançado Trindade points out that, in the course of the proceedings in the present case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, the two contending Parties, Georgia and the Russian Federation, in their responses to a question he deemed it fit to put to them in the public sitting of 17.09.2010, have duly taken into account the nature of the human rights treaty at issue, the CERD Convention (though deriving distinct consequences from their respective argu-

ments); only the Court has not taken into account this important point.

13. Attention is then drawn to the principle *ut res magis valeat quam pereat* (part VI), widely supported by case-law. Underlying the general rule of treaty interpretation is the aforementioned principle *ut res magis valeat quam pereat* (the so-called *effet utile*), whereby States Parties to human rights treaties ought to secure to the conventional provisions *the appropriate effects* at the level of their respective domestic legal orders. This principle applies—in his view—not only in relation to *substantive* norms of those treaties, but also in relation to *procedural* norms, such as the one pertaining to the acceptance of the compulsory jurisdiction in contentious matters of the international judicial organs of protection.

14. Accordingly, considerations of a superior order (international *ordre public*) have primacy over State voluntarism. In part VII of his Dissenting Opinion, Judge Cançado Trindade proceeds to an examination of the elements for the proper interpretation and application of the compromissory clause (Article 22) of the CERD Convention (encompassing its ordinary meaning, its *travaux préparatoires*, and the previous pronouncement of the Court itself on it). On the basis of his analysis, he concludes that the Court's view in the present case that Article 22 of the CERD Convention establishes "preconditions" to be fulfilled by a State Party before it may have recourse to this Court, thus rendering access to the ICJ particularly difficult, in his understanding finds no support in the Court's own *jurisprudence constante*, nor in the legislative history of the CERD Convention, and is in conflict with the approach recently espoused by the Court itself in its Order of 15.10.2008 in the present case.

15. He argues, as to this last point, that the Court could not have deconstructed its own *res interpretata*: positions *as to the law* (distinct from assessment of evidence) already upheld by the Court cannot, in his view, be simply changed at the Court's free will, shortly afterwards, to the diametrically opposite direction. This would generate a sense of juridical insecurity, and would clash with a basic principle of international procedural law, deeply rooted in legal thinking: *venire contra factum/dictum proprium non valet*.

16. Judge Cançado Trindade further argues that, in the present case, due weight should have been given to the consideration, in the preamble of the CERD Convention (para. 1), that all UN Member States have pledged themselves to take action (in co-operation with the Organization) for the achievement of one of the purposes of the United Nations, which is "to promote and encourage universal respect for and observance of human rights" for all, without distinction of any kind, keeping in mind the proclamation, echoed in all quarters of the world, by the 1948 Universal Declaration of Human Rights (in one of the rare moments or glimpses of lucidity of the XXth century), that all human beings are born free and equal in dignity and rights, being endowed with reason and conscience (Article 1).

17. Part VIII of his Dissenting Opinion is devoted to an examination of the case-law of the Hague Court (PCIJ and ICJ), as to the verification of prior *attempts* or *efforts* of negotiation, in the process of judicial settlement of disputes submitted to its cognizance. Judge Cançado Trindade finds that the *jurisprudence constante* of the Court itself has never ascribed to this factual element the character of a "precondition" that would have to be fully satisfied, for the exercise of its jurisdiction. Both the PCIJ and the ICJ have been quite clear in holding that an *attempt* of negotiation is sufficient, there being no mandatory "precondition" at all of *resolutory* negotiations for either of them to exercise jurisdiction in a case they had been seised of.

18. Quite on the contrary,—he proceeds,—compromissory clauses have been a relevant source of the Court's jurisdiction, and even more cogently so under some human rights treaties containing them (cf. *infra*), and pointing towards the goal of the realization of justice (part IX). He regrets this change of approach in the present case, setting a very high threshold (as to the requirement of prior negotiations) for the exercise of jurisdiction on the basis of that human rights treaty, the CERD Convention, and losing sight of the *nature* of this important UN human rights treaty.

19. Judge Cançado Trindade argues that one cannot lose sight of the rights and values that are at stake. Reliance on formalistic formulas, focus on State "interests" or intentions, or its "will", or other related notions, or State strategies of negotiations, should not make one lose sight of the fact that claimants of justice, and their beneficiaries, are, ultimately, human beings,—as disclosed by the present case brought to the cognizance of the Court. In his view, the Court cannot overlook the *rationale* of human rights treaties; a mechanical and reiterated search for State consent, placed above the fundamental values underlying those treaties, will lead it nowhere.

20. This brings him to part X of his Dissenting Opinion, wherein he sustains that under those treaties, peaceful settlement is coupled with the realization of justice, and this latter can hardly be achieved in a case, such as the present one, without turning attention to the *sufferings* and *needs of protection* of the population. These latter assume, in his view, a central position in the consideration of the present case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*. Most regrettably, this was not the outlook of the Court in the present case.

21. He stresses that the realization of justice under a human rights treaty (such as the CERD Convention), in a case of numerous victimized persons like the present one, can only be achieved taking due account and valuing the sufferings and needs of protection of the population. Instead of being particularly attentive to the sufferings and needs of protection of the population, on the basis of an assessment of the whole evidence produced before it by the contending Parties themselves, the Court unfortunately pursued an essentially inter-State, and mostly bilateral, outlook, centred on the (diplomatic) relations between the two States concerned.

22. The present Judgment contains only *in passim* references to the sufferings endured by the victimized population, despite the fact that there are documents, submitted to the Court by the two contending Parties themselves, which are clearly illustrative of the human aspect the pain and sufferings, and the pressing needs of protection, of the silent victims of the dispute and armed conflict between Georgia and the Russian Federation. In Judge Cançado Trindade's perception,

one has to go beyond the strict inter-State (diplomatic) outlook of traditional international law, for it is generally recognized that contemporary *jus gentium* is not at all insensitive to the fate of the populations. In his view, judicial recognition of the victimization of human beings is an imperative of justice, which comes at least to *alleviate* their sufferings.

23. He observes that the Court has spent 92 paragraphs to concede that a legal dispute at last crystallized, on 10 August 2008, only *after* the outbreak of an open and declared war between Georgia and Russia. The same formalistic reasoning has led the Court, in 70 paragraphs, to uphold the second preliminary objection, on the basis of allegedly unfulfilled "preconditions" of its own construction, at variance with its own *jurisprudence constante* and with the more lucid international legal doctrine. He warns that under human rights treaties, the individuals concerned, in situations of great vulnerability or adversity, need a higher standard of protection; yet the Court applied, contrariwise, a higher standard of State consent for the exercise of its jurisdiction. The result has been the remittance by the Court of the present dispute back to the contending Parties.

24. In part XI of his Dissenting Opinion, Judge Cançado Trindade sustains that human rights treaties are *living* instruments to be interpreted in the light of current living conditions, so as to respond to new needs of protection of human beings. This applies even more forcefully in respect of a treaty like the CERD Convention, centered on the fundamental principle of equality and non-discrimination, which lies in the foundations not only of the CERD Convention, but of the whole International Law of Human Rights, and which belongs, in his view, to the realm of international *jus cogens*. The CERD Convention, endowed with universality, occupies a prominent place in the *law of the United Nations* itself. Ever since its adoption, the CERD Convention faced and opposed a grave violation of an obligation of *jus cogens* (the absolute prohibition of racial discrimination), generating obligations *erga omnes*, and it exerted influence on subsequent international instruments at universal (UN) level.

25. He regrets that nowhere does the Court refer to the actual application that the CERD Convention has had in practice, throughout the last decades, so as to fulfill its object and purpose, to the benefit of millions of human beings. Nowhere does the Court recognize that the CERD Convention,—like other human rights treaties,—is a *living* instrument, which has acquired a life of its own, independently from the assumed or imagined "intentions" of its draftsmen almost half a century ago. Even within the static outlook of the Court, already at the time that the CERD Convention was being elaborated there were those—pointed out by him—who supported the compulsory settlement of disputes by the Court.

26. With the evolution of contemporary international law, this applies even more forcefully today, in 2011, in respect of obligations under the CERD Convention, and other human rights treaties. Yet, in the present Judgment, the Court, from an entirely different outlook, upheld the second preliminary objection, relying upon its own strictly textual or grammatical reasoning relating to the compromissory clause (Article 22) of the CERD Convention. Nowhere does one find considerations of a contextual nature, or any attempt to link such compromissory clause to the object and purpose of the CERD Convention, taking into account the substance and nature of the Convention *as a whole*.

27. Nowhere does the Court consider the historical importance of the CERD Convention as a pioneering human rights treaty, and its continuing contemporaneity for responding to new challenges that are of legitimate concern of humankind, for the purpose of interpreting the compromissory clause contained therein. As a result of its own decision, the Court deprived itself of the determination whether the present dispute (which has victimized so many people) falls or not under the CERD Convention. The unfortunate outcome of the present case discloses that, despite all the advances achieved for human dignity under the CERD Convention, there is still a long way to go: the struggle for the prevalence of human rights,—he adds,—is never-ending, like in the myth of Sisyphus.

28. In part XII of his Dissenting Opinion, Judge Cançado Trindade stresses that, on the basis of all the preceding considerations, his own position, in respect of all the points which form the object of the present Judgment, stands in clear opposition to the view espoused by the Court. In addition, it does not squarely fit into the conceptual framework of the dissenting minority group either, it goes beyond it. His dissenting position is grounded not only on the assessment of the evidence produced before the Court, to which he attributes importance, but above all on issues of principle, to which he attaches even greater importance.

29. He adds that international human rights case-law has constantly stressed that provisions of human rights treaties be interpreted in a way to render the safeguard of those rights *effective*; in this connection, Article 22 of the CERD Convention does not set forth any mandatory "preconditions" for recourse to the ICJ. To set forth such "preconditions" where they do not exist, amounts to erecting an undue and groundless obstacle to access to justice under a human rights treaty. The Court has to remain attentive to the *basic rationale* of human rights treaties.

30. Last but not least, in part XIII of his Dissenting Opinion, Judge Cançado Trindade revisits an old dilemma,—faced by the Court as well as by the States appearing before it,—in the framework of contemporary *jus gentium*. Such old dilemma, with a direct bearing on the present and future of international justice, cannot, in his view, be here revisited on the basis of old dogmas, erected in times past, which no longer exist, on the basis of notions of the "will" of the State, or its "interests" or intentions. To insist on such dogmas would present no dilemma, as it would lead to the freezing or ossification of International Law. There is nothing more alien or antithetical to human rights protection than such dogmas.

31. By remitting the present dispute back to the contending Parties, for its settlement by whatever other means (political or otherwise) they may wish to take or use, the Court has thereby deprived itself, *inter alia*, of the determination, at a possible subsequent merits stage, of whether or not the occurrences referred to in the complaint lodged with it, which caused so many victims, fall or not under the relevant provi-

sions of the CERD Convention. In his view, the present decision undermines the appropriate effects of the CERD Convention (including its compromissory clause in Article 22) and the compulsory jurisdiction of the Court itself thereunder.

32. Given the circumstances,—he adds,—the Court cannot remain hostage of State consent. It cannot keep displaying an instinctive and continuing search for State consent, to the point of losing sight of the imperative of realization of justice. The moment State consent is manifested is when the State concerned decides to become a party to a treaty,—such as the human rights treaty in the present case, the CERD Convention. The hermeneutics and proper application of that treaty cannot be continuously subjected to a recurring search for State consent. *State consent is not an element of treaty interpretation*; this would unduly render the letter of the treaty dead, and human rights treaties are meant to be living instruments, let alone their spirit.

33. Judge Cançado Trindade recalls that the "founding fathers" of the law of nations (the *droit des gens*) never visualized the individual consent of the emerging States as the *ultimate* source of their legal obligations. The sad outcome of the present case before the Court is the ineluctable consequence of inaptly and wrongfully giving pride of place to State consent, even above the fundamental values at stake, underlying the CERD Convention, which call for the realization of justice.

34. In his view, it is high time for the Court to give concrete expression of commitment to its mission,—as he perceives it,—when resolving cases, like the present one, in the exercise of its jurisdiction on the basis of human rights treaties, bearing in mind the *rationale*, the nature and substance of those treaties, with all the juridical consequences that ensue therefrom. This Court cannot keep on privileging State consent above everything, time and time again, even after such consent has already been given by States at the time of ratification of those treaties.

35. The Court cannot keep on embarking on a literal or grammatical and static interpretation of the terms of compromissory clauses enshrined in those treaties, drawing "preconditions" therefrom for the exercise of its jurisdiction, in an attitude remindful of traditional international arbitral practice. When human rights treaties are at stake,—he proceeds,—there is need, in his perception, to overcome the force of inertia, and to assert and develop the compulsory jurisdiction of the ICJ on the basis of the compromissory clauses contained in those treaties. After all, it is human beings who are ultimately being protected thereunder, and such compromissory clauses are to be approached in their ineluctable relationship with the *nature* and *substance* of the human rights treaties at issue, in their entirety.

36. From the standpoint of the *justiciables*,—Judge Cançado Trindade contends,—the subjects *(titulaires)* of the protected rights, compromissory clauses such as that of Article 22 of the CERD Convention are directly related to their *access to justice*, even if the complaints thereunder are lodged with the ICJ by States Parties to those human rights treaties. The *justiciables* are, ultimately, the human beings concerned. From this humanist optics, which is well in keeping with the creation itself of the Hague Court (PCIJ and ICJ), to erect a mandatory "precondition" of prior negotiations for the exercise of the Court's jurisdiction amounts to erecting, in his view, a groundless and most regrettable obstacle to justice.

37. The *realization of justice* is an imperative which the Court is to keep constantly in mind. It can hardly be attained from a strict State-centered voluntarist perspective, and a recurring search for State consent. The Court cannot, in his perception, keep on paying lip service to what it assumes as representing the State's "intentions" or "will". The proper interpretation of human rights treaties (cf. *supra*) is to the ultimate benefit of human beings, for whose protection human rights treaties have been celebrated, and adopted, by States. The *raison d'humanité* prevails over the old *raison d'État*.

38. Much to his regret, in the present Judgment the Court entirely missed this point: it rather embarked on the usual exaltation of State consent, labelled (in paragraph 110) as "the fundamental principle of consent". Judge Cançado Trindade challenges this view, as, in his understanding, consent is not "fundamental", it is not even a "principle". What is "fundamental", i.e., what lays in the *foundations* of the Court, since its creation, is the imperative of the *realization of justice*, by means of compulsory jurisdiction. State consent is but a rule to be observed in the exercise of compulsory jurisdiction for the realization of justice. It is a means, not an end, it is a procedural requirement, not an element of treaty interpretation; it surely does not belong to the domain of the *prima principia*.

39. To Judge Cançado Trindade, fundamental principles are those of *pacta sunt servanda*, of equality and non-discrimination (at substantive law level), of equality of arms (*égalité des armes*—at procedural law level). Fundamental principle is, furthermore, that of humanity (permeating the whole *corpus juris* of International Human Rights Law, International Humanitarian Law, and International Refugee Law). Fundamental principle is, moreover, that of the dignity of the human person (laying a foundation of International Human Rights Law). Fundamental principles of international law are, in addition, those laid down in Article 2 in the Charter of the United Nations (and restated in the UN Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, adopted in 1970 by the UN General Assembly).

40. To Judge Cançado Trindade, these are some of the true *prima principia*, which confer to the international legal order its ineluctable axiological dimension. These are some of the true *prima principia*, which reveal the values which inspire the *corpus juris* of the international legal order, and which, ultimately, provide its foundations themselves. *Prima principia* conform the *substratum* of the international legal order, conveying the idea of an *objective* justice (proper of natural law).

41. In turn,—he adds,—State consent does not belong to the realm of the *prima principia*; recourse to it is a concession of the *jus gentium* to States. It is a rule to be observed (no one would deny it) so as to render judicial settlement of international disputes viable. To this Court, conceived as an International Court of *Justice*, the *realization of justice* remains an ideal which, in the adjudication of human rights cases brought into its cognizance, has not yet been achieved,—as sadly dis-

closed by the present Judgment, given the undue pride of place it has given to State consent. Such rule or procedural requirement—Judge Cançado Trindade concludes—will be reduced to its proper dimension the day one realizes that *conscience stands above the will*. This sums up an old dilemma (faced by the Court as well as by States appearing before it), revisited in his Dissenting Opinion, in the framework of contemporary *jus gentium*.

Separate Opinion of Judge Greenwood

Judge Greenwood considers that a decision by the Court, on a request for provisional measures of protection, that there appears prima facie to be a basis for the jurisdiction of the Court does not in any way constrain the Court in later stages of the proceedings. The decision in 2008 that there might be a basis for the jurisdiction of the Court was in no sense inconsistent with the decision in today's Judgment that jurisdiction had not been established. The reason why there was no jurisdiction was that Article 22 of CERD imposed a precondition which had not been satisfied as Georgia had not made a sufficient attempt to negotiate the specific dispute regarding the interpretation or application of CERD before it seised the Court.

Separate opinion of Judge Donoghue

In a separate opinion, Judge Donoghue notes that she joins President Owada, Judges Simma and Abraham, and Judge *ad hoc* Gaja in dissenting as to Russia's Second Preliminary Objection. She then explains that although she voted in favour of the decision in the Judgment to reject Russia's First Preliminary Objection, she disagrees with the Judgment's approach to the question whether there is a "dispute" between Georgia and Russia with respect to the interpretation or application of the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"). Specifically, she rejects the Judgment's embrace of the notion that a "dispute" can exist only where the defendant has made statements of opposition prior to the filing of the application. She also rejects the Court's method of examining the documents and statements in the record.

First, Judge Donoghue recalls that the question whether a dispute existed between the Parties concerning the CERD as of the date of the Application is a matter for "objective determination" by the Court. In making that determination, the Court is not limited to considering whether Georgia provided notice of its claims to Russia, or whether Russia responded to those claims, prior to the date on which Georgia filed its Application. Previously, the Court has made clear that, in determining the existence of a dispute, the position or the attitude of a party can be established by inference. The Court has also relied on statements made in the course of the proceedings before it to confirm the existence of opposing views and, therefore, a legal dispute. In addition, Judge Donoghue points out that there is no general requirement of prior notice of claims or of an intention to submit those claims to the Court.

For these reasons, Judge Donoghue rejects the Judgment's characterization of the oft-cited phrase from the *South West Africa* cases *((Ethiopia* v. *South Africa*; *Liberia* v. *South Africa)*, *Preliminary Objections)*—that for a dispute to exist, it must be shown that the claim of one party "is positively opposed" by the other party—as establishing a formal requirement that the parties engage in an exchange of views prior to the seisin of the Court. On the contrary, the question whether a claim "is positively opposed" is part and parcel of the Court's "objective determination", based on the totality of the information before it, whether there is an actual, ongoing dispute between the parties to a contentious case.

Second, Judge Donoghue concludes that, even accepting the view of the law embraced by the Judgment, there is sufficient evidence to demonstrate that a dispute relating to the interpretation or application of the CERD existed prior to 9 August 2008, the date on which the Judgment sets the commencement of a dispute for purposes of Article 22 of the CERD. In her view, the record, taken as a whole, establishes that Georgia alleged conduct amounting to ethnic discrimination and alleged that Russia was responsible for that conduct, and that Russia opposed these allegations. By contrast, the Judgment assigns no probative value to any individual document if the document fails both to allege conduct that could be actionable under the CERD and to attribute responsibility for that conduct to Russia. Whether Georgia could meet its burden to establish the full range of legal and factual elements of a breach of the CERD by Russia would be relevant if the Court were considering the merits, but that is not the required showing here, where the Court is tasked only with identifying whether a dispute with respect to the CERD exists. In Judge Donoghue's view, the factual record before the Court is sufficient to confirm that the Parties hold opposing views on matters falling within the subject-matter of the CERD, and that a dispute therefore existed prior to the period of armed conflict in August 2008.

Judge Donoghue also notes that the decision of the Court that the dispute between Georgia and Russia began only on 9 August 2008 has significant consequences for its analysis of the Second Preliminary Objection, which disregards any engagement between Georgia and Russia prior to that date.

In conclusion, Judge Donoghue expresses her concern that the Court's Judgment has unnecessarily created new procedural obstacles that may serve to defeat jurisdiction in future cases, perhaps to the particular detriment of States with limited resources or those that lack experience before the Court.

185. JURISDICTION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (BELGIUM *v.* SWITZERLAND) (DISCONTINUANCE)

Order of 5 April 2011

In the case concerning *Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Belgium* v. *Switzerland)*, the President of the International Court of Justice delivered an Order on 5 April 2011, recording the discontinuance of the proceedings and directing the removal of the case from the Court's list.

The Court was composed as follows: President Owada; Vice-President Tomka; Judges Koroma, Al-Khasawneh, Simma, Abraham, Keith, Sepúlveda-Amor, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue; Registrar Couvreur.

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The text of the Order reads as follows:

"The International Court of Justice, Composed as above,

Having regard to Article 48 of the Statute of the Court and to Article 89, paragraph 2, of the Rules of Court,

Having regard to the Application filed in the Registry of the Court on 21 December 2009, whereby the Kingdom of Belgium instituted proceedings against the Swiss Confederation in respect of a dispute concerning

> 'the interpretation and application of the Lugano Convention of 16 September 1988 on jurisdiction and enforcement of judgments in civil and commercial matters . . . , as well as the application of the rules of general international law governing the exercise of State authority, in particular in judicial matters . . . [, and relating] to the decision by Swiss courts not to recognize a judgment of the Belgian courts and not to stay proceedings which were later initiated in Switzerland on the subject of the same dispute',

Having regard to the Order dated 4 February 2010, whereby the Court, taking into account the agreement of the Parties and the circumstances of the case, fixed 23 August 2010 and 25 April 2011, respectively, as the time-limits for the filing of the Memorial of the Kingdom of Belgium and the Counter-Memorial of the Swiss Confederation,

Having regard to the Order dated 10 August 2010, whereby the President of the Court, at the request of the Kingdom of Belgium, extended to 23 November 2010 and 24 October 2011, respectively, the time-limits for the filing of the Memorial and the Counter-Memorial,

Having regard to the Memorial of the Kingdom of Belgium, filed within the time-limit as extended,

Having regard to the preliminary objections to the jurisdiction of the Court and the admissibility of the Application which were raised by the Swiss Confederation on 18 February 2011, within the time-limit set by Article 79, paragraph 1, of the Rules of Court;

Whereas, in a letter dated 21 March 2011 and received in the Registry by facsimile on the same day, the Agent of the Kingdom of Belgium stated that the Swiss Confederation, in its preliminary objections, had

> 'indicate[d] that the reference by the [Swiss] Federal Supreme Court in its 30 September 2008 judgment to the non-recognizability of a future Belgian judgment [did] not have the force of *res judicata* and [did] not bind either the lower cantonal courts or the Federal Supreme Court itself, and that there [was] therefore nothing to prevent a Belgian judgment, once handed down, from being recognized in Switzerland in accordance with the applicable treaty provisions';

whereas he added that '[i]n the light of this statement Belgium, . . . in concert with the Commission of the European Union, consider[ed] that it [could] discontinue the proceedings it instituted against Switzerland'; whereas, by the same letter, the Agent of Belgium, referring to Article 89 of the Rules of Court, therefore 'request[ed] the Court to made an order recording [Belgium's] discontinuance of the proceedings and directing that the case be removed from the General List';

Whereas a copy of the said letter was immediately communicated to the Government of the Swiss Confederation, which was informed that the time-limit provided for in Article 89, paragraph 2, of the Rules of Court, within which the Swiss Confederation could state whether it opposed the discontinuance of the proceedings, had been fixed as 28 March 2011;

Whereas, within the time-limit thus fixed, the Swiss Confederation did not oppose the said discontinuance,

Places on record the discontinuance by the Kingdom of Belgium of the proceedings; and

Orders that the case be removed from the list."

186. TERRITORIAL AND MARITIME DISPUTE (NICARAGUA *v.* COLOMBIA) (APPLICATION BY COSTA RICA FOR PERMISSION TO INTERVENE)

Judgment of 4 May 2011

In its judgment of 4 May 2011 on the Application for permission to intervene in the case concerning the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia),* filed by the Republic of Costa Rica pursuant to Article 62 of the Statute, the Court, by nine votes to seven, found that the Application submitted by Costa Rica could not be granted.

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

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The operative paragraph (para. 91) of the Judgment reads as follows:

" . . .

The Court,

By nine votes to seven,

Finds that the Application for permission to intervene in the proceedings filed by the Republic of Costa Rica under Article 62 of the Statute of the Court cannot be granted;

In favour: President Owada; Vice-President Tomka; Judges Koroma, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Xue; Judge *ad hoc* Cot;

Against: Judges Al-Khasawneh, Simma, Abraham, Cançado Trindade, Yusuf, Donoghue; Judge *ad hoc* Gaja."

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Judges Al-Khasawneh and Abraham appended dissenting opinions to the Judgment of the Court; Judge Keith appended a declaration to the Judgment of the Court; Judges Cançado Trindade and Yusuf appended a joint dissenting opinion to the Judgment of the Court; Judge Donoghue appended a dissenting opinion to the Judgment of the Court; Judge *ad hoc* Gaja appended a declaration to the Judgment of the Court.

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History of the proceedings
(paras. 1–18)

The Court begins by recalling that, on 6 December 2001, the Republic of Nicaragua (hereinafter "Nicaragua") filed in the Registry of the Court an Application instituting proceedings against the Republic of Colombia (hereinafter "Colombia") in respect of a dispute consisting of a "group of related legal issues subsisting" between the two States "concerning title to territory and maritime delimitation" in the western Caribbean.

As a basis for the jurisdiction of the Court, the Application invoked the provisions of Article XXXI of the American Treaty on Pacific Settlement signed on 30 April 1948, officially designated, according to Article LX thereof, as the "Pact of Bogotá" (hereinafter referred to as such), as well as the declarations made by the Parties under Article 36 of the Statute of the Permanent Court of International Justice, which are deemed, for the period which they still have to run, to be acceptances of the compulsory jurisdiction of the present Court pursuant to Article 36, paragraph 5, of its Statute.

On 25 February 2010, the Republic of Costa Rica (hereinafter "Costa Rica") filed an Application for permission to intervene in the case pursuant to Article 62 of the Statute. In this Application, it stated in particular that its intervention "would have the limited purpose of informing the Court of the nature of Costa Rica's legal rights and interests and of seeking to ensure that the Court's decision regarding the maritime boundary between Nicaragua and Colombia does not affect those rights and interests". In accordance with Article 83, paragraph 1, of the Rules of Court, certified copies of Costa Rica's Application were communicated forthwith to Nicaragua and Colombia, which were invited to furnish written observations on that Application.

On 26 May 2010, within the time-limit fixed for that purpose by the Court, the Governments of Nicaragua and Colombia submitted written observations on Costa Rica's Application for permission to intervene. In its observations, Nicaragua set forth the grounds on which, in particular, it considered that this Application failed to comply with the Statute and the Rules of Court. For its part, Colombia indicated in its observations the reasons for which it had no objection to the said Application. The Court having considered that Nicaragua had objected to the Application, the Parties and the Government of Costa Rica were notified by letters from the Registrar date 16 June 2010 that the Court would hold hearings, in accordance with Article 84, paragraph 2, of the Rules of Court, to hear the observations of Costa Rica, the State applying to intervene, and those of the Parties to the case.

At the public hearings on whether to grant Costa Rica's Application for permission to intervene, the following submissions were presented:

On behalf of the Government of Costa Rica,

"[The Court is] respectfully request[ed] . . . to grant the Republic of Costa Rica the right to intervene, in order to inform the Court of its interests of a legal nature which might be affected by the decision in this case, according to Article 62 of the Statute.

[Costa Rica] seek[s] the application of the provisions of Article 85 of the Rules of Court, namely:

— Paragraph 1: 'the intervening State shall be supplied with copies of the pleadings and documents annexed

and shall be entitled to submit a written statement within a time-limit to be fixed by the Court', and

— Paragraph 3: 'The intervening State shall be entitled, in the course of the oral proceedings, to submit its observations with respect to the subject-matter of the intervention.'"

On behalf of the Government of Nicaragua,

"In accordance with Article 60 of the Rules of Court and having regard to the application for permission to intervene filed by the Republic of Costa Rica and oral pleadings, the Republic of Nicaragua respectfully submits that:

The application filed by the Republic of Costa Rica fails to comply with the requirements established by the Statute and the Rules of Court, namely, Article 62, and paragraph 2, *(a)* and *(b)* of Article 81 respectively."

On behalf of the Government of Colombia,

"In light of the considerations stated during these proceedings, [the] Government [of Colombia] wishes to reiterate what it stated in the Written Observations it submitted to the Court, to the effect that, in Colombia's view, Costa Rica has satisfied the requirements of Article 62 of the Statute and, consequently, that Colombia does not object to Costa Rica's request for permission to intervene in the present case as a non-party."

Reasoning of the Court

The Court recalls that in its Application for permission to intervene Costa Rica specified that it wished to intervene in the case as a non-party State for the "purpose of informing the Court of the nature of Costa Rica's legal rights and interests and of seeking to ensure that the Court's decision regarding the maritime boundary between Nicaragua and Colombia does not affect those rights and interests".

Referring to Article 81 of the Rules of Court, Costa Rica set out in its Application what it considers to be the interest of a legal nature which may be affected by the Court's decision on the delimitation between Nicaragua and Colombia, the precise object of its intervention, and the basis of jurisdiction which is claimed to exist as between itself and the Parties to the main proceedings.

I. The legal framework
(paras. 21–51)

The Court first addresses the legal framework set out in Article 62 of the Statute and Article 81 of the Rules of Court and indicates that intervention being a procedure incidental to the main proceedings before the Court, it is, according to the Statute and the Rules of Court, for the State seeking to intervene to set out the interest of a legal nature which it considers may be affected by the decision in that dispute, the precise object it is pursuing by means of the request, as well as any basis of jurisdiction which is claimed to exist as between it and the parties.

The Court then examines in turn these constituent elements of the request for permission to intervene, as well as the evidence in support of that request.

1. The interest of a legal nature which may be affected
(paras. 23–28)

The Court observes that the State seeking to intervene shall set out its own interest of a legal nature in the main proceedings, and a link between that interest and the decision that might be taken by the Court at the end of those proceedings. In the words of the Statute, this is "an interest of a legal nature which may be affected by the decision in the case" (expressed more explicitly in the English text than in the French "un intérêt d'ordre juridique . . . pour lui en cause"; see Article 62 of the Statute).

The finding by the Court of the existence of these elements is therefore a necessary condition to permit the requesting State to intervene, within the limits that it considers appropriate. The Court recalls that a Chamber of the Court has already held that:

"If a State can satisfy the Court that it has an interest of a legal nature which may be affected by the decision in the case, it may be permitted to intervene in respect of that interest." (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment, I.C.J.Reports 1990*, p. 116, para. 58.)

The Court notes that, being responsible for the sound administration of justice, it is for the Court to decide in accordance with Article 62, paragraph 2, of the Statute on the request to intervene, and to determine the limits and scope of such intervention. Whatever the circumstances, however, the condition laid down by Article 62, paragraph 1, shall be fulfilled.

The Court observes that, whereas the Parties to the main proceedings are asking it to recognize certain of their rights in the case at hand, a State seeking to intervene is, by contrast, contending, on the basis of Article 62 of the Statute, that the decision on the merits could affect its interests of a legal nature. The State seeking to intervene therefore does not have to establish that one of its rights may be affected; it is sufficient for that State to establish that its interest of a legal nature may be affected. Article 62 requires the interest relied upon by the State seeking to intervene to be of a legal nature, in the sense that this interest has to be the object of a real and concrete claim of that State, based on law, as opposed to a claim of a purely political, economic or strategic nature. But this is not just any kind of interest of a legal nature; it must in addition be possible for it to be affected, in its content and scope, by the Court's future decision in the main proceedings.

Accordingly, an interest of a legal nature within the meaning of Article 62 does not benefit from the same protection as an established right and is not subject to the same requirements in terms of proof.

The Court further notes that its decision granting permission to intervene can be understood as a preventive one, since it is aimed at allowing the intervening State to take part in the main proceedings in order to protect an interest of a legal nature which risks being affected in those proceedings. As to

the link between the incidental proceedings and the main proceedings, the Court recalls that it has previously stated that "the interest of a legal nature to be shown by a State seeking to intervene under Article 62 is not limited to the *dispositif* alone of a judgment. It may also relate to the reasons which constitute the necessary steps to the *dispositif*."

The Court also recalls that it is for the Court to assess the interest of a legal nature which may be affected that is invoked by the State that wishes to intervene, on the basis of the facts specific to each case, and it can only do so "*in concreto* and in relation to all the circumstances of a particular case".

2. The precise object of the intervention
(paras. 29–36)

The Court notes that under the terms of Article 81, paragraph 2 *(b)*, of the Rules of Court, an application for permission to intervene must set out "the precise object of the intervention".

The Court then recalls that Costa Rica asserts that the purpose of it requesting permission to intervene as a non-party is to protect the rights and interests of a legal nature of Costa Rica in the Caribbean Sea by all legal means available and, therefore, to make use of the procedure established for this purpose by Article 62 of the Statute of the Court. It thus seeks to inform the Court of the nature of Costa Rica's rights and interests of a legal nature that could be affected by the Court's maritime delimitation decision between Nicaragua and Colombia. Costa Rica has pointed out that, in order to inform the Court of its rights and interests of a legal nature and ensure that they are protected in the forthcoming judgment, it is not necessary "to establish the existence of a dispute or to resolve one with the Parties to this case".

As for Nicaragua, it asserts that Costa Rica has failed to identify the precise object of its intervention, and that its "vague" object of informing the Court of its alleged rights and interests in order to ensure their protection is insufficient.

Colombia, on the other hand, considers that Costa Rica has satisfied the requirements of Article 62 of the Statute and Article 81 of the Rules of Court.

In the opinion of the Court, the precise object of the request to intervene certainly consists in informing the Court of the interest of a legal nature which may be affected by its decision in the dispute between Nicaragua and Colombia, but the request is also aimed at protecting that interest. Indeed, if the Court acknowledges the existence of a Costa Rican interest of a legal nature which may be affected and allows that State to intervene, Costa Rica will be able to contribute to the protection of such an interest throughout the main proceedings.

The Court recalls that the Chamber formed to deal with the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, when considering the request for permission to intervene submitted by Nicaragua in that case, stated that "[s]o far as the object of Nicaragua's intervention is 'to inform the Court of the nature of the legal rights of Nicaragua which are in issue in the dispute', it cannot be said that this object is not a proper one: it seems indeed to accord with the function of intervention" (*Judgment, I.C.J. Reports 1990*, p. 130, para. 90). The Chamber also considered Nicaragua's second purpose "of seeking to ensure that the determinations of the Chamber did not trench upon the legal rights and interests of the Republic of Nicaragua", and concluded that, even though the expression "trench upon the legal rights and interests" is not found in Article 62 of the Statute, "it is perfectly proper, and indeed the purpose of intervention, for an intervener to inform the Chamber of what it regards as its rights or interests, in order to ensure that no legal interest may be 'affected' without the intervener being heard" (*ibid.*).

The Court is of the view that the object of the intervention, as indicated by Costa Rica, is in conformity with the requirements of the Statute and the Rules of Court, since Costa Rica seeks to inform the Court of its interest of a legal nature which may be affected by the decision in the case, in order to allow that interest to be protected.

The Court points out, moreover, that the written and oral proceedings concerning the application for permission to intervene must focus on demonstrating the interest of a legal nature which may be affected; these proceedings are not an occasion for the State seeking to intervene or for the Parties to discuss questions of substance relating to the main proceedings, which the Court cannot take into consideration during its examination of whether to grant a request for permission to intervene.

3. The basis and extent of the Court's jurisdiction
(paras. 37–43)

As regards the basis of jurisdiction, Costa Rica, while informing the Court that it has made a declaration under Article 36, paragraph 2, of the Statute and is a party to the Pact of Bogotá, specified that it is seeking to intervene as a non-party State and that, accordingly, it has no need to set out a basis of jurisdiction as between itself and the Parties to the dispute.

In this respect the Court observes that its Statute does not require, as a condition for intervention, the existence of a basis of jurisdiction between the parties to the proceedings and the State which is seeking to intervene as a non-party. By contrast, such a basis of jurisdiction is required if the State seeking to intervene intends to become itself a party to the case.

4. The evidence in support of the request to intervene
(paras. 44–51)

The Court recalls that Article 81, paragraph 3, of the Rules of Court provides that "[t]he application shall contain a list of the documents in support, which documents shall be attached".

In its written observations on Costa Rica's Application for permission to intervene, Nicaragua points out that Costa Rica "did not attach documents or any clear elements of proof of its contentions. This lack of supporting documentation, or even illustrations, makes it even more difficult to determine exactly what are the legal interests claimed by Costa Rica."

Costa Rica, for its part, states that the attachment of documents to an application for permission to intervene is not an obligation and that, in any event, it is a matter for it to choose the evidence in support of its Application.

The Court recalls that, since the State seeking to intervene bears the burden of proving the interest of a legal nature which it considers may be affected, it is for that State to decide which documents, including illustrations, are to be attached to its application. Article 81, paragraph 3, of the Rules of Court only obliges the State in question, should it decide to attach documents to its application, to provide a list thereof.

The evidence required from the State seeking to intervene cannot be described as restricted or summary at this stage of the proceedings, because, essentially, the State must establish the existence of an interest of a legal nature which may be affected by the decision of the Court. Since the object of its intervention is to inform the Court of that legal interest and to ensure it is protected, Costa Rica must convince the Court, at this stage, of the existence of such an interest; once that interest has been recognized by the Court, it will be for Costa Rica to ensure, by participating in the proceedings on the merits, that such interest is protected in the judgment which is subsequently delivered.

Consequently, it is for the State seeking to intervene to produce all the evidence it has available in order to secure the decision of the Court on this point.

This does not prevent the Court, if it rejects the application for permission to intervene, from taking note of the information provided to it at this stage of the proceedings. As the Court has already stated, "[it] will, in its future judgment in the case, take account, as a fact, of the existence of other States having claims in the region" (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, Judgment, I.C.J. Reports 1984*, p. 26, para. 43).

II. Examination of Costa Rica's application for permission to intervene
(paras. 52–90)

The interest of a legal nature claimed by Costa Rica
(paras. 53–90)

The Court then turns to consider whether Costa Rica has sufficiently set out an "interest of a legal nature" which may be affected by the decision of the Court in the main proceedings. The Court examines both of the elements, namely the existence of an interest of a legal nature on the part of Costa Rica and the effects that the Court's eventual decision on the merits might have on this interest, in order for the request for intervention to succeed.

In its Application, Costa Rica states that its:

> "interest of a legal nature which may be affected by the decision of the Court is Costa Rica's interest in the exercise of its sovereign rights and jurisdiction in the maritime area in the Caribbean Sea to which it is entitled under international law by virtue of its coast facing on that sea".

It takes the view that the arguments developed by Nicaragua and Colombia in their delimitation dispute affect its legal interest, which it wishes to assert before the Court. According to Costa Rica, such interest is established in reference to the "hypothetical delimitation scenario between Costa Rica and Nicaragua" and, consequently, if it does not intervene, "the delimitation decision in this case may affect the legal interest of Costa Rica".

For its part, Nicaragua asserts that Costa Rica "has not . . . managed to show the existence of a direct, concrete and present legal interest of its own, which is a necessary premise of any intervention. It has not managed to show that this exists in the context of the dispute between Nicaragua and Colombia", but has rather shown that it has "legal interests in the delimitation with its neighbour Nicaragua . . . [and] that it is presenting itself as a party—not to the dispute between Nicaragua and Colombia—but to a dispute between itself and Nicaragua regarding the maritime delimitation between the two countries".

Colombia shares Costa Rica's conclusion that the latter has rights and interests of a legal nature which may be affected by the decision in the main proceedings. Colombia contends that "[t]he legal rights and interests of Costa Rica . . . include the legal rights and obligations that [the latter has] subscribed to in the delimitation agreements with Colombia". Therefore, according to Colombia, Costa Rica has a legal interest relating to the maritime areas delimited by the 1977 Treaty, as well as in the delimitation of an eventual tripoint between Costa Rica, Colombia and Nicaragua.

The Court notes that, although Nicaragua and Colombia differ in their assessment as to the limits of the area in which Costa Rica may have a legal interest, they recognize the existence of Costa Rica's interest of a legal nature in at least some areas claimed by the parties to the main proceedings. The Court however is not called upon to examine the exact geographical parameters of the maritime area in which Costa Rica considers it has an interest of a legal nature.

The Court recalls that the Chamber in the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, when rejecting Nicaragua's Application for permission to intervene with respect to any question of delimitation within the Gulf of Fonseca, stated that

> "the essential difficulty in which the Chamber finds itself, on this matter of a possible delimitation within the waters of the Gulf, is that Nicaragua did not in its Application indicate any maritime spaces in which Nicaragua might have a legal interest which could be said to be affected by a possible delimitation line between El Salvador and Honduras" (*Judgment, I.C.J. Reports 1990*, p. 125, para. 78).

In the present case, by contrast, Costa Rica has indicated the maritime area in which it considers it has an interest of a legal nature which may be affected by the decision of the Court in the main proceedings.

The indication of this maritime area is however not sufficient in itself for the Court to grant Costa Rica's Application for permission to intervene. Under Article 62 of the Statute, it is not sufficient for a State applying to intervene to show that it has an interest of a legal nature which is the object of a claim based on law, in the maritime area in question; it must also demonstrate that this interest may be affected by the decision in the main proceedings.

Costa Rica contends that it need only show that a delimitation decision could affect its legal interest, and that such

would be the case if it is shown that there is any "overlap whatsoever between the area in which Costa Rica has a legal interest . . . and the area in dispute between the Parties to this case". It also contends that Nicaragua has failed to clarify where the line representing the southern limit of its claims would be located, thus leaving Costa Rica in uncertainty. Specifically, Costa Rica asserts that even the most northerly southern limit of the areas claimed by Nicaragua in its written pleadings would encroach on Costa Rica's entitlements.

Costa Rica further contends that the location of the southern terminus of the boundary between Nicaragua and Colombia which, in its view, will be decided by the Court may also affect its legal interest in the area, inasmuch as the southern endpoint may be placed in Costa Rica's potential area of interest.

Finally, Costa Rica asserts that its interests could be affected even if the Court places a directional arrow at the end of the boundary line between Nicaragua and Colombia that does not actually touch Costa Rica's potential interests. Costa Rica contends that the Court cannot be sure to place such a directional arrow a safe distance away from Costa Rica's area of interests without it providing "full information about the extent of [its] interests" to the Court by way of intervention.

The Court recalls that it has stated in the past that "in the case of maritime delimitations where the maritime areas of several States are involved, the protection afforded by Article 59 of the Statute may not always be sufficient" (*Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 421, para. 238).

At the same time, it is equally true, as the Chamber of the Court noted in its Judgment on the Application by Nicaragua for permission to intervene in the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, that

> "the taking into account of all the coasts and coastal relationships . . . as a geographical fact for the purpose of effecting on eventual delimitation as between two riparian States . . . in no way signifies that by such an operation itself the legal interest of a third . . . State . . . may be affected" (*Judgment, I.C.J. Reports*, *1990*, p. 124, para. 77).

Furthermore, in the case concerning *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine)*, the Court, after noting that "the delimitation [between Romania and Ukraine] will occur within the enclosed Black Sea, with Romania being both adjacent to, and opposite Ukraine, and with Bulgaria and Turkey lying to the south" (*Judgment, I.C.J. Reports 2009*, p. 100, para. 112), stated that "[i]t will stay north of any area where third party interests could become involved" (*ibid*.).

It follows that a third State's interest will, as a matter of principle, be protected by the Court, without it defining with specificity the geographical limits of an area where that interest may come into play. The Court wishes to emphasize that this protection is to be accorded to any third party, whether intervening or not. For instance, in its Judgment concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening*), the Court adopted the same position with regard to Equatorial Guinea, which had intervened as a non-party, and to Sao Tome and Principe, which had not (*Judgment, I.C.J. Reports 2002*, p. 421, para. 238).

The Court, in its above-mentioned Judgment, had occasion to indicate the existence of a certain relationship between Articles 62 and 59 of the Statute. Accordingly, to succeed with its request, Costa Rica must show that its interest of a legal nature in the maritime area bordering the area in dispute between Nicaragua and Colombia needs a protection that is not provided by the relative effect of decisions of the Court under Article 59 of the Statute, i.e., Costa Rica must fulfil the requirement of Article 62, paragraph 1, by showing that an interest of a legal nature which it has in the area "may be affected" by the decision in the case.

The Court recalls in this connection that, in the present case, Colombia has not requested that the Court fix the southern endpoint of the maritime boundary that it has to determine. Indeed, Colombia asserts that its claims deliberately leave open the endpoints of the delimitation so as not to affect third State's interests. The Court further recalls that Nicaragua has agreed "that any delimitation line established by the Court should stop well short of the area [in which, according to Costa Rica, it has an interest of a legal nature,] and terminate [with] an arrow pointing in the direction of Costa Rica's area".

The Court notes that, in the present case, Costa Rica's interest of a legal nature may only be affected if the maritime boundary that the Court has been asked to draw between Nicaragua and Colombia were to be extended beyond a certain latitude southwards. The Court, following its jurisprudence, when drawing a line delimiting the maritime areas between the Parties to the main proceedings, will, if necessary, end the line in question before it reaches an area in which the interests of a legal nature of third States may be involved (see *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 100, para. 112).

The Court concludes that Costa Rica has not demonstrated that it has an interest of a legal nature which may be affected by the decision in the main proceedings.

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Dissenting opinion of Judge Al-Khasawneh

In his dissenting opinion, Judge Al-Khasawneh explains the reasons for his disagreement with the Court's decision to reject Costa Rica's request to intervene in the main proceedings. He also takes issue with the majority's attempt to define and clarify the concept of "an interest of a legal nature".

At the outset, Judge Al-Khasawneh draws attention to the Court's persistently restrictive approach to intervention. In his view, the Court's unwillingness to grant permission to intervene cannot be explained in terms of the statutory requirements because the standard of "an interest of a legal nature which may be affected by the decision in the case" under Article 62 of the Statute of the Court is a liberal one. While there may well be cases where rejection is warranted because the interest asserted by the would-be intervener is not sufficiently specified or is merely an interest in the Court's pronounce-

ment on the applicable general principles and rules of international law, or because the permission to intervene would have involved the Court in pronouncing, rather than only protecting, the intervener's rights, the main factor diminishing the role of intervention in the Court's proceedings appears to be the Court's reliance on the argument that the rights of third States will in any case be protected by the relative effect of Article 59 of the Statute. Judge Al-Khasawneh rejects this approach as insufficient because the purpose and scope of protection of third State interests under Article 62 are wider than that under Article 59, providing the intervener with a chance to be fully heard in order to protect its legal interests before the merits.

With respect to Costa Rica's Application in the present case, Judge Al-Khasawneh expresses his disappointment with the Court's decision to decline permission to intervene notwithstanding that all the requirements of Article 62 are met. In particular, he rejects the Court's argument that Costa Rica should have demonstrated that its interest of a legal nature needs protection beyond and above that provided under Article 59. Judge Al-Khasawneh finds it ironic that the Court begins with proposing a low threshold by requiring the requesting State to demonstrate only that it has legal *interests* as opposed to established *rights*, only to later impose a higher threshold based on the adequacy of protection under Article 59. Whilst he commends the Court's policy to always take third State interests into account, whether or not there was a request for intervention, he emphasizes that such protection will inevitably be speculative, particularly where requests for intervention do not relate to maritime or spatial delimitation.

Judge Al-Khasawneh also takes issue with the Court's attempt to clarify the elusive concept of "an interest of a legal nature" by distinguishing between legal *interests* and *rights* and stating that these two concepts are not subject to the same protection or to the same burden of proof. First, he notes that it is unnecessary for the Court to draw such distinction as the issue of the relationship between interests and rights does not arise in the present case. Second, the Court's attempt to lower the threshold for intervention makes no difference in the present case, as Costa Rica's request is still rejected on the basis of the (ironically less stringent) Article 59 test. Third, Judge Al-Khasawneh disagrees altogether with the Court's view that the concepts of a legal *interest* and a *right* in the context of intervention are distinct. He notes that the concept of "an interest of a legal nature" was born out of a compromise struck by the drafters of Article 62, intended to exclude intervention for purely political, economic and other non-legal reasons, and not to create a hybrid concept that is neither an interest nor a right. Furthermore, he points out that the terms "legal interests", "rights" and "entitlements" have been used interchangeably in the Court's jurisprudence, thus not supporting the conclusion that they carry different meanings. Even the present Judgment appears to acknowledge that when it defines, in paragraph 26, the interest of a legal nature as a "real and concrete claim . . . based on law", which, according to Judge Al-Khasawneh, can only mean a *right*. Accordingly, he finds the Court's conclusion that an interest of a legal nature in terms of Article 62 "does not benefit from the same protection as an established right and is not subject to the same requirements in terms of proof" (Judgment, paragraph 26), illogical and unsubstantiated. In light of the above, Judge Al-Khasawneh concludes that the Court's attempt to clarify the phrase "an interest of a legal nature" is out of context and fails to bring us any closer to its understanding.

Dissenting opinion of Judge Abraham

In his dissenting opinion, Judge Abraham sets out the reasons why he believes the Court should have allowed Costa Rica's intervention.

Referring initially to the general considerations relating to intervention contained in his dissenting opinion in respect of Honduras's Application for permission to intervene, Judge Abraham briefly restates his view that intervention by a third State under Article 62 of the Statute of the Court is a right, in the sense that intervention is not an option whose exercise is subject to an authorization to be granted or refused at the discretion of the Court, but a right dependent on the existence of conditions whose satisfaction is to be determined by the Court.

Judge Abraham then explains that, although he agrees with most of the arguments in the first part of the Judgment relating to the legal framework, and in particular with the distinction made therein between the "rights" of third States and their "interests", he disagrees with the Court's application to the present case of the principles identified in that first part.

Judge Abraham considers that Costa Rica's interests may be affected by a future Judgment in the principal case for two reasons. Firstly, were the Court to accept the delimitation line suggested by Colombia, or even a line slightly further to the east, the adopted line would extend southwards in such a way that it could enter the area of Costa Rica's interests. The use of a "directional arrow" is not sufficient to offset that risk, because the Court still needs to know where to put the arrow. In that respect, the information provided by a third State during the proceedings on the Application to intervene is no substitute for the comprehensive information and observations which that State could submit once allowed to intervene. Secondly, were the Court to accept Nicaragua's claims, or even to fix a delimitation line to the east of the most easterly point of the line established by the 1977 bilateral treaty between Colombia and Costa Rica, the effect would be to deny that treaty any possibility of taking effect, and to render its ratification without purpose, since the area situated immediately to the Colombian side of the line fixed by the bilateral treaty would lie within the ambit of Nicaragua's sovereign rights.

Lastly, Judge Abraham disagrees with the restrictive position adopted by the Court in the Judgment, which he believes is contrary to the Court's most recent decisions on the subject of intervention. Moreover, Judge Abraham considers that the Court's Judgment is based on the erroneous reasoning that the delimitation line drawn by the Court will terminate before it reaches an area in which the interests of third States are at stake. Judge Abraham recalls that it is the Court's practice to place an arrow at the end of the delimitation line it draws, and to explain that the line continues beyond that point until it reaches an area in which the rights of a third State would be affected, and not the "interests" of that State. Judge Abraham

concludes by pointing out that it is difficult to see from the Court's reasoning in the Judgment under what circumstances the Court would authorize intervention by a third State in a maritime delimitation case in the future.

Declaration of Judge Keith

In his declaration, Judge Keith states that he agrees with the conclusions the Court reaches, essentially for the reasons it gives. He does, however, disagree with one aspect of the reasoning.

Judge Keith expresses three difficulties with the Court's elaboration of the distinction between "the rights in the case at hand" and "an interest of a legal nature". Those terms or concepts are being taken out of context. The definition given to the second is problematic. And, to the extent that it exists, the distinction does not appear to be useful in practice.

Joint dissenting opinion of Judges Cançado Trinidade and Yusuf

1. Judges Cançado Trindade and Yusuf append a joint dissenting opinion in which they outline their reasons for dissenting from the present Judgment of the Court. It is their belief that Costa Rica has met the conditions for intervention under Article 62 of the Statute. In their joint dissenting opinion, composed of six parts, they present the foundations of their position on *(a)* the scope and object of Article 62 of the Statute; *(b)* the need to identify an "interest of a legal nature"; *(c)* the need to demonstrate that such interest "may be affected by the decision in the case"; and *(d)* the purported special "relationship" between Articles 62 and 59 of the Court's Statute.

2. Judges Cançado Trindade and Yusuf begin their joint dissenting opinion by arguing that the Court's decision is based on policy grounds rather than on the assessment of whether the requisites of Article 62 have been fulfilled since the Court decides to reject Costa Rica's Application on the simple policy ground that "a third party's interest will, as a matter of principle, be protected by the Court, without it defining with specificity the geographical limits of an area where that interest may come into play".

3. Furthermore, they do not agree with the position of the Court that the objectives which Article 62 was established to achieve can be attained through the exercise of some kind of "judicial due diligence" concerning third-party interests of a legal nature without affording the would-be intervenor a hearing in the proceedings on the merits. On the issue of the scope and object of non-party intervention under Article 62 (part II), the two Judges note that the opportunity given to a non-party intervenor to alert the Court of the manner in which its decision could affect the Applicant's legal interest is meant to have an effect in the main proceedings through the substantive information provided by the intervenor to the Court. They express concern with the reasoning of the Court that "[t]he Court, following its jurisprudence, when drawing a line delimiting the maritime areas between the Parties to the main proceedings, will, if necessary, end the line in question before it reaches an area in which the interests of a legal nature of third States may be involved" (paragraph 89 of the Judgment). In their view, this reasoning is based on the flawed assumption that the delimitation of all maritime areas in contention between two parties can be somewhat mechanically effected without taking into account all the circumstances or facts of a particular case.

4. Judges Cançado Trindade and Yusuf also disagree with the Court for portraying itself as a potential substitute to would-be non-party intervenors in the main proceedings. If this were the case, then the object of intervention of any State applying to intervene would lose all significance. Though the Court might be able to delimit certain maritime areas until it reaches the area where the rights of third States may be affected, it is not clear how it would know about areas where third State interests of a legal nature may exist, without affording a hearing to such States in the main proceedings.

5. Judges Cançado Trindade and Yusuf then address the need to identify an "interest of a legal nature" (part III). They commend the Court for its efforts in clarifying, for the first time in its history, the concept of an "interest of a legal nature". Though this is a welcome development, they believe that the Court does not make a full assessment of the fulfilment of the requirements of Article 62 in the *cas d'espèce*. Laying out the history behind the expression "interest of a legal nature", they observe that an "interest of a legal nature" constitutes a legitimate means whereby a third party may request permission to seek protection from a future judgment which may, in the absence of such intervention, affect its claims. Thus, the standard of proof applied in the assessment of such requirements should not be as demanding as that applicable to the establishment of the existence of a right.

6. Judges Cançado Trindade and Yusuf then focus on the need to demonstrate that such an interest "may be affected by the decision in the case" (part IV). They note that the Court *(a)* mischaracterized Costa Rica's interest of a legal nature; *(b)* introduced a new standard of proof; and *(c)* based its decision solely on policy considerations.

7. First, the two Judges point out that the Court, in paragraphs 71–72 of the Judgment, sets aside Costa Rica's arguments aimed at demonstrating how its interest of a legal nature may be affected by a decision of the Court on the factually erroneous ground that Costa Rica had initially claimed its 1977 Facio-Fernandez Treaty with Colombia, and the assumptions underlying it, as an "interest of a legal nature", but later retracted that claim. It is their view that Costa Rica's aim in presenting arguments on the 1977 Treaty was to demonstrate the manner in which its interest of a legal nature, as specified in its application, may be affected by a decision of the Court. An unwarranted link appears to have been established between the requirement that Costa Rica's request has to satisfy in terms of demonstrating the manner in which its interest of a legal nature may be affected by a decision and the fact that the 1977 Treaty is not its legal interest *per se*.

8. Secondly, the Judges express surprise at the Court's introduction of a new and hitherto unknown standard of proof which required Costa Rica to demonstrate that "its interest of a legal nature (. . .) needs a protection that is not provided by the relative effect of decisions of the Court under Article 59 of the Statute". A standard of proof based on the adequacy of the protection provided by Article 59 of the Stat-

ute cannot be founded in the wording of Article 62 (1) of the Statute and does not have a direct bearing on the procedure of intervention under Article 62. Judges Cançado Trindade and Yusuf draw the conclusion that by introducing this standard of proof, the Court's decision was based on policy grounds which were not articulated in the Judgment. They emphasize that Article 62 does not confer general discretionary powers on the Court "to accept or reject a request for permission to intervene for reasons simply of policy" (see *Tunisia/Libya, Application to Intervene, Judgment, I.C.J. Reports 1981*, p. 12, paragraph 17). In determining whether or not the conditions for intervention established under Article 62 (1) have been met by the Applicant, the Court has to assess whether the grounds invoked by the Applicant are sufficiently convincing. However, in their view, the Court failed to do so, and appears to have taken a short cut and opted for a policy based decision.

9. The penultimate part of the joint dissenting opinion is devoted to the purported special relationship between Articles 62 and 59 of the Statute. The judges reiterate that the institution of intervention was conceived in a broader perspective, unrelated to Article 59, which limits the binding force of a Court's decision to the contending parties in the concrete case. Article 59 has a specific and narrow focus and applies to all decisions of the Court. On the contrary, intervention under Article 62 was conceived, for the purposes of the sound administration of justice, to operate prior to the issuance of a final decision by the Court, and thus before Article 59 comes into operation. It is thus their regret that the Court chose to focus on an unproven special "relationship" between Article 59 and Article 62, ignoring these important characteristics of the institution of intervention.

10. In their concluding remarks, Judges Cançado Trindade and Yusuf observe that the Court's practice appears reminiscent of traditional bilateral arbitral proceedings where a barrier against third party intervention may be considered desirable. Nevertheless,

Judges Cançado Trindade and Yusuf stress that this practice does not respond to the contemporary demands of the judicial settlement of disputes, and does not meet the challenges faced by present-day international law.

Dissenting opinion of Judge Donoghue

Judge Donoghue dissents from the Court's decision to reject Costa Rica's Application to intervene as a non-party. She also sets forth her disagreement with the Court's approach to Article 62 of the Statute of the Court.

With respect to the factors relevant to consideration of an application to intervene under Article 62 of the Statute and to the Court's practice of protecting third States that "may be affected" in maritime delimitation cases, Judge Donoghue refers the reader to Part I of her dissenting opinion relating to the Application to intervene by Honduras in this case. Judge Donoghue notes that in her Honduras opinion, she explains her conclusion that in delimitation cases in which the area to be delimited overlaps an area subject to the claim of a third State, the Court's decision may affect "the interest of a legal nature" of that third State.

Judge Donoghue then turns to Costa Rica's Application to intervene. She notes that Costa Rica has described a "minimum area of interest" that overlaps the area at issue in the dispute between Nicaragua and Colombia. This is made clear by the sketch-map attached to the Court's Judgment. In Judge Donoghue's view, the Court appears to have decided that it can protect Costa Rica's interests by delimiting the boundary between Nicaragua and Colombia in a manner that stops short of the area claimed by Costa Rica. This leads the Court to reject Costa Rica's Application. However, Judge Donoghue takes the position that the possibility that the Court may use directional arrows to protect Costa Rica's interests does not counsel against intervention, but instead supports the conclusion that Costa Rica has an interest of a legal nature that may be affected by the Court's decision. Moreover, Judge Donoghue notes that the Court inevitably must assess or estimate the point at which a third State may have an interest of a legal nature in order to avoid placing a directional arrow within the area subject to the claim of that third State. In this light, Judge Donoghue concludes that the object of Costa Rica's request to intervene as a non-party—to inform the Court of its legal rights and interests and to seek to ensure that the Court's decision does not affect those interests—is appropriate and that Costa Rica has met its burden under Article 62.

In her conclusion, Judge Donoghue again refers the reader to her Honduras opinion, in which she makes some general observations about the Court's current approach to intervention requests and offers some thoughts on how the approach might be improved.

Declaration of Judge *ad hoc* Gaja

In his declaration Judge *ad hoc* Gaja maintains that the Court should have admitted Costa Rica's Application to intervene if it had followed its more recent precedents in cases of maritime delimitation. That would have allowed the State wishing to intervene to contribute to the determination of the nature and scope of its legal interest at stake. While the Court says that it would at any event take note of the information provided by that State in its application, it seems paradoxical that, in a case of maritime delimitation, the only way for a third State to submit information about its interest of a legal nature which may be affected by a decision of the Court would be to make an application that the Court considers inadmissible.

187. TERRITORIAL AND MARITIME DISPUTE (NICARAGUA *v.* COLOMBIA) (APPLICATION BY HONDURAS FOR PERMISSION TO INTERVENE)

Judgment of 4 May 2011

In its judgment of 4 May 2011 on the Application for permission to intervene in the case concerning the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* filed by the Republic of Honduras pursuant to Article 62 of the Statute, the Court, by thirteen votes to two, found that the Application submitted by Honduras could not be granted.

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

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The operative paragraph (para. 76) of the Judgment reads as follows:

" . . .

The Court,

By thirteen votes to two,

Finds that the Application for permission to intervene in the proceedings, either

as a party or as a non-party, filed by the Republic of Honduras under Article 62 of the Statute of the Court cannot be granted;

In favour: President Owada; Vice-President Tomka; Judges Koroma, Al-Khasawneh, Simma, Keith, Sepúlveda-Amor, Bennouna, Cançado Trindade, Yusuf, Xue; Judges *ad hoc* Cot, Gaja;

Against: Judges Abraham, Donoghue."

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Judge Al-Khasawneh appended a declaration to the Judgment of the Court; Judge Abraham appended a dissenting opinion to the Judgment of the Court; Judge Keith appended a declaration to the Judgment of the Court; Judges Cançado Trindade and Yusuf appended a joint declaration to the Judgment of the Court; Judge Donoghue appended a dissenting opinion to the Judgment of the Court.

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History of the proceedings
(paras. 1–17)

The Court begins by recalling that, on 6 December 2001, the Republic of Nicaragua (hereinafter "Nicaragua") filed in the Registry of the Court an Application instituting proceedings against the Republic of Colombia (hereinafter "Colombia") in respect of a dispute consisting of a "group of related legal issues subsisting" between the two States "concerning title to territory and maritime delimitation" in the western Caribbean.

As basis for the Court's jurisdiction, Nicaragua invoked the provisions of Article XXXI of the American Treaty on Pacific Settlement signed on 30 April 1948, officially designated, according to Article LX thereof, as the "Pact of Bogotá" (hereinafter referred to as such), as well as the declarations made by the Parties under Article 36 of the Statute of the Permanent Court of International Justice, which are deemed, for the period which they still have to run, to be acceptances of the compulsory jurisdiction of the present Court pursuant to Article 36, paragraph 5, of its Statute.

The Court states that, on 10 June 2010, the Republic of Honduras (hereinafter "Honduras") filed an Application for permission to intervene in the case pursuant to Article 62 of the Statute. It stated that the object of this Application was:

"*Firstly*, in general terms, to protect the rights of the Republic of Honduras in the Caribbean Sea by all the legal means available and, consequently, to make use for that purpose of the procedure provided for in Article 62 of the Statute of the Court.

Secondly, to inform the Court of the nature of the legal rights and interests of Honduras which could be affected by the decision of the Court, taking account of the maritime boundaries claimed by the parties in the case brought before the Court . . .

Thirdly, to request the Court to be permitted to intervene in the current proceedings as a State party. In such circumstances, Honduras would recognize the binding force of the decision that would be rendered. Should the Court not accede to this request, Honduras requests the Court, in the alternative, for permission to intervene as a non-party."

In accordance with Article 83, paragraph 1, of the Rules of Court, certified copies of Honduras's Application were communicated forthwith to Nicaragua and Colombia, which were invited to furnish written observations on that Application.

On 2 September 2010, within the time-limit fixed for that purpose by the Court, the Governments of Nicaragua and Colombia submitted written observations on Honduras's Application for permission to intervene. In its observations, Nicaragua stated that the request to intervene failed to comply with the Statute and the Rules of Court and that it therefore "opposes the granting of such permission, and . . . requests that the Court dismiss the Application for permission to intervene filed by Honduras". For its part, Colombia indicated *inter alia* in its observations that it had "no objection" to Honduras's request "to be permitted to intervene as a non-party", and added that it "considers that [Honduras's request to be permitted to intervene as a party] falls to the Court to decide". Nicaragua having objected to the Application, the Parties and the Government of Honduras were notified by letters from the Registrar dated 15 September 2010 that the Court would

hold hearings, in accordance with Article 84, paragraph 2, of the Rules of Court, to hear the observations of Honduras, the State applying to intervene, and those of the Parties to the case.

At the public hearings on whether to grant Honduras's Application for permission to intervene, the following submissions were presented:

On behalf of the Government of Honduras,

"Having regard to the Application and the oral pleadings,

May it please the Court to permit Honduras:

(1) to intervene as a party in respect of its interests of a legal nature in the area of concern in the Caribbean Sea (paragraph 17 of the Application) which may be

affected by the decision of the Court; or

(2) in the alternative, to intervene as a non-party with respect to those interests."

On behalf of the Government of Nicaragua,

"In accordance with Article 60 of the Rules of the Court and having regard to the Application for permission to intervene filed by the Republic of Honduras and its oral pleadings, the Republic of Nicaragua respectfully submits that:

The Application filed by the Republic of Honduras is a manifest challenge to the authority of the *res judicata* of your 8th of October 2007 Judgment. Moreover, Honduras has failed to comply with the requirements established by the Statute and the Rules of the Court, namely, Article 62, and paragraph 2, *(a)* and *(b)*, of Article 81 respectively, and therefore Nicaragua (1) opposes the granting of such permission, and (2) requests that the Court dismiss the Application for permission to intervene filed by Honduras."

On behalf of the Government of Colombia,

"In light of the considerations stated during these proceedings, [the] Government [of Colombia] wishes to reiterate what it stated in the Written Observations it submitted to the Court, to the effect that, in Colombia's view, Honduras has satisfied the requirements of Article 62 of the Statute and, consequently, that Colombia does not object to Honduras's request for permission to intervene in the present case as a non-party. As concerns Honduras's request to be permitted to intervene as a Party, Colombia likewise reiterates that it is a matter for the Court to decide in conformity with Article 62 of the Statute."

Reasoning of the Court

The Court notes that Honduras defined the object of its intervention according to whether its primary or alternative request to intervene were granted: if the former, to settle the maritime boundary between itself and the two States parties to the case; if the latter, to protect its legal rights and interests and to inform the Court of the nature of these, so that they are not affected by the future maritime delimitation between Nicaragua and Colombia.

I. The legal framework
(paras. 20–48)

The Court first considers the legal framework of Honduras's request to intervene as set out in Article 62 of the Statute of the Court and Article 81 of the Rules of Court and notes that, intervention being a proceeding incidental to the main proceedings before the Court, it is, according to the Statute and the Rules of Court, for the State seeking to intervene to set out the interest of a legal nature which it considers may be affected by the decision in that dispute, the precise object it is pursuing by means of the request, as well as any basis of jurisdiction which is claimed to exist as between it and the parties.

The Court examines the capacities in which Honduras is seeking to intervene, before turning to the other constituent elements of the request for permission to intervene.

1. The capacities in which Honduras is seeking to intervene
(paras. 22–30)

Honduras is seeking permission to intervene as a party in the case before the Court in order to achieve a final settlement of the dispute between itself and Nicaragua, including the determination of the tripoint with Colombia, and, in the alternative, as a non-party, in order to inform the Court of its interests of a legal nature which may be affected by the decision the Court is to render in the case between Nicaragua and Colombia, and to protect those interests.

Referring to the jurisprudence of the Court, Honduras considers that Article 62 of the Statute allows a State to intervene either as a party or a non-party. In the former case, a basis of jurisdiction as between the State seeking to intervene and the parties to the main proceedings is required, and the intervening State is bound by the Court's judgment, whereas in the latter, that judgment has effect only between the parties to the main proceedings, pursuant to Article 59 of the Statute. Honduras maintains that in the present proceedings, Article XXXI of the Pact of Bogotá founds the Court's jurisdiction as between itself, Nicaragua and Colombia. For a State seeking to intervene as a party, according to Honduras, intervention consists in "asserting a right of its own with respect to the object of the dispute", so as to obtain a ruling from the Court on such a right.

For Nicaragua, whatever the two alternative capacities in which Honduras is seeking to intervene, the *sine qua non* conditions laid down by Article 62 of the Statute remain applicable, namely that the State must be able to show an interest of a legal nature which may be affected by the decision in a dispute submitted to the Court. It points out that Honduras, in any event, may not intervene as a party, if for no other reason than the absence of a basis of jurisdiction, since Article VI of the Pact of Bogotá excludes from the Court's jurisdiction "matters already settled . . . by decision of an international court". In Nicaragua's view, Honduras's argument consists in reopening delimitation issues already decided by the Judgment of the Court of 8 October 2007 (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 659).

Colombia notes that intervention is an incidental procedure and may not be used to tack on a new case, distinct from

the case that exists between the original parties. It accepts that both forms of intervention, as a party and as a non-party, require proof of the existence of an interest of a legal nature, although it questions whether the same criterion applies to this interest in both cases.

The Court observes that neither Article 62 of the Statute nor Article 81 of the Rules of Court specifies the capacity in which a State may seek to intervene. However, in its Judgment of 13 September 1990 on Nicaragua's Application for permission to intervene in the case concerning *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, the Chamber of the Court considered the status of a State seeking to intervene and accepted that a State may be permitted to intervene under Article 62 of the Statute either as a non-party or as a party:

> "It is therefore clear that a State which is allowed to intervene in a case, does not, by reason only of being an intervener, become also a party to the case. It is true, conversely, that, provided that there be the necessary consent by the parties to the case, the intervener is not prevented by reason of that status from itself becoming a party to the case." (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990*, pp. 134–135, para. 99.)

In the opinion of the Court, the status of intervener as a party requires, in any event, the existence of a basis of jurisdiction as between the States concerned, the validity of which is established by the Court at the time when it permits intervention. However, even though Article 81 of the Rules of Court provides that the application must specify any basis of jurisdiction claimed to exist as between the State seeking to intervene and the parties to the main case, such a basis of jurisdiction is not a condition for intervention as a non-party.

If it is permitted by the Court to become a party to the proceedings, the intervening State may ask for rights of its own to be recognized by the Court in its future decision, which would be binding for that State in respect of those aspects for which intervention was granted, pursuant to Article 59 of the Statute. *A contrario*, as the Chamber of the Court formed to deal with the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* has pointed out, a State permitted to intervene in the proceedings as a non-party "does not acquire the rights, or become subject to the obligations, which attach to the status of a party, under the Statute and Rules of Court, or the general principles of procedural law" (*Application to Intervene, Judgment, I.C.J. Reports 1990*, p. 136, para. 102).

The Court observes however that, whatever the capacity in which a State is seeking to intervene, it must fulfil the conditions laid down by Article 62 of the Statute. Since Article 62 of the Statute and Article 81 of the Rules of Court provide the legal framework for a request to intervene and define its constituent elements, those elements are essential, whatever the capacity in which a State is seeking to intervene; that State is required in all cases to establish its interest of a legal nature which may be affected by the decision in the main case, and the precise object of the requested intervention.

2. The interest of a legal nature which may be affected (paras. 31–39)

The Court notes that Honduras takes the view that there are two principles underpinning Article 62 of the Statute. Under the first of these, it is for the State wishing to intervene to "consider" whether one or more of its interests of a legal nature may be affected by the decision in the case, and it alone is able to appreciate the extent of the interests in question. According to the second principle, it is for that State to decide whether it is appropriate to exercise a right of intervention before the Court.

For Honduras, therefore, Article 62, like Article 63, lays down a right to intervene for all States parties to the Statute, whereby it is sufficient for one of them to "consider" that its interests of a legal nature may be affected in order for the Court to be bound to permit intervention. According to Honduras, if that interest is genuine, the Court does not have the discretion not to authorize the intervention.

The Court observes that, as provided in the Statute and the Rules of Court, the State seeking to intervene shall set out its own interest of a legal nature in the main proceedings, and a link between that interest and the decision that might be taken by the Court at the end of the proceedings. In the words of the Statute, this is "an interest of a legal nature which may be affected by the decision in the case" (expressed more explicitly in the English text than in the French "un intérêt d'ordre juridique . . . pour lui en cause"; see Article 62 of the Statute).

The Court considers that it is up to the State concerned to apply to intervene, even though the Court may, in the course of a particular case, draw the attention of third States to the possible impact that its future judgment on the merits may have on their interests, as it did in its Judgment of 11 June 1998 on preliminary objections in the case concerning *Land and Maritime Boundary between Cameroon and Nigeria, I.C.J. Reports 1998*, p. 324, para. 116.

The Court notes that, in contrast to Article 63 of the Statute, a third State does not have a right to intervene under Article 62. It is not sufficient for that State to consider that it has an interest of a legal nature which may be affected by the Court's decision in the main proceedings in order to have, *ipso facto*, a right to intervene in those proceedings. Indeed, Article 62, paragraph 2, clearly recognizes the Court's prerogative to decide on a request for permission to intervene, on the basis of the elements which are submitted to it.

It is true that, as it has already indicated, the Court "does not consider paragraph 2 [of Article 62] to confer upon it any general discretion to accept or reject a request for permission to intervene for reasons simply of policy" (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application for Permission to Intervene, Judgment, I.C.J. Reports 1981*, p. 12, para. 17). It is for the Court, responsible for safeguarding the proper administration of justice, to decide whether the condition laid down by Article 62, paragraph 1, has been fulfilled. Consequently, Article 62, paragraph 2, according to which "[it] shall be for the Court to decide upon this request", is markedly different from Article 63, paragraph 2, which clearly gives certain States "the right to intervene in the proceedings" in respect of the interpretation of a convention to which they are parties.

The Court observes that, whereas the parties to the main proceedings are asking it to recognize certain of their rights in the case at hand, a State seeking to intervene is, by contrast, contending, on the basis of Article 62 of the Statute, that the decision on the merits could affect its interests of a legal nature. The State seeking to intervene as a non-party, therefore, does not have to establish that one of its rights may be affected; it is sufficient for that State to establish that its interest of a legal nature may be affected. Article 62 requires the interest relied upon by the State seeking to intervene to be of a legal nature, in the sense that it has to be the object of a real and concrete claim of that State, based on law, as opposed to a claim of a purely political, economic or strategic nature. But this is not just any kind of interest of a legal nature; it must in addition be possible for it to be affected, in its content and scope, by the Court's future decision in the main proceedings.

Accordingly, an interest of a legal nature within the meaning of Article 62 does not benefit from the same protection as an established right and is not subject to the same requirements in terms of proof.

The decision of the Court granting permission to intervene can be understood as a preventive one, since it is aimed at allowing the intervening State to take part in the main proceedings, in order to protect an interest of a legal nature which risks being affected in those proceedings. As to the link between the incidental proceedings and the main proceedings, the Court has previously stated that "the interest of a legal nature to be shown by a State seeking to intervene under Article 62 is not limited to the *dispositif* alone of a judgment. It may also relate to the reasons which constitute the necessary steps to the *dispositif*" (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Application for Permission to Intervene, Judgment, I.C.J. Reports 2001*, p. 596, para. 47).

The Court makes clear that it falls to it to assess the interest of a legal nature which may be affected that is invoked by the State that wishes to intervene, on the basis of the facts specific to each case, and it can only do so "*in concreto* and in relation to all the circumstances of a particular case" (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, p. 118, para. 61).

3. The precise object of the intervention
(paras. 40–48)

The Court recalls that, under Article 81, paragraph 2 *(b)*, of the Rules of Court, an application for permission to intervene must set out "the precise object of the intervention".

Honduras is requesting the Court, in the context of its Application for permission to intervene as a party, to determine the definitive course of the maritime boundary between itself, Nicaragua and Colombia in the maritime zone in question, and to fix the tripoint on the boundary line under the 1986 Treaty. In the alternative, the object of Honduras's intervention as a non-party is "to protect its rights and to inform the Court of the nature of the legal rights and interests of the Republic of Honduras in the Caribbean Sea which could be affected by the decision of the Court in the pending case".

The Court states that Honduras's request for permission to intervene is an incidental procedure and that, whatever the form of the requested intervention, as a party or as a non-party, the State seeking to intervene is required by the Statute to demonstrate the existence of a legal interest which may be affected by the decision of the Court in the main proceedings. It follows that the precise object of the intervention must be connected with the subject of the main dispute between Nicaragua and Colombia.

The Court points out, moreover, that the written and oral proceedings concerning the application for permission to intervene must focus on demonstrating the interest of a legal nature which may be affected; these proceedings are not an occasion for the State seeking to intervene or for the Parties to discuss questions of substance relating to the main proceedings, which the Court cannot take into consideration during its examination of whether to grant a request for permission to intervene.

As the Court has previously stated, the *raison d'être* of intervention is to enable a third State, whose legal interest might be affected by a possible decision of the Court, to participate in the main case in order to protect that interest.

The Court notes that a State requesting permission to intervene may not, under the cover of intervention, seek to introduce a new case alongside the main proceedings. While it is true that a State which has been permitted to intervene as a party may submit claims of its own to the Court for decision, these have to be linked to the subject of the main dispute. The fact that a State is permitted to intervene does not mean that it can alter the nature of the main proceedings, since intervention "cannot be [a proceeding] which transforms [a] case into a different case with different parties" (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990*, p. 134, para. 98; see also *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, Judgment, I.C.J. Reports 1984*, p. 20, para. 31).

Therefore, the purpose of assessing the connection between the precise object of the intervention and the subject of the dispute is to enable the Court to ensure that a third State is actually seeking to protect its legal interests which may be affected by the future judgment.

II. Examination of Honduras's application for permission to intervene
(paras. 49–75)

The Court notes that, in specifying its interests of a legal nature that may be affected by the decision of the Court, Honduras in its Application states that the 1986 Maritime Delimitation Treaty between Honduras and Colombia (hereinafter referred to as "the 1986 Treaty") recognizes that the area north of the 15th parallel and east of the 82nd meridian involves Honduras's legitimate rights and interests of a legal nature. Honduras argues that the Court should, in its decision in the present case, take full account of such rights and interests in the said area, which, it maintains, were not addressed in the 2007 Judgment of the Court in the case concerning *Territorial and Maritime Dispute between Nicaragua and Hondu-*

ras in the Caribbean Sea (Nicaragua v. *Honduras) (Judgment, I.C.J. Reports 2007 (II)*, p. 658). Since the Court is going to determine the allocation of the "delimitation area" proposed by Nicaragua in the main proceedings, Honduras is of the view that the Court will inevitably have to decide whether the 1986 Treaty is in force and whether it does or does not accord Colombia rights in the area in dispute between Colombia and Nicaragua. Therefore, Honduras maintains that the status and substance of the 1986 Treaty are at stake in the present case.

Honduras claims that by virtue of the 1986 Treaty, in the area east of the 82nd meridian, it is still entitled to certain sovereign rights and jurisdiction such as oil concessions, naval patrols and fishing activities. Honduras contends that Nicaragua as a third party to the 1986 Treaty cannot rely on the said Treaty to maintain that the maritime area in question appertains to Nicaragua alone. Honduras is convinced that, without its participation as an intervening State, the decision of the Court may irreversibly affect its legal interests if the Court is eventually to uphold certain claims formulated by Nicaragua.

Honduras argues that the 2007 Judgment did not settle the entire Caribbean Sea boundary between Honduras and Nicaragua. In its opinion, the fact that the arrow on the bisector boundary appearing on one of the sketch-maps in the 2007 Judgment stops at the 82nd meridian, together with the wording of the *dispositif* of the Judgment, indicates that the Court made no decision about the area lying east of that meridian. According to Honduras, because the Court in the 2007 Judgment did not rule on the 1986 Treaty, a matter that the Court was not asked to address, there still exists uncertainty to be resolved in regard to the respective sovereign rights and jurisdiction of the three States in the area, namely, Honduras, Colombia and Nicaragua. To be more specific, Honduras takes the view that the Court has not determined the final point of the boundary between Honduras and Nicaragua, nor has it specified that the final endpoint will lie on the azimuth of the bisector boundary line. As the object of its Application, Honduras is requesting the Court, in the event it is granted permission to intervene as a party, to fix the tripoint between Honduras, Nicaragua and Colombia, thus to reach a final settlement of maritime delimitation in the area.

In explaining its understanding of the effect of the 2007 Judgment with respect to the reasoning contained in paragraphs 306–319 of the Judgment under the heading "Starting-point and endpoint of the maritime boundary", Honduras contends that these paragraphs are not part of *res judicata*, and that, in paragraph 319, the Court was not ruling on a specific matter, but rather indicating to the Parties the methodology it could use without prejudging a final endpoint, and without prejudging which State or States could be considered as the third States. Thus, in its view, paragraph 319 does not rule upon any matter at all and *res judicata* in principle only applies to the *dispositif* of the Judgment.

Nicaragua and Colombia, the Parties to the main proceedings, hold different positions towards Honduras's request. Nicaragua is definitely opposed to the Application by Honduras, either as a party or a non-party. Nicaragua takes the position that Honduras's request fails to identify any interest of a legal nature that may be affected by the decision of the Court as required by Article 62 of the Statute and challenges the *res judicata* of the 2007 Judgment.

Nicaragua contends that Honduras has no interest of a legal nature south of the delimitation line fixed by the Court in the 2007 Judgment, including the area bounded by that line in the north and the 15th parallel in the south. According to Nicaragua, the 1986 Treaty cannot be relied on against it because it encroaches on its sovereign rights. Nicaragua argues that the 2007 Judgment, with full force of *res judicata*, settles the entire Caribbean Sea boundary between Nicaragua and Honduras, and that *res judicata* extends not only to the *dispositif*, but also to the reasoning, insofar as it is inseparable from the operative part. Nicaragua is of the view that the Application instituted by Honduras attempts to reopen matters that have already been decided by the Court and therefore should be barred by the principle of *res judicata*.

Colombia, on the other hand, is of the view that Honduras has satisfied the test to intervene as a non-party in the case under Article 62 of the Statute. Moreover, it raises no objection to the request of Honduras to intervene as a party. Colombia focused its arguments on the effect of the 2007 Judgment on the legal rights of Colombia vis-à-vis Nicaragua in the area which the 1986 Treaty covers. Colombia asserts that its bilateral obligations towards Honduras under the 1986 Treaty do not prevent it from claiming in the present proceedings rights and interests in the area north of the 15th parallel and east of the 82nd meridian as against Nicaragua, because what it had committed to Honduras under the 1986 Treaty was only applicable to Honduras.

The Court notes that, according to Article 62 of the Statute and Article 81 of the Rules of Court, the State applying to intervene has to satisfy certain conditions for intervention to be permitted. Either as a party or a non-party, the State requesting permission to intervene should demonstrate to the Court that it has an interest of a legal nature that may be affected by the decision of the Court in the main proceedings. The Court, in ascertaining whether Honduras has or has not met the criteria in Article 62 of the Statute concerning intervention, will first of all examine the legal interest claimed to be involved. The Court is mindful, as stated previously, that in analysing such interests, the Court neither has the intention to construe the meaning or scope of the 2007 Judgment in the sense of Article 60 of the Statute, nor to address any subject-matter that should be dealt with at the merits phase of the main proceedings. The Court must not in any way anticipate its decision on the merits (see *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990*, p. 118, para. 62).

1. The interest of a legal nature claimed by Honduras (paras. 57–75)

The Court first examines the interest that Honduras has claimed for protection by intervention. Honduras indicates that the zone containing its interest of a legal nature that may be affected by the decision of the Court lies within a roughly rectangular area as illustrated in the sketch-map on page 26 of the Judgment. It further states that the south line and the east

line of the rectangle, that are identical with the boundary in the 1986 Treaty, run as follows:

> "[S]tarting from the 82nd meridian, the boundary goes due east along the 15th parallel until it reaches meridian 79° 56' 00". It then turns due north along that meridian. Some distance to the north, it turns to follow an approximate arc to the west of some cays and Serranilla Bank, until it reaches a point north of the cays . . ."

The Court observes that Honduras, in order to demonstrate that it has an interest of a legal nature in the present case, contends that it is entitled to claim sovereign rights and to assert jurisdiction over the maritime area in the rectangle. In concrete terms, Honduras states that it can assert rights relating to oil concessions, naval patrols and fishing activities in that area. In its arguments, Honduras raises a number of issues which, according to the Court, directly put into question the 2007 Judgment, in which the maritime boundary between Honduras and Nicaragua was delimited.

Honduras's interest of a legal nature relates essentially to two issues: whether the 2007 Judgment has settled the entire maritime boundary between Honduras and Nicaragua in the Caribbean Sea and what effect, if any, the decision of the Court in the pending proceedings will have on the rights that Honduras enjoys under the 1986 Treaty.

In its Application, Honduras explains that it and Colombia possess rights in the maritime zone north of the 15th parallel as they are generated by the Honduran coast, on the one hand, and by the Archipelago of San Andrés, Serranilla and the island of Providencia, on the other. Due to their overlapping claims, the 1986 Treaty was concluded. The Court observes that Honduras's position on the status of the 15th parallel as stated in the present case is not raised for the first time as between Honduras and Nicaragua. As a matter of fact, it was duly considered by the Court in the Judgment on the delimitation of the maritime boundary between Nicaragua and Honduras in 2007.

In the *Nicaragua* v. *Honduras* case, one of Honduras's principal arguments with respect to the delimitation was that the 15th parallel, either as a traditional line or by tacit agreement of the neighbouring States, should serve as the maritime boundary between Honduras and Nicaragua. The Court, in that judgment, rejected both of these legal grounds and gave no effect to the 15th parallel as the boundary line. By virtue of the 2007 Judgment, therefore, the 15th parallel plays no role in the consideration of the maritime delimitation between Honduras and Nicaragua. In other words, the matter has rested on *res judicata* for Honduras in the present proceedings.

In establishing a single maritime boundary between Nicaragua and Honduras, delimiting their respective territorial seas, continental shelves and exclusive economic zones in the disputed area, the Court in the 2007 Judgment drew up a straight bisector line, with some adjustments taking into account Honduras's islands off the coastline. In the present proceedings, Honduras and Nicaragua hold considerably different positions on the effect of this bisector boundary. They differ as to whether the 2007 Judgment has specified an endpoint on the bisector line, whether the bisector line extends beyond the 82nd meridian and, consequently, whether the 2007 Judgment has definitively delimited the entire maritime boundary between Honduras and Nicaragua in the Caribbean Sea. The Court notes Honduras's assertion that these issues, if not answered, would certainly affect the finality and stability of the legal relations between the two parties.

In the Court's reasoning in paragraphs 306–319 of the 2007 Judgment, there are two aspects that the Court considers as directly bearing on the above issues. The Court recalls, first, that in the 2007 Judgment, it was only after the Court came to the conclusion that there may be potential third-State interests in the area that it decided not to rule on the issue of the endpoint. Logically, if Point F on the bisector line had been determined as the endpoint, as interpreted by Honduras, it would have been unnecessary for the Court to continue considering where third-State interests might possibly lie because Point F would in any event be devoid of potential effect on the rights of any third State. Secondly, it was because of the claim raised by Honduras that a delimitation continuing *beyond* the 82nd meridian would affect Colombia's rights that the Court took full account of the arguments put forward by Honduras in regard to the third-State rights and made sure

> "that any delimitation between Honduras and Nicaragua extending *east beyond the 82nd meridian and north of the 15th parallel (as the bisector adopted by the Court would do*) would not actually prejudice Colombia's rights because Colombia's rights under [the 1986 Treaty] do not extend north of the 15th parallel" (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, pp. 758–759, para. 316; emphasis added).

According to the Court's reasoning, the bisector line with a defined azimuth, after Point F, is to continue as a straight line subject to the curve of the Earth and run the whole course of the maritime boundary between Honduras and Nicaragua as long as there are no third-State rights affected. It thus delimits the maritime zones respectively accruing to Honduras and Nicaragua in the Caribbean Sea, which by definition must cover the area in the rectangle.

In examining Honduras's argument, the Court finds it difficult to appreciate Honduras's contention that "a boundary that does not have an endpoint, clearly cannot be settled in its entirety", because that was not the first time that the Court left open the endpoint of a maritime boundary to be decided later when the rights of the third State or States were ascertained. As the Court held in its 2007 Judgment, it is "usual in a judicial delimitation for the precise endpoint to be left undefined in order to refrain from prejudicing the rights of third States" (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 756, para. 312). What was decided by the Court with respect

to the maritime delimitation between Honduras and Nicaragua in the Caribbean Sea is definitive. Honduras could not be a "third State" in the legal relations in that context for the reason that it was itself a party to the proceedings. So long as there are no third-State claims, the boundary is to run indisputably on the course defined by the Court.

The Court observes that the boundary might have conceivably deviated from the straight-line established by the 2007 Judgment only if Honduras had presented further maritime features to be taken into account for the boundary delimitation. Neither in the case concerning the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras*) nor in the present proceedings did Honduras make such a suggestion or produce any evidence to that effect. Of course, even if it had done so in the present proceedings, the matter still would not have fallen under Article 62 of the Statute with respect to intervention, but under Article 61 thereof concerning revision. In other words, Honduras does not suggest that there still exists any unresolved dispute or evidence that would prove that the bisector line is not the complete and final maritime boundary between Honduras and Nicaragua.

2. The application of the principle of res judicata
(paras. 66–70)

The Court notes that Honduras's claims are primarily based on the ground that the reasoning contained in paragraphs 306–319 of the 2007 Judgment does not have the force of *res judicata*. Honduras contends that, therefore, the principle of *res judicata* does not prevent it from raising issues relating to the reasoning of that Judgment.

The Court recalls that it is a well-established and generally recognized principle of law that a judgment rendered by a judicial body has binding force between the parties to the dispute.

It notes that, in ascertaining the scope of *res judicata* of the 2007 Judgment, it must consider Honduras's request in the specific context of the case.

The rights of Honduras over the area north of the bisector line have not been contested either by Nicaragua or by Colombia. With regard to that area, there thus cannot be an interest of a legal nature of Honduras which may be affected by the decision of the Court in the main proceedings.

In order to assess whether Honduras has an interest of a legal nature in the area south of the bisector line, the essential issue for the Court to ascertain is to what extent the 2007 Judgment has determined the course of the single maritime boundary between the areas of territorial sea, continental shelf and exclusive economic zone appertaining respectively to Nicaragua and Honduras.

The Court is of the view that the course of the bisector line as determined in point (3) of the operative clause of its 2007 Judgment (paragraph 321) is clear. In point (3) of its operative clause, which indisputably has the force of *res judicata*, the Court held that "[f]rom point F, [the boundary line] shall continue along the line having the azimuth of 70° 14' 41.25" until it reaches the area where the rights of third States may be affected".

The Court observes that the reasoning contained in paragraphs 306–319 of the 2007 Judgment, which was an essential step leading to the *dispositif* of that Judgment, is also unequivocal on this point. The Court made a clear determination in these paragraphs that the bisector line would extend beyond the 82nd meridian until it reached the area where the rights of a third State may be affected. Before the rights of such third State were ascertained, the endpoint of the bisector line would be left open. Without such reasoning, it may be difficult to understand why the Court did not fix an endpoint in its decision. With this reasoning, the decision made by the Court in its 2007 Judgment leaves no room for any alternative interpretation.

3. Honduras's request in relation to the 1986 Treaty
(paras. 71–75)

With regard to the 1986 Treaty, the Court observes that Honduras and Colombia have different positions. Honduras asserts that given the "conflicting bilateral obligations", stemming from the 1986 Treaty with Colombia and the 2007 Judgment vis-à-vis Nicaragua respectively, Honduras has an interest of a legal nature in determining if and how the 2007 Judgment has affected the status and application of the 1986 Treaty. Colombia, on the other hand, asks the Court to leave the 1986 Treaty aside, because the task of the Court at the merits phase is to delimit the maritime boundary between Colombia and Nicaragua, not to determine the status of the treaty relations between Colombia and Honduras. Thus, in the view of Colombia, the status and substance of the 1986 Treaty are not issues at stake in the main proceedings.

In the perceived rectangle under consideration by the Court, there are three States involved: Honduras, Colombia and Nicaragua. These States may conclude maritime delimitation treaties on a bilateral basis. Such bilateral treaties, under the principle *res inter alios acta*, neither confer any rights upon a third State, nor impose any duties on it. Whatever concessions one State party has made to the other shall remain bilateral and bilateral only, and will not affect the entitlements of the third State. In conformity with the principle of *res inter alios acta*, the Court in the 2007 Judgment did not rely on the 1986 Treaty.

The Court states that, between Colombia and Nicaragua, the maritime boundary will be determined pursuant to the coastline and maritime features of the two Parties. In so doing, the Court will place no reliance on the 1986 Treaty in determining the maritime boundary between Nicaragua and Colombia.

Finally, the Court does not consider any need to address the remaining issue of the "tripoint" that Honduras claims to be on the boundary line in the 1986 Treaty. Having clarified the above matters pertaining to the 2007 Judgment and the 1986 Treaty, the Court does not see any link between the issue of the "tripoint" raised by Honduras and the current proceedings.

In light of the above considerations, the Court concludes that Honduras has failed to satisfy the Court that it has an interest of a legal nature that may be affected by the decision of the Court in the main proceedings. Consequently, there is no need for the Court to consider any further questions that have been put before it in the present proceedings.

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Declaration of Judge Al-Khasawneh

Judge Al-Khasawneh concurs in the Judgment's conclusion that the Application by Honduras for permission to intervene

in the present proceedings either as a party or a non-party, cannot be granted. He also essentially agrees with the reasoning which led the majority to this conclusion.

However, Judge Al-Khasawneh disagrees, for reasons already outlined in his dissenting opinion appended to the Judgment concerning Costa Rica's Application for permission to intervene in the same case, with the Court's attempt to clarify the elusive concept of "an interest of a legal nature" by distinguishing between legal *interests* and *rights* and by stating that these two concepts are not subject to the same protection or to the same burden of proof. In his view, this attempt has not brought us any closer to understanding of the concept of "an interest of a legal nature" but has rather made it even more obscure.

Dissenting opinion of Judge Abraham

Judge Abraham agrees with the operative part of the Judgment in so far as it rejects Honduras's Application to intervene as a party, but he does not agree with the reasoning which led the Court to that conclusion. Furthermore, Judge Abraham disagrees with the operative part of the Judgment in so far as it rejects Honduras's Application to intervene as a non-party.

By way of general considerations, Judge Abraham explains that third States have a "right" to intervene in a case in progress, but that that right is subject to the existence of certain conditions, whose satisfaction is to be determined by the Court on the basis of the evidence presented by the State seeking intervention. If the Court finds that the conditions are met, it is obliged, in Judge Abraham's view, to authorize the intervention. Consequently, Judge Abraham believes that the Court's Judgment is open to criticism in so far as the Court does not confine itself, in the part of the Judgment relating to the application of those principles to Honduras's Application to intervene, to establishing whether the condition set forth in Article 62 of the Statute is met, but reasons as if it had a discretionary power giving it a free hand to accept or reject an application to intervene.

Judge Abraham considers that Honduras's Application to intervene as a party must be rejected, given the lack of any basis of jurisdiction between Honduras and the two Parties to the present case. Thus it is Judge Abraham's belief that the maritime delimitation between Honduras and Nicaragua was completely settled by the Court's Judgment rendered on 8 October 2007 in the case between Nicaragua and Honduras. That delimitation therefore constitutes a matter "settled . . . by decision of an international court", within the meaning of Article VI of the Pact of Bogotá, thus precluding the application of the compromissory clause contained in Article XXXI of the Pact.

According to Judge Abraham, the Court should, however, have allowed Honduras to intervene as a non-party. He believes that, in this case, the future Judgment of the Court could affect Honduras's interests of a legal nature in two ways. Firstly, the Judgment rendered by the Court in the dispute between Nicaragua and Colombia could fix the endpoint of the bisector line drawn by the Court in its Judgment of 8 October 2007 in the case between Nicaragua and Honduras. Judge Abraham accordingly concludes that the future Judgment of the Court could affect Honduras's interests. Secondly and more importantly, Judge Abraham believes that the Judgment rendered by the Court could have direct consequences on the effective application of the 1986 bilateral treaty between Honduras and Colombia. In effect, should the Court adopt the delimitation line proposed by Colombia, Honduras will still be able, on the basis of that treaty, to lay claim to the greater part of the areas which that treaty attributes to it. However, in the event that the Court should decide to award all or part of those areas to Nicaragua, Honduras would no longer be able to lay claim to them, because there is no treaty basis between it and Nicaragua on which such a claim could be based. Judge Abraham disagrees with the Judgment in so far as it does not take account of those considerations and concludes, on the strength of irrelevant grounds, that Honduras does not have an interest of a legal nature which might be affected by the future Judgment.

Declaration of Judge Keith

In his declaration, Judge Keith states that he agrees with the conclusions the Court reaches, essentially for the reasons it gives. He does, however, disagree with one aspect of the reasoning.

Judge Keith expresses three difficulties with the Court's elaboration of the distinction between "the rights in the case at hand" and "an interest of a legal nature". Those terms or concepts are being taken out of context. The definition given to the second is problematic. And, to the extent that it exists, the distinction does not appear to be useful in practice.

Joint declaration of Judges Cançado Trinidade and Yusuf

1. Judges Cançado Trindade and Yusuf have voted in favour of the Court's overall decision not to grant Honduras' Application for permission to intervene either as a party or as a non-party. In addition, they commend the Court for its treatment of the distinction between rights and legal interests. In their joint declaration, Judges Cançado Trindade and Yusuf explain the foundations of their position in joining the Court's decision not to grant Honduras' Application for permission to intervene. They also express concern regarding the continued propensity of the Court to decide against the concrete application of the institution of intervention, which they consider to have an important role to play in contemporary international litigation and dispute-settlement (part I).

2. To this end, Judges Cançado Trindade and Yusuf undertake an examination of the requisites for intervention under the Court's Statute (part II). They consider that for the purpose of assessing the criteria for intervention laid down in Article 62 of the Statute it is irrelevant whether the applicant third-State wishes to intervene as a party or a non-party in the main proceedings since, in any event, the applicant third-State ought to demonstrate that it has "an interest of a legal nature" which "may be affected" by the decision of the Court on the merits of the case. Judges Cançado Trindade and Yusuf sustain that in the *cas d'espèce*, Honduras has not demonstrated that it has an "interest of a legal nature" which may be affected by the decision in the case. To their understanding, the 2007 Judgment of the Court in the case of the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Carib-*

bean Sea bears the status of *res judicata* and has thus settled the maritime delimitation between Honduras and Nicaragua in the Caribbean Sea. They argue that Honduras has not presented any further maritime features to be considered in the assessment of its Application for permission to intervene, and concur with the Court that the 1986 Treaty between Honduras and Colombia held no bearing on a maritime delimitation between Nicaragua and Colombia.

3. Judges Cançado Trindade and Yusuf then consider the irrelevance of State consent for the consideration by the Court of requests for permission to intervene (part III). In this regard, they stress their view that consent by the main parties to the proceedings is irrelevant to the assessment of an application for permission to intervene and cannot be perceived as a requirement under Article 62 of the Statute.

4. Furthermore, they explain their agreement with the conclusion of the Court that a jurisdictional link between the State seeking to intervene and the Parties to the main case "is not a condition for intervention as a non-party". They consider that the reasoning of the Court pertaining to intervention in international legal proceedings sets aside clearly the issue of State consent. To their understanding, the consent of the parties to the main case is not, in any way, a condition for intervention as a non-party since the Court is the master of its own jurisdiction and does not need to concern itself with the search for State consent in deciding on an Application for permission to intervene. In their view, intervention under the Statute transcends individual State consent. What matters, in their view, is the consent originally expressed by States in becoming Parties to the Court's Statute, or in recognizing the Court's jurisdiction by other instrumentalities, such as compromissory clauses. They argue that there is therefore no need for the Court to keep on searching instinctively for individual State consent *in the course* of international legal proceedings.

5. Judges Cançado Trindade and Yusuf trust that the point made in their Joint Declaration regarding the irrelevance of State consent in the Court's consideration of applications for permission to intervene under Article 62 of the Statute may be helpful to elucidate the positions that the Court may take on the matter in its jurisprudential construction.

Dissenting opinion of Judge Donoghue

Judge Donoghue dissents from the Court's decision to reject Honduras's Application to intervene as a non-party. She also sets forth her disagreement with the Court's approach to Article 62 of the Statute of the Court.

At the outset, Judge Donoghue reviews the provisions of the Statute and the Rules of Court that address intervention. She notes that Article 62 makes no distinction between intervention as a party and as a non-party, which can lead to some confusion.

Judge Donoghue next focuses on the requirement of Article 62 that a third State requesting to intervene must demonstrate "an interest of a legal nature which may be affected by the decision in the case". She notes that the phrase "may be affected" must be read in light of Article 59 of the Statute, which states that a "decision of the Court has no binding force except between the parties and in respect of that particular case". Because Article 59 clearly limits the way in which a judgment can "affect" a third State, Article 62 must extend to an effect that falls short of imposing binding legal obligations on the third State.

Turning to maritime delimitation, Judge Donoghue describes the practice whereby the Court has addressed the interests of third States by declining to set final endpoints, instead specifying that boundary lines continue until they reach the area in which the rights of third States may be affected. Judge Donoghue rejects the suggestion that this practice counsels against permitting intervention. Rather, where a third State asserts a claim that overlaps those of the parties to the case, this demonstrates an interest of a legal nature that may be affected by the Court's decision and suggests that intervention as a non-party may be warranted.

Judge Donoghue then examines Honduras's Application. Noting that Honduras has claims that overlap the area in dispute between Nicaragua and Colombia, Judge Donoghue states that the Court can be expected to take account of Honduras's claims in its decision on the merits. This demonstrates that Honduras has an "interest of a legal nature" that "may be affected" by the decision in the case. Judge Donoghue further explains that in addition to the overlapping claims, there is an additional reason to grant Honduras's request to intervene as a non-party. If the Court were to adopt the line proposed by Colombia, it would have a significant impact on the concrete meaning of the Court's 2007 Judgment in the case concerning the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, a decision that binds Honduras under Article 59.

On the question of party intervention, Judge Donoghue states that the Court correctly rejected Honduras's request. The intervention by Honduras as a party, on the terms requested by Honduras, would add a new dispute to the case—the location of a "tripoint" along the boundary line established by the bilateral treaty between Honduras and Colombia. According to Judge Donoghue, this is not a proper object of party intervention.

In conclusion, Judge Donoghue takes note of the Court's reaffirmation that, even when the Court rejects an application to intervene, it may take account of the information submitted by the failed intervenor. In Judge Donoghue's view, this practice gives rise to a *de facto* form of third-State participation that is not currently a feature of the Statute or the Rules of Court. Noting the significant delay in the proceedings that an application to intervene as a non-party may cause, Judge Donoghue suggests that the Court should streamline the procedures for considering such requests, reserving the more onerous procedures for applications to intervene as a party.

188. JURISDICTIONAL IMMUNITIES OF THE STATE (GERMANY *v.* ITALY) (APPLICATION BY THE HELLENIC REPUBLIC FOR PERMISSION TO INTERVENE)

Order of 4 July 2011

On 4 July 2011, the International Court of Justice issued an Order on the Application for permission to intervene filed by Greece in the case concerning *Jurisdictional Immunities of the State (Germany* v. *Italy)*. By its Order, the Court granted the Hellenic Republic permission to intervene in the case, pursuant to Article 62 of the Statute, to the extent and purposes set out in paragraph 32 of the Order.

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

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The operative paragraph (para. 34) of the Order reads as follows:

" . . .

The Court

(1) By fifteen votes to one,

Decides that Greece is permitted to intervene as a non-party in the case, pursuant to Article 62 of the Statute, to the extent and for the purposes set out in paragraph 32 of this Order;

In favour: *President* Owada; *Vice-President* Tomka; *Judges* Koroma, Al-Khasawneh, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue;

Against: *Judge* ad hoc Gaja;

(2) Unanimously,

Fixes the following time-limits for the filing of the written statement and the written observations referred to in Article 85, paragraph 1, of the Rules of Court:

5 August 2011 for the written statement of Greece;

5 September 2011 for the written observations of Germany and Italy; and

Reserves the subsequent procedure for further decision."

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

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Whilst drawing the Court's attention to certain considerations which would indicate that Greece's Application did not meet the criteria set out in Article 62, paragraph 1, of the Statute of the Court, Germany had expressly stated that it did not "formally object" to this Application being allowed. Italy, for its part, had indicated that it did not object to the Application being granted.

In its Order, the Court first briefly described the factual context of Greece's Application for permission to intervene. It recalled that, on 10 June 1944, during the German occupation of Greece, German armed forces had committed a massacre in the Greek village of Distomo, killing many civilians. It noted that a Greek court of first instance had rendered a judgment in 1997 against Germany and awarded damages to relatives of the victims of the massacre, and that that judgment had later been confirmed by the Hellenic Supreme Court in the year 2000, but that it had not been possible to enforce those two judgments in Greece because the Greek Minister for Justice had not granted the authorization required in order to enforce a judgment against a foreign State. The Court also observed that the claimants in the *Distomo* case had subsequently brought proceedings against Greece and Germany before the European Court of Human Rights but that, in 2002, the latter, invoking the principle of State immunity, had held that the claimants' application was inadmissible. The Court recalled that the Greek claimants had then sought to enforce the judgments of the Greek courts in Italy and that the Italian court had held that the first Greek judgment (delivered in 1997) was enforceable in Italy.

In its Order, the Court subsequently declared that, in the judgment that it will render in the case concerning *Jurisdictional Immunities of the State (Germany* v. *Italy)*, it might find it necessary "to consider the decisions of Greek courts in the *Distomo* case, in light of the principle of State immunity, for the purposes of making findings with regard to the third request in Germany's submissions". The Court concluded that this was sufficient to indicate that Greece had an interest of a legal nature which might be affected by the judgment in the case between Germany and Italy. It should be recalled that the third request in Germany's submissions reads as follows: "that the Italian Republic . . . (3) by declaring Greek judgments based on [violations of international humanitarian law by the German Reich during World War II] enforceable in Italy, committed a further breach of Germany's jurisdictional immunity".

The Court made clear that where it permits an intervention, it may limit the scope thereof and allow intervention for only one aspect of the subject-matter of the application which is before it. Taking account of its conclusions regarding Greece's legal interest in the present case, the Court found that Greece could be permitted to intervene as a non-party "in so far as this intervention is limited to the decisions of Greek courts [in the *Distomo* case]", as referred to above.

In concrete terms, intervening as a "non-party" in the case concerning *Jurisdictional Immunities of the State (Germany* v. *Italy)* allows Greece to have access to the Parties' written pleadings and "to inform the Court of the nature of [its] legal

rights and interests . . . that could be affected by the Court's decision in light of the claims advanced by Germany" in the principal proceedings. To this end, by the same Order, the Court fixed 5 August 2011 as the time-limit for the filing of the written statement of Greece, and 5 September 2011 as the time-limit for the filing of the written observations of Germany and Italy on that statement. The subsequent procedure was reserved for further decision. Article 85 of the Rules of Court provides, *inter alia*, that "[t]he intervening State shall be entitled, in the course of the oral proceedings, to submit its observations with respect to the subject-matter of the intervention".

It should be noted that its non-party status denies Greece the possibility of asserting rights of its own in the context of the principal proceedings between the Parties (Germany and Italy), and that the judgment that the Court will render on the merits of the case will not be binding on Greece, whereas it will have binding force and be without appeal for the Parties.

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Separate opinion of Judge Cançado Trindade

1. Judge Cançado Trindade, in his separate opinion, composed of five parts, begins by pointing out that, given the importance that he ascribes to the matters dealt with by the Court in the present Order, and those underlying it, he feels obliged to leave on the records his own examination of, and personal position on, the issues raised—as he perceives them—in the six documents relating to the proceedings before the Court concerning Greece's Application for permission to intervene (two submitted by the applicant State, Greece, and two presented by each of the two Parties in the main case before the Court, Germany and Italy—part I).

2. He next points out, as to Greece's Application for Permission to Intervene (part II), that, although Germany submitted that it did not *formally* object to it, it in fact *substantially* contradicted the grounds of Greece's purported intervention under Article 62 of the ICJ Statute. Italy, in turn, plainly stated that it had no objection to Greece's aforementioned Application. Greece made clear that it was not requesting to intervene as a party to the present case, but that it had in mind only clearly circumscribed aspects of the procedure, concerning decisions of its own domestic courts on claims pertaining to occurrences during the Second World War, intended to be enforced by Italian Courts.

3. Greece's Application hinged on Italian Court decisions which *inter alia* rendered possible the enforcement in Italy of Greek Court decisions that had granted civil claim damages against Germany, pertaining to grave violations of human rights and international humanitarian law perpetrated by German troops in Greece, particularly in the Greek village of Distomo, during the Second World War. Given the difficulties faced in Greece, the Greek nationals concerned sought recognition and enforceability of those decisions in Italy. Germany, for its part, is seeking, in the main case, a determination by the ICJ of what it considers a breach by Italy of its jurisdictional immunity.

4. Judge Cançado Trindade observes that the consent of the parties in the main case was not strictly or formally at issue in the *cas d'espèce*, and, in any case, such consent does not play a role in the proceedings conducive to the Court's decision whether or not to grant permission to intervene (part III). He upholds that State consent has its limits, and that the ICJ is not always restrained by State consent, in relation not only to intervention, but also in respect of other aspects of the procedure before the Court; the ICJ is not an arbitral tribunal.

5. Judge Cançado Trindade then proceeds to the more extensive part of his separate opinion, concerning the *co-existence of rights of States and rights of individuals* in the *jus gentium* of the XXIst century (part IV). As to the States' *titularity* of rights, he first reviews the decisions of Greek Courts, as referred to by Germany, namely: a) the judgment of 1997 of the First Instance Court of Livadia in the *Distomo Massacre* case; b) the judgment of 2000 of the Court of Cassation (*Areios Pagos*) in the same *Distomo Massacre* case; and c) the judgment of 2002 of the Greek Special Supreme Court in the *Margellos and Others* case.

6. He recalls, in this connection, that, in 1995, over 250 relatives of the victims of the massacre (of 1944) in the village of Distomo instituted proceedings against Germany before Greek Courts, claiming compensation for loss of life and property for acts perpetrated in June 1944 by German occupation forces (under the Third *Reich*) in Greece. On 25 September 1997, the First Instance Court of Livadia found that a State cannot rely on immunity when the act attributed to it was perpetrated in breach of norms of *jus cogens*, and affirmed that a State committing such a breach had indirectly waived immunity. Accordingly, the Court of Livadia held Germany liable and ordered it to pay compensation to the relatives of the victims of the *massacre of Distomo*.

7. This judgment became object of enforcement proceedings in Italy, which Germany referred to in its pleadings in the case before the Court. In connection with *jus cogens*, the Court of Livadia expressly referred to the Hague Convention (IV) of 19 October 1907, Article 46 of the Regulations on the Laws and Customs of War annexed thereto, as well as to customary international law, and to the general principle of law *ex injuria jus non oritur*. Germany then brought the case before the Court of Cassation (*Areios Pagos*) in Greece, claiming immunity from the jurisdiction of Greek Courts. On 4 May 2000, the Court of Cassation found, in the *Distomo Massacre* case, that the Greek Courts were competent to exercise jurisdiction over the case.

8. On the substantive law, the Court held first that State immunity is a generally accepted rule of international law, and is part of the Greek legal order. The Court of Cassation held that immunity is tacitly waived whenever the acts at issue are performed in violation of *jus cogens* norms (again referring to Article 46 of the Regulations on the Laws and Customs of War Annexed to the Hague Convention (IV) of 1907). The *Areios Pagos* also held, in the *Distomo Massacre* case, that an exception to the immunity rule should apply when the acts for which compensation was sought (especially crimes against humanity) had targeted individuals in a given place who were neither directly nor indirectly connected with the military

operations; moreover, immunity was tacitly waived whenever such acts, as already indicated, were in breach of *jus cogens*.

9. Parallel to that, proceedings in a similar but yet *another case* (the *Margellos and Others* case) were also on-going before Greek courts. The Court of Cassation referred the *Margellos and Others* case to the Greek Special Supreme Court, which, by a majority of *six votes to five*, held, on 17 September 2002, *inter alia*, that, under customary international law, a foreign State continued to enjoy sovereign immunity in respect of a tort committed in the forum State irrespective of whether the conduct at issue violated *jus cogens* norms or whether the armed forces were participating in an armed conflict. As a result of that, the effect of the latter Special Supreme Court judgment in the *Margellos* case, was essentially to overrule the judgment of the First Instance Court of Livadia awarding compensation to the plaintiffs, as confirmed by the Court of Cassation in the same case.

10. Still dwelling on the question of States as *titulaires* of rights, the approaches by Germany and Greece are next reviewed by Judge Cançado Trindade, who upholds the view that it could hardly be denied that the question of the enforceability of judgments of a State's judiciary, which is part and parcel of the State concerned, conforms an interest of a legal nature of that State, for the purposes of its purported intervention in international litigation. This is so, even if the ultimate beneficiaries of the enforcement of those judgments are *individuals*, *human beings*, nationals of that State. An interest relating to the enforcement (abroad) of judicial decisions can only be qualified as an interest of a *legal nature*, and not of another kind or of a distinct nature.

11. Judge Cançado Trindade then moves on to his considerations as to the individuals' *titularity* of rights, ¾ an issue raised in the present proceedings by Germany itself. In this respect, he regrets that Italy's counter-claim in the present case was dismissed by the Court (in its Order of 6 July 2010), with his dissenting opinion. His understanding is that claims as to rights which are inherent to human beings (such as, in the ambit of that counter-claim, the right to personal integrity, not to be subjected to forced labour) cannot be waived by States by means of inter-State agreements; there can be no tacit or express waiver in that respect, as the rights at stake are not rights of States, but of human beings.

12. As to Greece's Application for permission to intervene, he recalls: a) the legacy of the individual's subjectivity in the law of nations; b) the individual's presence and participation in the international legal order; c) the rescue of the individual as subject of international law; and d) the historical significance of the international subjectivity of the individual. Judge Cançado Trindade sustains that human beings effectively possess rights and obligations which *emanate directly from International Law*, with which they find themselves in direct contact. There is nothing intrinsic to International Law that impedes or renders such direct contact impossible.

13. To him, it is perfectly possible to conceptualize as subject of International Law any person or entity, *titulaire* of rights and bearer of obligations, which emanate directly from norms of International Law. Such is, in his understanding, the case of human beings, who have thus fostered and strengthened their direct contact—without intermediaries—with the international legal order. The reassuring expansion of both international legal *personality and accountability* ensue there from. The idea of absolute State sovereignty,—which led to the irresponsibility and the alleged omnipotence of the State, not impeding successive atrocities against human beings (such as the massacre of Distomo, of 10 June 1944),—appeared with the passing of time entirely unfounded.

14. Judge Cançado Trindade adds that the advent of the juridical category of the international legal personality of individuals,—bearing witness of the historical process of *humanization* of international law,—came to fulfil one of the *necessities* of the international community, precisely one which appeared with prominence, namely, that of providing *protection* to the human beings who compose it, in particular those who find themselves in a situation of special vulnerability. It has lately become clear that State immunity is not a static concept, tied up immutably to its historical origins, but that it also readjusts itself within the evolving conceptual universe of contemporary *jus gentium*.

15. This evolution,—contributing ultimately to the rule of law at national and international levels,—is to be appreciated in a wider dimension. In Judge Cançado Trindade's outlook, the Court has now before itself a case concerning the jurisdictional immunities of the State, with repercussions to all *titulaires* of rights, States and individuals alike. This is a case which has a direct bearing on the evolution of International Law in our times. In his view, there is no reason for keeping on overworking the rights of States while at the same time overlooking the rights of individuals. One and the other are meant to develop *pari passu* in our days, attentive to superior common values. State immunity and the fundamental rights of the human person are not to exclude each other, as that would make immunity unacceptably tantamount to impunity.

16. Part V of the separate opinion of Judge Cançado Trindade is devoted to the *resurrectio* of intervention in contemporary international litigation. He notes that in the ambit of the circumstances of the present case, intervention has at last seen the light of the day. This is reassuring,—he adds,—as the subject-matter of the *cas d'espèce* is closely related to the evolution of International Law itself in our times, being of relevance, ultimately, to all States, to the international community as a whole, and, in his perception, pointing towards an evolution into a true *universal* international law. In his view, the Court's decision, in the present Order, to grant to Greece permission to intervene, gives a proper expression to the principle of the sound administration of justice (*la bonne administration de la justice*) in the context of the *cas d'espèce*.

17. Judge Cançado Trindade concludes that one cannot approach a matter like that of the jurisdictional immunities of the State, in circumstances such as the present ones (having as factual origin grave breaches of human rights and international humanitarian law), from a strictly inter-State dimension. In the present proceedings before the Court, consideration has duly been given to States as *titulaires* of rights, as well as to individuals as *titulaires* of rights. The *resurrectio* of intervention in such circumstances may come to satisfy the needs not only of the States concerned, but of the individuals

concerned as well, and ultimately of the international community as a whole, in the conceptual universe of the new *jus gentium* of our times.

Declaration of Judge *ad hoc* Gaja

One can well understand the Greek Government's wish to be involved in a discussion on the jurisdictional immunity of foreign States with regard to claims by individuals who suffered from infringements of international humanitarian law during belligerent occupation. However, the only opportunity provided by the Statute and Rules for a State which is not a party to the proceedings to express its views is to intervene. The State is required by the Statute to have an interest of a legal nature which may be affected by the decision in the case. The interest in question must exist according to international law. In the absence of any rule of international law providing for the enforcement of the relevant Greek judgments in Italy, Greece cannot be said to have an interest of a legal nature in seeing the Greek judgments enforced in Italy. The question whether, by making the Greek judgments enforceable in Italy under its domestic law, Italy breached an obligation towards Germany is a matter which concerns only Germany and Italy.

189. 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) (REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES)

Order of 18 July 2011

On 18 July 2011, the International Court of Justice delivered its Order regarding the request for the indication of provisional measures submitted by Cambodia 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)*. In its Order, the Court rejected Thailand's request for the case introduced by Cambodia to be removed from the General List and indicated various provisional measures.

The Court was composed as follows: President Owada; Vice-President Tomka; Judges Koroma, Al-Khasawneh, Simma, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue; Judges *ad hoc* Guillaume, Cot; Registrar Couvreur.

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The operative paragraph (para. 69) of the Order reads as follows:

" . . .

The Court,

Unanimously,

Rejects the Kingdom of Thailand's request to remove the case introduced by the Kingdom of Cambodia on 28 April 2011 from the General List of the Court;

(B) *Indicates* the following provisional measures:

(1) By eleven votes to five,

Both Parties shall immediately withdraw their military personnel currently present in the provisional demilitarized zone, as defined in paragraph 62 of the present Order, and refrain from any military presence within that zone and from any armed activity directed at that zone;

In favour: Vice-President Tomka; Judges Koroma, Simma, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood; Judge *ad hoc* Guillaume;

Against: President Owada; Judges Al-Khasawneh, Xue, Donoghue; Judge *ad hoc* Cot;

(2) By fifteen votes to one,

Thailand shall not obstruct Cambodia's free access to the Temple of Preah Vihear or Cambodia's provision of fresh supplies to its non-military personnel in the Temple;

In favour: President Owada; Vice-President Tomka; Judges Koroma, Al-Khasawneh, Simma, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue; Judges *ad hoc* Guillaume, Cot;

Against: Judge Donoghue

(3) BY fifteen votes to one,

Both Parties shall continue the co-operation which they have entered into within ASEAN and, in particular, allow the observers appointed by the organization to have access to the provisional demilitarized zone;

In favour: President Owada; Vice-President Tomka; Judges Koroma, Al-Khasawneh, Simma, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue; Judges *ad hoc* Guillaume, Cot;

Against: Judge Donoghue

(4) By fifteen votes to one,

Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve;

In favour: President Owada; Vice-President Tomka; Judges Koroma, Al-Khasawneh, Simma, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue; Judges *ad hoc* Guillaume, Cot;

Against: Judge Donoghue

(C)By fifteen votes to one,

Decides that each Party shall inform the Court as to its compliance with the above provisional measures;

In favour: President Owada; Vice-President Tomka; Judges Koroma, Al-Khasawneh, Simma, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue; Judges *ad hoc* Guillaume, Cot;

Against: Judge Donoghue

(D) By fifteen votes to one,

Decides that, until the Court has rendered its judgment on the request for interpretation, it shall remain seised of the matters which form the subject of this Order.

In favour: President Owada; Vice-President Tomka; Judges Koroma, Al-Khasawneh, Simma, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue; Judges *ad hoc* Guillaume, Cot;

Against: Judge Donoghue."

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President Owada appended a dissenting opinion to the Order of the Court; Judge Koroma appended a declaration to the Order of the Court; Judge Al-Khasawneh appended a dissenting opinion to the Order of the Court; Judge Cançado Trindade appended a separate opinion to the Order of the Court; Judges Xue and Donoghue appended dissenting opinions to the Order of the Court; Judge *ad hoc* Guillaume appended a declaration to the Order of the Court; Judge *ad hoc* Cot appended a dissenting opinion to the Order of the Court.

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1. Application and request for the indication of provisional measures
(paras. 1 to 18 of the Order)

Application instituting proceedings
(paras. 1 to 5)

The Court begins by recalling that, in its Application, Cambodia invokes the first paragraph of the operative clause of the 1962 Judgment, in which the Court declared that "the Temple of Preah Vihear [was] situated in territory under the sovereignty of Cambodia". The Court notes Cambodia's argument whereby it "could not have reached such a conclusion if it had not first recognized that a legally established frontier existed between the two Parties in the area in question". It also recalls that the Applicant implies that, in the reasoning of the 1962 Judgment, the Court considered that the two Parties had, by their conduct, recognized the line on the map in Annex I to Cambodia's Memorial (hereinafter the "Annex I map"), a map drawn up in 1907 by the Franco-Siamese Mixed Commission, as representing the frontier between Cambodia and the Kingdom of Thailand (hereinafter "Thailand") in the area of the Temple of Preah Vihear. It also observes that Cambodia invokes the jurisprudence of the Court whereby, "while in principle any request for interpretation must relate to the operative part of the judgment, it can also relate to those reasons for the judgment which are inseparable from the operative part".

The Court then recalls that, in its Application, the applicant State invokes the second paragraph of the operative clause of the 1962 Judgment, in which the Court declared that "Thailand [was] under an obligation to withdraw any military or police forces, or other guards or keepers, stationed by her at the Temple, or in its vicinity on Cambodian territory". The Court further observes that, according to the Applicant, this obligation derives from the fact that the Temple of Preah Vihear and its vicinity are situated in territory under Cambodian sovereignty, as recognized by the Court in the first paragraph of the operative clause, and "goes beyond a withdrawal from only the precincts of the Temple itself and extends to the area of the Temple in general". It notes that, according to Cambodia, "the setting forth of this obligation in the operative clause of the Judgment indicates that it must be understood as a general and continuing obligation incumbent upon Thailand not to advance into Cambodian territory".

The Court also observes that, according to Cambodia, its jurisdiction to entertain a request for interpretation of one of its judgments is based directly on Article 60 of the Statute, which stipulates that "[i]n the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party" and that, "at the end of its Application, Cambodia presents the following request:

> "Given that 'the Temple of Preah Vihear is situated in territory under the sovereignty of Cambodia' (first paragraph of the operative clause), which is the legal consequence of the fact that the Temple is situated on the Cambodian side of the frontier, as that frontier was recognized by the Court in its Judgment, and on the basis of the facts and legal arguments set forth above, Cambodia respectfully asks the Court to adjudge and declare that:
>
> The obligation incumbent upon Thailand 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' (second paragraph of the operative clause) is a particular consequence of the general and continuing obligation to respect the integrity of the territory of Cambodia, that territory having been delimited in the area of the Temple and its vicinity by the line on the Annex I map, on which the Judgment of the Court is based."

Request for the indication of provisional measures

The Court goes on to recall that, "on 28 April 2011, having filed its Application, Cambodia, referring to Article 41 of the Statute and Article 73 of the Rules of Court, also submitted a request for the indication of provisional measures in order to 'cause [the] incursions onto its territory [by Thailand] to cease' pending the Court's ruling on the Request for interpretation of the 1962 Judgment" and that, "in its request for the indication of provisional measures, Cambodia refers to the basis for the Court's jurisdiction invoked in its Application".

The Court notes the allegations put forward by Cambodia whereby, "since 22 April 2011, serious armed incidents have occurred in the area of the Temple of Preah Vihear and at several locations situated along the boundary between Cambodia and Thailand". The Court also notes that, according to Cambodia, "Thailand is responsible for those incidents". The Court observes that, according to the Applicant, "those incidents have caused fatalities, injuries and the evacuation of local inhabitants". The Court further notes that "in its request, Cambodia asserts that if that request were to be rejected, and if Thailand persisted in its conduct, the damage caused to the Temple of Preah Vihear, as well as the loss of life and human suffering as a result of those armed clashes, would become worse". The Court states that, according to Cambodia, "[m]easures are urgently required, both to safeguard [its] rights . . . pending the Court's decision—rights relating to its sovereignty, its territorial integrity and to the duty of non-interference incumbent upon Thailand—and to avoid aggravation of the dispute".

The Court recalls that "at the end of its request for the indication of provisional measures, Cambodia asks [it] to indicate the following provisional measures pending the delivery of its judgment on the Request for interpretation: (i) "an immediate and unconditional withdrawal of all Thai forces from those parts of Cambodian territory situated in the area of the Temple of Preah Vihear"; (ii) "a ban on all military activity by Thailand in the area of the Temple of Preah Vihear"; and (iii) "that Thailand refrain from any act or action which could interfere with the rights of Cambodia or aggravate the dispute in the principal proceedings". It states that the Applicant also asks it, "on account of the gravity of the situation, to consider its request for the indication of provisional measures as a matter of urgency".

The Court then gives a brief outline of the history of the proceedings (paras. 12 to 17).

The Court notes that, at the end of its second round of oral observations, the Kingdom of Thailand asked it "to remove the case introduced by the Kingdom of Cambodia on 28 April 2011 from the General List".

2. Dispute as to the meaning or scope of the 1962 Judgment and jurisdiction of the Court
(paras. 19 to 32)

The Court first observes that, when it receives a request for the indication of provisional measures in the context of proceedings for interpretation of a judgment under Article 60 of the Statute, it has to consider whether the conditions laid down by that Article for the Court to entertain a request for interpretation appear to be satisfied.

The Court recalls that Article 60 reads as follows: "The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party", and that this provision is supplemented by Article 98 of the Rules of Court, paragraph 1 of which states: "In the event of dispute as to the meaning or scope of a judgment any party may make a request for its interpretation . . .".

The Court notes, in paragraph 21 of its Order, 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 "it follows that, even if the basis of jurisdiction in the original case lapses, the Court, nevertheless, by virtue of Article 60 of the Statute, may entertain a request for interpretation provided that there is a 'dispute as to the meaning or scope' of any judgment rendered by it". The Court nevertheless states that it "may indicate provisional measures in the context of proceedings for interpretation of a judgment only if it is satisfied that there appears *prima facie* to exist a 'dispute' within the meaning of Article 60 of the Statute". It adds that "at this stage, it need not satisfy itself in a definitive manner that such a dispute exists".

The Court recalls that a dispute within the meaning of Article 60 of the Statute must be understood as a difference of opinion or views between the parties as to the meaning or scope of a judgment rendered by the Court, and that the existence of such a dispute does not require the same criteria to be fulfilled as those determining the existence of a dispute under Article 36, paragraph 2, of the Statute.

Having pointed out that "it is established that 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", the Court states that it must now "ascertain whether a dispute appears to exist between the Parties in the present case, within the meaning of Article 60 of the Statute". It recalls the positions adopted by the Parties (paragraphs 25 to 30 of the Order) and concludes that, in the light of those positions, "a difference of opinion or views appears to exist between them as to the meaning or scope of the 1962 Judgment". The Court declares that this difference appears to relate, (i) "in the first place, to the meaning and scope of the phrase 'vicinity on Cambodian territory' used in the second paragraph of the operative clause of the Judgment"; (ii) "next, to the nature of the obligation imposed on Thailand, in the second paragraph of the operative clause of the Judgment, to 'withdraw any military or police forces, or other guards or keepers', and, in particular, to the question of whether this obligation is of a continuing or an instantaneous character"; and (iii) "finally, to the question of whether the Judgment did or did not recognize with binding force the line shown on the Annex I map as representing the frontier between the two Parties". The Court recalls that "the Permanent Court of International Justice previously had occasion to state that 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".

Having concluded that "a dispute thus appears to exist between the Parties as to the meaning or scope of the 1962 Judgment, and [that it] therefore appears that the Court may, pursuant to Article 60 of the Statute, entertain the request for interpretation of the said Judgment submitted by Cambodia", the Court considers, "in consequence, [that it] cannot accede to the request by Thailand that the case be removed from the General List" and that "there is a sufficient basis for [it] to be able to indicate the provisional measures requested by Cambodia, if the necessary conditions are fulfilled".

The Court then considers the conditions required for the indication of provisional measures (paras. 33 to 56).

3. Plausible character of the alleged rights in the principal request and link between these rights and the measures requested
(paras. 33 to 45)

Having noted that "[its] power to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights of the parties pending the decision of the Court" and that "it follows that [it] must be concerned to preserve by such measures the rights which may subsequently be adjudged by the Court to belong to either party", the Court indicates, first, that it "may exercise this power only if it is satisfied that the rights asserted by a party are at least plausible" and, secondly, that "in proceedings under Article 60 of the Statute, this supposes that the rights which the party requesting provisional measures claims to derive from the judgment in question, in the light of its interpretation of that judgment, are at least plausible". The Court observes moreover that "a link must be established between the alleged rights and the provisional measures sought to protect them" and that, "in proceedings under Article 60 of the Statute, this supposes that there is a link between the provisional measures requested by a party and the rights which it claims to derive from the judgment in question, in the light of the interpretation it gives to that judgment".

Plausible character of the alleged rights in the principal request
(paras. 35 to 41)

Having briefly recalled the positions of the Parties on the plausible character of the alleged rights in the principal request (paras. 35 and 36), the Court considers that "it should, at the outset, be made clear that Article 60 of the Statute does not impose any time-limit on requests for interpretation". It underlines that it "may entertain a request for interpretation

in so far as there exists a dispute as to the meaning or scope of a judgment", and that "such a dispute can, in itself, certainly arise from facts subsequent to the delivery of that judgment". The Court considers that "at this stage in the proceedings, [it] does not have to rule definitively on the interpretation put forward by Cambodia of the 1962 Judgment and on the rights it claims to derive therefrom". It adds that "for the purposes of considering the request for the indication of provisional measures, [it] need only determine whether those rights are at least plausible".

The Court then recalls that, "in the operative clause of its 1962 Judgment, [it] declared in particular that the Temple of Preah Vihear was situated in territory under the sovereignty of Cambodia, and that Thailand was under an obligation to withdraw any military forces stationed at the Temple or in its vicinity on Cambodian territory". It notes that "the interpretation of the 1962 Judgment put forward by Cambodia in order to assert its rights—namely, the right to respect for its sovereignty in the area of the Temple of Preah Vihear and its right to territorial integrity—is that the Court was only able to reach these conclusions once it had recognized the existence of a frontier between the two States and found that the Temple and its 'vicinity' were on the Cambodian side of that frontier". Cambodia claims that the phrase "vicinity on Cambodian territory" includes the area surrounding the precincts of the Temple and that consequently "Thailand has a continuing obligation not to infringe Cambodia's sovereignty over that area".

The Court concludes that "the rights claimed by Cambodia, in so far as they are based on the 1962 Judgment as interpreted by Cambodia, are plausible", and it states that while "this conclusion does not prejudge the outcome of the main proceedings . . . , it is nonetheless sufficient for the purposes of considering the present request for the indication of provisional measures".

Link between the alleged rights and the measures requested (paras. 42 to 45)

Having briefly recalled the positions of the Parties on this point (paras. 42 to 43), the Court recalls that "in proceedings on interpretation, [it] is called upon to clarify the meaning and the scope of what the Court decided with binding force in a judgment". It observes that "Cambodia is seeking clarification of the meaning and the scope of what the Court decided with binding force in the 1962 Judgment in the case concerning the *Temple of Preah Vihear (Cambodia* v. *Thailand*)", and requests it "to specify the meaning and scope of the operative clause of that Judgment in respect of the extent of its sovereignty in the area of the Temple (see paragraph 5 [of the Order])". In its Request for the indication of provisional measures (see paragraph 11 [of the Order]), Cambodia, pending the Court's final decision, "is precisely seeking the protection of the rights to sovereignty over this area which it claims to derive from the operative clause of the 1962 Judgment". The Court concludes that "the provisional measures sought thus aim to protect the rights that Cambodia invokes in its request for interpretation" and that "the necessary link between the alleged rights and the measures requested is therefore established".

4. Risk of irreparable prejudice; urgency (paras. 46 to 68)

The Court first of all 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 the judicial proceedings" and that its power to indicate provisional measures "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 the rights in dispute before [it] has given its final decision". It must therefore "consider whether, in these proceedings, such a risk exists".

The Court then recalls the facts as reported by the Parties to the proceedings (paras. 48 to 52).

The Court observes (para. 53) that "at this stage in the proceedings, [it] is only required to consider whether the circumstances brought to its attention call for the indication of provisional measures". In this case, it notes "that it is apparent from the case file that incidents have occurred on various occasions between the Parties in the area of the Temple of Preah Vihear". Thus it observes that, "since 15 July 2008, armed clashes have taken place and have continued to take place in that area, in particular between 4 and 7 February 2011, leading to fatalities, injuries and the displacement of local inhabitants", and that "damage has been caused to the Temple and to the property associated with it". It notes that, "on 14 February 2011, the Security Council called for a permanent ceasefire to be established between the two Parties and expressed its support for [the Association of Southeast Asian Nations (hereinafter 'ASEAN')] in seeking a solution to the conflict", and that "the Chair of ASEAN therefore proposed to the Parties that observers be deployed along their boundary, but whereas this proposal was not put into effect, however, because the Parties failed to agree on how it should be implemented". The Court adds that "in spite of these attempts to settle the dispute peacefully, there was a further exchange of fire between the Parties on 26 April 2011 in the area of the Temple".

The Court observes (para. 54) that "the existence of a ceasefire 'does not . . . deprive [it] of the rights and duties pertaining to it in the case brought before it'" and that "it is therefore not obliged to establish, at this stage in the proceedings, whether the oral ceasefire negotiated between the Parties' military commanders on 28 April 2011 did or did not cover the area of the Temple of Preah Vihear". It further considers that "the rights which Cambodia claims to hold under the terms of the 1962 Judgment in the area of the Temple might suffer irreparable prejudice resulting from the military activities in that area and, in particular, from the loss of life, bodily injuries and damage caused to the Temple and the property associated with it". Having observed that "there are competing claims over the territory surrounding the Temple" and that "the situation in the area of the Temple of Preah Vihear remains unstable and could deteriorate", the Court considers that "because of the persistent tensions and absence of a settlement to the conflict, there is a real and imminent risk of irreparable prejudice being caused to the rights claimed by Cambodia". It therefore concludes that there is urgency in this case.

The Court concludes, first, that it can indicate provisional measures, as provided for in Article 41 of its Statute, and that the circumstances of the present case require it to do so. It then notes that it has the power under its Statute "to indicate measures that are in whole or in part other than those requested, or measures that are addressed to the party which has itself made the request, as Article 75, paragraph 2, of the Rules of Court expressly states". It recalls that "it has already exercised this power on several occasions", and states that, when it is indicating provisional measures for the purpose of preserving specific rights, it also has, "independently of the parties' requests, . . . the power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that the circumstances so require".

Having considered the terms of the provisional measures requested by Cambodia, the Court "does not find, in the circumstances of the case, that the measures to be indicated must be the same as or limited to those sought by [that State]". Having analysed the material before it, "[it] deems it appropriate to indicate measures addressed to both Parties".

The Court underlines that "the area of the Temple of Preah Vihear has been the scene of armed clashes between the Parties and [that it] has already found that such clashes may reoccur". It considers that it is for the Court (para. 61) "to ensure, in the context of these proceedings, that no irreparable damage is caused to persons or property in that area pending the delivery of its Judgment on the request for interpretation". It concludes that "in order to prevent irreparable damage from occurring, all armed forces should be provisionally excluded from a zone around the area of the Temple, without prejudice to the judgment which [it] will render on the request for interpretation submitted by Cambodia".

The Court continues by stating that it "considers it necessary, in order to protect the rights which are at issue in these proceedings, to define a zone which shall be kept provisionally free of all military personnel, without prejudice to normal administration, including the presence of non-military personnel necessary to ensure the security of persons and property". It then defines that provisional demilitarized zone (see para. 62 and the sketch-map appended to the Order and annexed to this summary) and states that "both Parties, in order to comply with this Order, shall withdraw all military personnel currently present in the zone as thus defined [and that] both Parties shall refrain not only from any military presence within that provisional demilitarized zone, but also from any armed activity directed at the said zone" (para. 63).

The Court further states (para. 64) that "both Parties shall continue the co-operation which they have entered into within ASEAN and, in particular, allow the observers appointed by that organization to have access to the provisional demilitarized zone".

The Court states (para. 65) that it is not disputed that the Temple of Preah Vihear itself belongs to Cambodia, that "Cambodia must, in all circumstances, have free access to the Temple and must be able to provide fresh supplies to its non-military personnel"; Thailand must therefore "take all necessary measures in order not to obstruct such free and uninterrupted access".

The Court then reminds the Parties, (i) that "the Charter of the United Nations imposes an obligation on all Member States of the United Nations to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations"; (ii) that "United Nations Member States are also obliged to settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered"; and (iii) that "both Parties are obliged, by the Charter and general international law, to respect these fundamental principles of international law".

Finally, the Court underlines that its orders "on provisional measures under Article 41 [of its Statute] have binding effect" and that they therefore create "international legal obligations with which both Parties are required to comply". It adds that the decision given in the present proceedings on the request for the indication of provisional measures "in no way prejudges any question that the Court may have to deal with relating to the Request for interpretation".

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Dissenting opinion of President Owada

In his dissenting opinion, President Owada states that while he agrees with the Court's indicating that a provisional demilitarized zone be established for the purpose of military disengagement, he is in disagreement with the Court in its concrete delimitation of the zone.

The Court designated the zone from which all military personnel should be withdrawn, pending the final outcome of the decision of the Court on the merits in the main case, in such a manner so that it extends to a certain portion of the territories of the Parties over which sovereignty is undisputed. In the past, in similar cases where there was a risk of armed conflict in the disputed area, the Court limited the indication of provisional measures to ordering the parties to disengage their forces, in principle, from "the area in dispute". President Owada considers that, however understandable the Court's concern was regarding the potential outbreak of armed conflict over the area around the Temple of Preah Vihear, the Court should not, and indeed cannot, within the competence of the Court in the present case, establish the quadrangular area as designated in the Order as the provisional demilitarized zone. Moreover, in his view, the feasibility of implementing the demilitarized zone by the Parties could in fact be increased, were the Court to set it up as confined to the territory in dispute between the Parties (circa 4.6 sq km), since each of the Parties can easily identify the area on the ground, based on their respectively claimed boundaries.

Declaration of Judge Koroma

In his declaration, Judge Koroma states that he has voted in favour of the Court's Order, but emphasizes that the demilitarized zone established in the Order is a *temporary* one that in no way prejudges the outcome of the Application before

the Court. Rather, according to Judge Koroma, the Order is designed to prevent further armed clashes between the Parties that might prejudice the rights of either Party while the case is pending before the Court.

Judge Koroma states that the Court, when deciding upon the precise nature of the provisional measures it plans to indicate, must take into consideration the existence, nature, and magnitude of an armed conflict between the Parties. According to Judge Koroma, the Court must also assess the risk that further armed conflict will occur while the case is pending. He points out that in other cases involving armed conflict, the Court has indicated provisional measures similar to those indicated in this case in order to preserve the rights of the parties. He adds that, in the present case, the evidence provided to the Court demonstrated that repeated incidents of armed conflict had occurred between the Parties, including shelling from heavy artillery. As a result, Judge Koroma states that the Court decided to create a temporary demilitarized zone of a size adequate to minimize the risk of further armed clashes and shelling.

Judge Koroma concludes that the Court's Order should be seen as an effort to prevent further armed conflict between the two Parties and should not be regarded as a prejudgment of the Application before the Court.

Dissenting opinion of Judge Al-Khasawneh

In his dissenting opinion, Judge Al-Khasawneh explains the reasons for his vote against operative paragraph 69 (B) (1) of the Order. While accepting that, in principle, all the conditions necessary for the indication of provisional measures have been met in the present instance, Judge Al-Khasawneh rejects the Court's decision to establish a "provisional demilitarized zone" and to direct both Parties to withdraw their military personnel from this zone. In his view, this measure is excessive and unnecessary, since the rights that need to be protected from the risk of irreparable prejudice resulting from the military activities in the area of the Temple of Preah Vihear can be adequately and effectively protected by simply directing both Parties to refrain from any military activities in or directed at the area around the Temple. At the same time, Judge Al-Khasawneh warns that the Court's establishment of the "provisional demilitarized zone" without any discernible criterion is open to accusations of arbitrariness, which the Court could have avoided by limiting the scope of provisional measures to those strictly necessary for protection of rights pending the final judgment.

Separate opinion of Judge Cançado Trindade

1. Judge Cançado Trindade begins his Separate Opinion, composed of twelve parts, by pointing out that, given the great importance that he attributes to the matters dealt with by the Court in the present Order, or else underlying it, he feels obliged to leave on the records of this "transcendental case" of the *Temple of Preah Vihear* (as he perceives it) 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, even more so as some of the lessons he extracts from the present decision of the Court "are not explicitly developed and stated in the present Order" (part I).

2. This being so, he develops his own reflections pursuant to the following sequence: *(a)* the passing of time and the *chiaroscuro* of Law; *(b)* the density of time; *(c)* the temporal dimension in International Law; *(d)* the search for timelessness; *(e)* from timelessness to timeliness; *(f)* the passing of time and the *chiaroscuro* of existence; *(g)* time, legal interpretation, and the nature of legal obligation; *(h)* from time to space: territory and people together; *(i)* the effects of provisional measures of protection in the *cas d'espèce* (encompassing the protection of people in territory; the prohibition of use or threat of force; and the protection of cultural and spiritual world heritage); *(j)* provisional measures of protection, beyond the strict territorialist approach; and *(k)* final considerations *sub specie aeternitatis*.

3. He begins reasoning by dwelling upon "the multifaceted relationship between time and law", an issue which discloses the *chiaroscuro* of international law as well as, ultimately, of existence itself (part II). He warns that one cannot assume a linear progress in the regulation of relations among States *inter se*, or among human beings *inter se*, or among States and human beings. The present requests for provisional measures and for interpretation in respect of the Judgment of the ICJ of 15 June 1962 in the case of the *Temple of Preah Vihear*, bear witness of the element of factual unpredictability of endeavours of peaceful settlement, to guard us against any asumption as to definitive progress achieved in those relations among States or among human beings, or among the former and the latter.

4. In this respect, he recalls pertinent parts of the pleadings of fifty years ago before the Court (in the public sittings of March 1962), and then turns to an examination of what he calls the "density of time", likewise brought to the attention of the Court half a century ago (part III). As time does not cease to pass, and keeps on flowing, he singles out the new factual developments (occurred in the years 2000, 2007–2008 and 2011) now lodged with the Court in the two requests pending before it. To him, the temporal dimension, in the present case of the *Temple of Preah Vihear*, can be examined, in his understanding, from distinct angles, which he develops throughout his Separate Opinion.

5. To Judge Cançado Trindade, the temporal dimension is clearly inherent to the conception of the "progressive development" of international law. By the same token, the conscious search for new juridical solutions is to presuppose the solid knowledge of solutions of the past and of the evolution of the applicable law as an open and dynamic system, capable of responding to the changing needs of regulation. In effect,—he adds,—the temporal dimension underlies the whole domain of Law in general, and of Public International Law in particular. Time is inherent to Law, to its interpretation and application, and to all the situations and human relations regulated by it. He next criticizes the "ineluctable pitfalls" of the static outlook of legal positivism and of "realist" thinking.

6. Judge Cançado Trindade contends that time marks a noticeable presence in the whole domain of international procedural law. As to substantive law, the temporal dimension permeates virtually all domains of Public International Law, such as, e.g., the law of treaties (regulation *pro futuro*),

peaceful settlement of international disputes (settlement *pro futuro*), State succession, the international law of human rights, international environmental law, among others. In the field of regulation of spaces (e.g., law of the sea, law of outer space), the temporal dimension stands out likewise. There is nowadays greater awareness of the need to fulfill the interests of present and future generations (with a handful of multilateral conventions in force providing for that).

7. The present case, centered on the Temple of Preah Vihear, in the perception of Judge Cançado Trindade appears to resist the onslaught of time and to be endowed with a touch of timelessness. The Temple of Preah Vihear, a monument of Khmer art, dates back to the first half of the XIth century; it was intended to stand for times immemorial, and to fulfill the spiritual needs of the faithful of the region (part V). Temples and shrines,—he adds,—giving expression to different religious faiths, have been erected in times past in distinct localities in all continents, in search of timelessness, to render eternal the human faith, carved in stone to that end.

8. Recent factual developments (2007–2011) in the region show that what was meant to be a monument endowed with *timelessness*, is now again the object of contention before this Court, raising before it, *inter alia*, the issue of *timeliness* (part VI). The case of the *Temple of Preah Vihear* is now, half a century after its adjudication by the Court on 15 June 1962, brought again to the attention of the Court, by means of two requests from Cambodia, one for interpretation of the 1962 Judgment, and the other for provisional measures of protection. In the first request, for interpretation, the applicant State draws attention to its timeliness, as the right to seek the assistance of the Court to resolve it is not subjected to any time-limit by Article 60 of the Court's Statute.

9. The respondent State, while conceding that there is no such time-limit in Article 60, argues that an interpretation "goes back" to the text of the Judgment, whereas a request for provisional measures "relates to the future", there being "a tension between the two, which becomes ever more acute as time passes". The fact that both Thailand and Cambodia have seen it fit to address, each one in its own way, the issue of timeliness in the circumstances of the *cas d'espèce*, seemingly startled by it, renders the present case of the *Temple of Preah Vihear*, in Judge Cançado Trindade's view, "indeed fascinating", as it shows "the human face of an inter-State case before the World Court".

10. In his perception, the present case appears to contain some lessons, not so easy to grasp, in respect of "boundaries in space and in time", meant to "bring countries and their peoples together, rather than separate them". Judge Cançado Trindade ponders that "all cultures, including the ancient ones, in distinct latitudes, grasped the mystery of the passing of time, each one in its own way"; there is no social *milieu* wherein collective representations pertaining to its origin and to its destiny are not found. There is a spiritual legacy which is transmitted, with the passing of time, from generation to generation, conforming a "perfect spiritual continuity among generations"; hence the relevance of the conscience of living *in time*.

11. Judge Cançado Trindade adds that "the *passing* of time,—a source of desperation to some,—in fact brings the living ineluctably closer to their dead, and binds them together, and the preservation of the spiritual legacy of our predecessors constitutes a means whereby they can communicate themselves with the living, and vice-versa" (part VII). He then points out, as to the *chiaroscuro* of existence itself, the distinctions between chronological time and biological time, and between this latter and psychological time. The time of human beings first nourishes them with innocence and hope, and, later, with experience and memory; "time links the beginning and the end of human existence, rather than separates them".

12. He then turns attention to time, legal interpretation and the nature of legal obligation (part VIII). In this connection, he ponders that, in the long history of the law of nations, 50 years may appear a long, or not so long a time, depending on how we see them, and on "what period of that history we have in mind. All will depend on the density of time (. . .) of the period at issue,—whether at that period much has happened, or nothing significant has taken place at all". One cannot lose sight of the fact that time and space do not form part of the empirical or real world,—he adds,—but are rather part of our "mental constitution" to examine and understand events that have occurred or occur.

13. Judge Cançado Trindade recalls that, in so far as legal interpretation is concerned, in the present case, Cambodia and Thailand uphold the distinct theses of the existence of a *continuing*, or else an *instantaneous* obligation, respectively. In a request for *provisional measures of protection* like the one before the Court, pertaining to a situation which appears to abide by the prerequisites of urgency and gravity, and imminence of irreparable harm, the Court cannot simply decline to answer the points raised before it. In the *cas d'espèce*, concerning the domain of inter-State relations (between Cambodia and Thailand), when the fundamental principle of the prohibition of use or threat of force is at stake, as it is here, the corresponding obligation is, in his understanding, a *continuing or permanent* one (rather than an immediate or "instantaneous" one), for the States concerned.

14. Judge Cançado Trindade then addresses another aspect of the case, moving from his considerations on time and law to those pertaining to space and law. He focuses on "the human element of statehood: the population", which calls for taking territory and people together (part IX). He examines the two rounds of responses provided by Cambodia and Thailand, to a series of questions he put to both of them, at the end of the public sitting of the Court of 31 March 2011. His questions concerned the living conditions of the local population in the area of the Temple of Preah Vihear, as a result of the incidents occurred therein since 22 April 2011.

15. After pointing out that there are points of convergence as well as of difference in those respective responses, Judge Cançado Trindade finds that, while "the responses provide some clarification and the situation seems to have progressed in a positive manner, with regard to the safe and voluntary return of local inhabitants to their homes, the calm achieved remains fragile, and seems to be provisional". He warns that the ceasefire is only verbal, there being no assurances that the

armed hostilities would not resume and that the population would not be displaced yet again. The ceasefire "seems to be temporary", and nothing indicates that the conflict would not break out again. Accordingly, in his view, the situation in the present case "requires the indication of Provisional Measures of Protection to prevent or avoid the *further aggravation* of the dispute or situation, given its current gravity, urgency, and the risks of irreparable harm".

16. He further observes, in this connection, that it has become almost commonplace today to evoke Provisional Measures of Protection to prevent or avoid the "aggravation" of the dispute or situation at issue. Yet, this sounds "almost tautological", given the fact that a dispute or situation which calls for Provisional Measures of Protection is already—*per definitionem*—endowed with gravity and urgency, given the probability or imminence of irreparable harm. It would thus be more accurate, in his view, to evoke Provisional Measures of Protection to prevent or avoid the *"further aggravation"* of the dispute or situation at issue.

17. His next set of considerations pertain to the *effects* of Provisional Measures of Protection in the *cas d'espèce* (part X). He ponders that "International Law 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. What is anticipatory is Law itself, and not the unwarranted recourse to force". This brings to the fore the *raison d'être* of Provisional Measures of Protection, to prevent and avoid irreparable harm in situations of gravity and urgency. They are endowed with "a preventive character, being anticipatory in nature, looking forward in time", and disclosing the preventive dimension of the safeguard of rights.

18. To Judge Cançado Trindade, further lessons can be extracted from the present decision of Court in the case of the *Temple of Preah Vihear*, also in respect of: *(a)* the protection of people in territory; *(b)* the prohibition of use or threat of force; *(c)* the protection of cultural and spiritual world heritage. In his understanding, as to the first point, "there is epistemologically no impossibility or inadequacy for provisional measures, of the kind of the ones indicated in the present Order, not to extend protection also to human life, and to cultural and spiritual world heritage". Quite on the contrary, in his perception, "the reassuring effects of the provisional measures indicated in the present Order are that they do extend protection not only to the territorial zone at issue, but also, by asserting the prohibition of the use or threat of force—pursuant to a fundamental principle of international law (. . .),—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".

19. To him, due attention is given by the Court to compliance with the fundamental principles of international law, as enshrined into the U.N. Charter (Article 2) and reckoned in general international law, in particular that of the prohibition of use or threat of force (Article 2 (4)), in addition to that of the peaceful settlement of disputes (Article 2 (3)). Furthermore, Judge Cançado Trindade devotes special attention to the acknowledgement of the "universal value" of the Temple of Preah Vihear, inscribed by the World Heritage Committee as a UNESCO World Heritage Site on 07.07.2008, pursuant to the relevant provisions of the 1972 UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage. Provisional Measures indicated by the Court are thus here extending protection also to cultural and spiritual world heritage.

20. In his view, although the Court has taken the right decision in this respect, establishing, to that end, a "provisional demilitarized zone, in the vicinity of the Temple of Preah Vihear", it has done so pursuant to a traditional outlook and to a "reductionist reasoning", attentive "essentially to territory, although the case lodged with it goes well beyond it". To him, beyond the strict territorialist approach, one has to take into account *"people and territory together"*, expressly, for the purpose of protection (part XI). In his view, the Court should be prepared, in our days, to give proper weight to the *human factor*.

21. Judge Cançado Trindade adds that, if one further takes into account also the protection of cultural and spiritual world heritage, for the purposes of Provisional Measures, the resulting picture appears "even more complex, and the strict territorialist approach even more unsatisfactory". It shows how multifaceted, in these circumstances, the protection provided by Provisional Measures can be, going well beyond State territorial sovereignty, and bringing *territory, people and human values together*.

22. Judge Cançado Trindade's final considerations are presented *"sub specie aeternitatis"*, in addressing in particular the protection of the *spiritual* needs of human beings" (part XII). Parallel to material and moral damages, he sustains the existence of "spiritual damages", and parallel to damage to the "project of life", he advances the conceptualization of damage to the "project of after-life". He regrets the incidents recently occurred in the area the Temple of Preah Vihear, a masterpiece of Khmer art and architecture built in the first half of the XIth century so as to assist in fulfilling the religious needs of human beings.

23. Recalling the importance and the conceptual origins of *religions*, and the *encounters* among them and among cultures, he points out that the relationship, in its distinct aspects, between religions and the law of nations (*le droit des gens*) itself, has been the object of constant attention throughout the last nine decades; the interest on the matter has remained alive lately. In Judge Cançado Trindade's perception, "cultural and spiritual heritage appears more closely related to a *human context*, rather than to the traditional State-centric context; it appears to transcend the purely inter-State dimension, that the Court is used to".

24. To him, "beyond the States are the human beings who organize themselves socially and compose them. The State is not, and has never been, conceived as an end in itself, but rather as a means to regulate and improve the living conditions of the *societas gentium*, keeping in mind the basic *principle of humanity*, amongst other fundamental principles of the law of nations, so as to achieve the *common good*. Beyond the States, the ultimate *titulaires* of the right to the safeguard and preservation of their cultural and spiritual heritage are the

collectivities of human beings concerned, or else humankind as a whole", ponders Judge Cançado Trindade.

25. To him, it can be inferred from the present case of the *Temple of Preah Vihear* that "we are here in the domain of superior *human values*, the protection of which is not unknown to the law of nations, although not sufficiently worked upon in international case law and doctrine to date". The present Order of the Court is directly related to the Court's Judgment of 15 June 1962, of half a century ago, in the case of the *Temple of Preah Vihear*, wherein the ICJ expressly stated, in its *dispositif* (para. 2), 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". He observes that the Temple remains the reference to "its vicinity" (from Latin *vicinitas*), and the provisional demilitarized *zone* set up by the present Order of the Court covers the territory neighbouring (*vicinus* to) the Temple.

26. Judge Cançado Trindade concludes, for the issue of the supervision of compliance by the States concerned with the present Order, that this latter encompasses, to the effect of protection, the people living in the said zone and its surroundings, the Temple of Preah Vihear itself, and all that it represents, all that comes with it from time immemorial, nowadays regarded by UNESCO as part of the cultural and spiritual world heritage. He adds that "cultures, like human beings, are vulnerable, and need protection. The universality of international law is erected upon respect for cultural diversity". He finds it reassuring that, for the first time in the history of this Court, Provisional Measures of Protection indicated by it are, as he perceives them, "so meaningfully endowed with a scope of this kind"; to him, this is "well in keeping with the *jus gentium* of our times".

Dissenting opinion of Judge Xue

Judge Xue is in agreement with the Court's decision to indicate provisional measures but has reservation to operative paragraph 69 (B) (1) of the Order, which defines a provisional demilitarized zone (the PDZ). In her view, such measure is excessive and puts into question the proper exercise of the judicial discretion of the Court in indicating provisional measures.

Judge Xue notes that in all the cases that either directly involve territorial disputes or bear territorial implications, the Court, in indicating provisional measures, has invariably confined such measures to the disputed territories and never gone beyond such areas. While acknowledging the power of the Court to indicate provisional measures independently of the requests submitted by the Parties when circumstances so require, she is concerned that the Court has liberally exercised its judicial discretionary power in identifying the co-ordinates of the PDZ and extending the provisional measures into territories that is not in dispute between the Parties. Along this line, Judge Xue expresses her regret that the Court fails to give sufficient reasons for the adoption of the PDZ as one of the provisional measures, especially why factual circumstances require such an extraordinary measure to be taken. She is particularly concerned that given the lack of adequate knowledge of the ground situation in the area, defining a PDZ on a flat map could give rise to unpredictable difficulties in reality to the detriment of the legitimate interests of the Parties.

In the view of Judge Xue, it would have been sufficient for the Court just to order the Parties to refrain from any military activities "in the area of the Temple", a term repeatedly used by both Parties, in order to preserve the rights of either Party in the main proceedings. Otherwise, the Court could have followed the practice in the case concerning *Frontier Dispute (Burkina Faso/Mali)* by ordering the Parties, with the co-operation of the Association of Southeast Asian Nations, to determine first by themselves the positions to which their armed forces should be withdrawn. Failing such agreement, the Court could then draw such lines by means of an Order.

Lastly, Judge Xue observes that the Court has so far followed the jurisprudence that in indicating provisional measures, there must be a link between the rights which form the subject of the main proceedings on the merits and the measures requested. The provisional measures as thus indicated should logically relate to the rights concerned in the main proceedings. The PDZ as indicated in the operative paragraph 69 (B) (1) fails to maintain this necessary link within reasonable bounds.

Dissenting opinion of Judge Donoghue

Judge Donoghue filed a dissenting opinion. She agrees with the Court that the case should not be removed from the General List. She dissents, however, as to the provisional measures imposed by the Court. In her view, it is doubtful that the Statute of the Court contemplates the imposition of provisional measures in an interpretation proceeding in which the sole basis of jurisdiction is Article 60 of the Statute of the Court. Even assuming that such jurisdiction exists, Judge Donoghue considers that the particular measures imposed today exceed its bounds. She notes in particular that those measures extend to areas that are not the subject of the dispute over interpretation. She also concludes that today's Order stretches the limits of Article 60 further than did the order in the one interpretation case in which the Court has previously indicated provisional measures (*Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico *v.* United States of America) *(Mexico* v. *United States of America)*) and is also far-reaching in comparison to provisional measures orders in past conflicts over border areas. Because Article 60 jurisdiction appears to persist indefinitely and without a means for States to withdraw from it, Judge Donoghue expresses the concern that the Order today could deter States from consenting to the jurisdiction of the Court, because it may undermine their confidence that any limits on such jurisdiction will be respected.

Declaration of Judge *ad hoc* Guillaume

Judge *ad hoc* Guillaume shares the Court's view that the necessary conditions for the indication of provisional measures have been fulfilled in the present case. In this connection, he observes that the Court has jurisdiction to entertain both the dispute between the Parties concerning the interpretation of the second paragraph of the operative part of the 1962 Judgment and the dispute as to the force of *res judicata* of the

Judgment's reasoning in respect of the course of the boundary between the two States.

He sets out his reasons for supporting the creation of a relatively large demilitarized zone and recalls the guarantees given by the Court to Cambodia regarding the Temple itself: the reaffirmation of Cambodia's sovereignty; the obligation for Thailand not to obstruct Cambodia's free access to the Temple; and the possibility of stationing in the Temple any police personnel necessary for the security of persons and property.

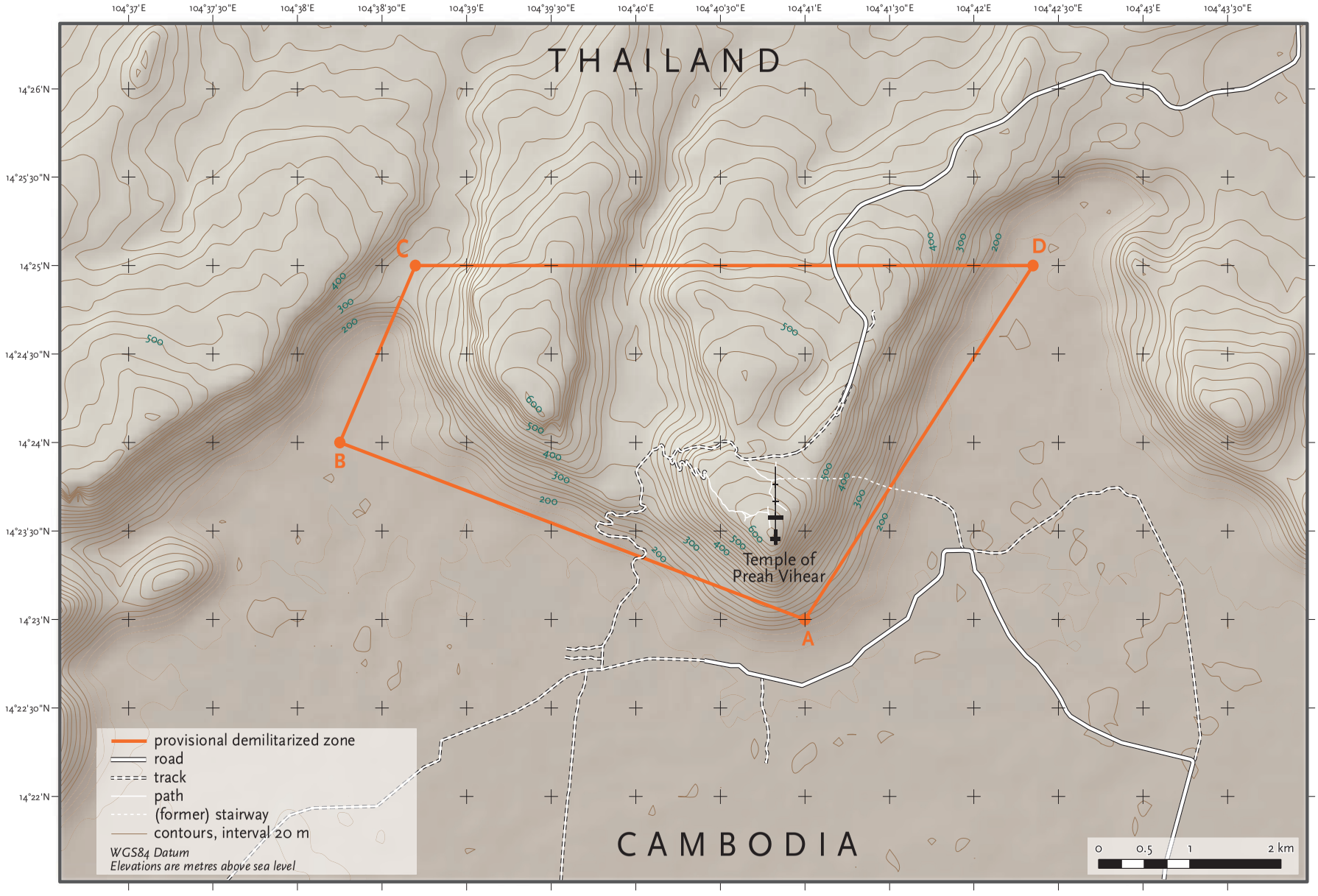
Dissenting opinion of Judge *ad hoc* Cot

In his dissenting opinion, Judge *ad hoc* Jean-Pierre Cot observes that it is exceptional for the Court to indicate provisional measures in connection with a request for interpretation. The only precedent, in the *Avena* case (*Order of 16 July 2008*), is in no way comparable. The present case concerns a judgment which is fifty years old and has been applied for decades without any problems. However, the provisional measures limit the exercise of the States' territorial sovereignty. Judge *ad hoc* Cot draws attention to the risk of abuse of process in such circumstances. The applicant may attempt to graft a new case—proceedings for revision or non-compliance in relation to a previous decision—on to the request for interpretation. The basic requirement for the consent of the parties to the case would thus be circumvented.

Judge *ad hoc* Cot further considers that the main provisional measure indicated by the Court—the establishment of a temporary demilitarized zone—is ill-advised. The Parties have provided no details of topographical or strategic data in the case. In these circumstances, the defining of a temporary demilitarized zone is the product of "armchair strategy" and results in provisional measures being indicated which may be inapplicable on the ground. Judge *ad hoc* Cot would have preferred the Court to have based itself on the precedent in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*. The Chamber of the Court, in its wisdom, noted the lack of data enabling it to indicate a disarmament measure and limited its indication of provisional measures to support for the efforts of the regional organization concerned, in this case the Indonesian Chair of ASEAN.

SKETCH—MAP OF PROVISIONAL DEMILITARIZED ZONE IDENTIFIED BY THE COURT

This sketch-map has been prepared for illustrative purposes only



190. APPLICATION OF THE INTERIM ACCORD OF 13 SEPTEMBER 1995 (THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA *v.* GREECE)

Judgment of 5 December 2011

On 5 December 2011, the International Court of Justice rendered its Judgment in the case concerning the *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece)*.

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

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The operative paragraph (para. 170) of the Judgment reads as follows:

" . . .

The Court,

By fourteen votes to two,

Finds that it has jurisdiction to entertain the Application filed by the former Yugoslav Republic of Macedonia on 17 November 2008 and that this Application is admissible;

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

Against: Judge Xue; Judge *ad hoc* Roucounas;

(2) By fifteen votes to one,

Finds that the Hellenic Republic, by objecting to the admission of the former Yugoslav Republic of Macedonia to NATO, has breached its obligation under Article 11, paragraph 1, of the Interim Accord of 13 September 1995;

In favour: President Owada; Vice-President Tomka; Judges Koroma, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue; Judge *ad hoc* Vukas;

Against: Judge *ad hoc* Roucounas;

(3) By fifteen votes to one,

Rejects all other submissions made by the former Yugoslav Republic of Macedonia.

In favour: President Owada; Vice-President Tomka; Judges Koroma, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue; Judge *ad hoc* Roucounas;

Against: Judge *ad hoc* Vukas.

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Judge Simma appended a separate opinion to the Judgment of the Court; Judge Bennouna appended a declaration to the Judgment of the Court; Judge Xue appended a dissenting opinion to the Judgment of the Court; Judge *ad hoc* Roucounas appended a dissenting opinion to the Judgment of the Court; Judge *ad hoc* Vukas appended a declaration to the Judgment of the Court.

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I. Factual background of the case
(paras. 15–22)

The Court recalls that, on 17 November 2008, the former Yugoslav Republic of Macedonia (hereinafter the "Applicant") filed in the Registry of the Court an Application instituting proceedings against the Hellenic Republic (hereinafter the "Respondent") in respect of a dispute concerning the interpretation and implementation of the Interim Accord of 13 September 1995 (hereinafter the "Interim Accord").

In particular, the Applicant seeks to establish that, by objecting to the Applicant's admission to NATO, the Respondent breached Article 11, paragraph 1, of the said Accord, which provides that:

> "Upon entry into force of this Interim Accord, the Party of the First Part agrees not to object to the application by or the membership of the Party of the Second Part in international, multilateral and regional organizations and institutions of which the Party of the First Part is a member; however, the Party of the First Part reserves the right to object to any membership referred to above if and to the extent the Party of the Second Part is to be referred to in such organization or institution differently than in paragraph 2 of United Nations Security Council resolution 817 (1993)."

In paragraph 2 of resolution 817, the Security Council recommended that the Applicant be admitted to membership in the United Nations, being "provisionally referred to for all purposes within the United Nations as 'the former Yugoslav Republic of Macedonia' pending settlement of the difference that has arisen over the name of the State".

In the period following the adoption of the Interim Accord, the Applicant was granted membership in a number of international organizations of which the Respondent was already a member. On the invitation of the North Atlantic Treaty Organization, the Applicant in 1995 joined the organization's Partnership for Peace (a programme that promotes cooperation between NATO and partner countries) and, in 1999, the organization's Membership Action Plan (which assists prospective NATO members). The Applicant's NATO candidacy was considered in a meeting of NATO member States in Bucharest (hereinafter the "Bucharest Summit") on 2 and 3 April 2008 but the Applicant was not invited to begin talks on accession to the organization. The communiqué issued at the end of the Summit stated that an invitation would be extended to the Applicant "as soon as a mutually acceptable solution to the name issue has been reached".

II. Jurisdiction of the Court and admissibility of the Application
(paras. 23–61)

The Court recalls that the Applicant invoked as a basis for the Court's jurisdiction Article 21, paragraph 2, of the Interim Accord, under the terms of which any "difference or dispute" as to the "interpretation or implementation" of the Interim Accord falls within the jurisdiction of the Court, with the exception of the "difference" referred to in Article 5, paragraph 1, of the Interim Accord, which reads as follows:

> "The Parties agree to continue negotiations under the auspices of the Secretary-General of the United Nations pursuant to Security Council resolution 845 (1993) with a view to reaching agreement on the difference described in that resolution and in Security Council resolution 817 (1993)."

The Respondent claims that the Court has no jurisdiction to entertain the present case and that the Application is inadmissible based on the following reasons. Firstly, the Respondent submits that the dispute concerns the difference over the name of the Applicant referred to in Article 5, paragraph 1, of the Interim Accord and that, consequently, it is excluded from the Court's jurisdiction by virtue of the exception provided in Article 21, paragraph 2. Secondly, the Respondent alleges that the dispute concerns conduct attributable to NATO and its member States, which is not subject to the Court's jurisdiction in the present case. Thirdly, the Respondent claims that the Court's Judgment in the present case would be incapable of effective application because it could not effect the Applicant's admission to NATO or other international, multilateral and regional organizations or institutions. Fourthly, the Respondent submits that the exercise of jurisdiction by the Court would interfere with ongoing diplomatic negotiations mandated by the Security Council concerning the difference over the name and thus would be incompatible with the Court's judicial function.

In respect of the first objection raised by the Respondent, the Court considers it to be clear from the text of Article 5, paragraph 1, and Article 21, paragraph 2, of the Interim Accord, that the "difference" referred to therein is the difference over the definitive name of the Applicant and not disputes regarding the Respondent's obligation not to object to the Applicant's admission to international organizations, unless the Applicant is to be referred to in the organization in question differently than in resolution 817 (1993). Accordingly, the Court decides not to uphold that objection.

With regard to the second objection, the Court considers that the conduct forming the object of the Application is the Respondent's alleged objection to the Applicant's admission to NATO, and that, on the merits, the Court will only have to determine whether or not that conduct demonstrates that the Respondent failed to comply with its obligations under the Interim Accord, irrespective of NATO's final decision on the Applicant's membership application. Accordingly, the Court decides not to uphold that objection.

In respect of the third objection, the Court observes that the Applicant is not requesting it to reverse NATO's decision in the Bucharest Summit, but to determine whether the Respondent violated its obligations under the Interim Accord as a result of its conduct. It concludes that a Judgment of the Court would be capable of being applied effectively, because it would affect the Parties' existing rights and obligations under the Interim Accord. Accordingly, it decides not to uphold that objection.

As regards the fourth objection, the Court notes that the Parties included a provision conferring jurisdiction on the Court (Art. 21) in an agreement that also required them to continue negotiations on the dispute between them over the name of the Applicant (Art. 5, para. 1). It takes the view that, had the Parties considered that a future ruling by the Court would interfere with diplomatic negotiations mandated by the Security Council, they would not have agreed to refer to it disputes concerning the interpretation or implementation of the Interim Accord. Accordingly, it decides not to uphold that objection.

In light of the foregoing, the Court concludes that it has jurisdiction over the dispute and that the Application is admissible.

III. Whether the Respondent failed to comply with the obligation under Article 11, paragraph 1, of the Interim Accord
(paras. 62–113)

The Court then considers whether the Respondent objected to the Applicant's admission to NATO, within the meaning of the first clause of Article 11, paragraph 1, of the Interim Accord.

It begins by examining the meaning of that clause and finds in that connection that the Respondent is under an obligation not to object to "the application by or membership of" the Applicant in NATO. It notes that the Parties agree that the obligation "not to object", which is an obligation of conduct, rather than one of result, does not require the Respondent actively to support the Applicant's admission to international organizations. The Court further observes that nothing in the text of that clause limits the Respondent's obligation not to object to organizations that use a voting procedure to decide on the admission of new members. It considers that there is no indication that the Parties intended to exclude from Article 11, paragraph 1, organizations like NATO which follow procedures which do not require a vote. Moreover, the Court notes that the question before it is not whether the decision taken by NATO at the Bucharest Summit with respect to the Applicant's candidacy was due exclusively, principally, or marginally to the Respondent's objection, but whether the Respondent, by its own conduct, did not comply with the obligation not to object contained in Article 11, paragraph 1, of the Interim Accord. The Court also observes that the Respondent did not take the position that any objection by it at the Bucharest Summit was based on grounds unrelated to the difference over the name. Therefore, it does not consider it necessary to decide whether the Respondent retains a right to object to the Applicant's admission to international organizations on such other grounds.

The Court then considers whether the Respondent "objected" to the Applicant's admission to NATO. To this end, it turns to the evidence submitted to it by the Parties, in order to decide whether the record supports the Applicant's contention that the Respondent objected to the Applicant's

membership in NATO. The Court notes that, in support of its position, the Applicant refers to diplomatic correspondence of the Respondent before and after the Bucharest Summit and to statements by senior officials of the Respondent during the same period. The Court observes that the Respondent does not dispute the authenticity of these statements and it examines them as evidence of the Respondent's conduct in connection with the Bucharest Summit, in light of its obligation under Article 11, paragraph 1, of the Interim Accord. In the view of the Court, the evidence submitted to it demonstrates that through formal diplomatic correspondence and through statements of its senior officials, the Respondent made clear before, during and after the Bucharest Summit that the resolution of the difference over the name was the "decisive criterion" for the Respondent to accept the Applicant's admission to NATO. The Court notes that the Respondent manifested its objection to the Applicant's admission to NATO at the Bucharest Summit, citing the fact that the difference regarding the Applicant's name remained unresolved. The Court concludes that the Respondent objected to the Applicant's admission to NATO, within the meaning of the first clause of Article 11, paragraph 1, of the Interim Accord.

The Court then turns to the question whether the Respondent's objection to the Applicant's admission to NATO at the Bucharest Summit fell within the exception contained in the second clause of Article 11, paragraph 1, of the Interim Accord.

It considers that, in this clause, the Parties agree that the Respondent "reserves the right to object to any membership" by the Applicant in an international, multilateral or regional organization or institution of which the Respondent is a member "if and to the extent the [Applicant] is to be referred to in such organization or institution differently than in paragraph 2 of United Nations Security Council resolution 817 (1993)". The Court recalls that paragraph 2 of resolution 817 recommends that the Applicant be admitted to membership in the United Nations, being "provisionally referred to for all purposes within the United Nations as 'the former Yugoslav Republic of Macedonia' pending settlement of the difference that has arisen over the name of the State".

The Court notes that the Parties agree that the Applicant intended to refer to itself within NATO, once admitted, by its constitutional name, not by the provisional designation set forth in resolution 817. Thus, it considers whether the second clause of Article 11, paragraph 1, permits the Respondent to object in that circumstance. The interpretation of that clause in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties leads the Court to conclude that the Respondent does not have the right to object to the Applicant's admission to an organization based on the prospect that the Applicant is to refer to itself in such organization with its constitutional name. It finds, in effect, that the Applicant's intention to refer to itself in an international organization by its constitutional name did not mean that it was "to be referred to" in such organization "differently than in" paragraph 2 of resolution 817.

Finally, the Court considers the Respondent's position that, even assuming that the Court were to conclude that the Respondent had objected to the Applicant's admission to NATO, in contravention of Article 11, paragraph 1, such objection would not breach the Interim Accord, because of the effect of Article 22. Article 22 of the Interim Accord provides:

> "This Interim Accord is not directed against any other State or entity and it does not infringe on the rights and duties resulting from bilateral or multilateral agreements already in force that the Parties have concluded with other States or international organizations."

The Court observes that the Respondent's initial interpretation of Article 22, that its "rights" under a prior agreement (in addition to its "duties") take precedence over its obligation not to object to admission by the Applicant to an organization within the terms of Article 11, paragraph 1, would vitiate that obligation, because the Respondent normally can be expected to have a "right" under prior agreements with third States to express a view on membership decisions. The Court, considering that the Parties did not intend Article 22 to render meaningless the first clause of Article 11, paragraph 1, is therefore unable to accept that interpretation advanced by the Respondent. The Court then notes that the Respondent's narrower interpretation of Article 22, which it advanced during the oral proceedings, i.e., that "duties" under a prior treaty would take precedence over obligations in the Interim Accord, would oblige it to determine whether the Respondent has established that the North Atlantic Treaty imposed a duty on it to object to the Applicant's admission to NATO. However, according to the Court, the Respondent offers no persuasive argument that any provision of the North Atlantic Treaty required it to object to the Applicant's membership. The Court concludes that the Respondent's attempt to rely on Article 22 is unsuccessful. Accordingly, it need not decide which of the two Parties' interpretations is the correct one.

In the light of the above, the Court concludes that the Respondent failed to comply with its obligation under Article 11, paragraph 1, of the Interim Accord by objecting to the Applicant's admission to NATO at the Bucharest Summit. It considers that the prospect that the Applicant would refer to itself in NATO using its constitutional name did not render that objection lawful under the exception contained in the second clause of Article 11, paragraph 1. It adds that, in the circumstances of the present case, Article 22 of the Interim Accord does not provide a basis for the Respondent to make an objection that is inconsistent with Article 11, paragraph 1.

IV. Additional justifications invoked by the Respondent
(paras. 114–165)

The Court observes that, as an alternative to its main argument that it complied with its obligations under the Interim Accord, the Respondent contends that the wrongfulness of any objection to the admission of the Applicant to NATO is precluded by the doctrine of *exceptio non adimpleti contractus*. The Respondent also suggests that any failure to comply with its obligations under the Interim Accord could be justified both as a response to a material breach of a treaty and as a countermeasure under the law of State responsibility.

The Court observes that while the Respondent presents separate arguments relating to the *exceptio*, partial suspension under Article 60 of the 1969 Vienna Convention, and counter-

measures, it advances certain minimum conditions that are common to all three arguments, namely that the Applicant breached several provisions of the Interim Accord and that the Respondent's objection to the Applicant's admission to NATO was made in response to those breaches.

A. Alleged breach by the Applicant of the second clause of Article 11, paragraph 1

The Court notes that on its face, the text of the second clause of Article 11, paragraph 1, does not impose an obligation upon the Applicant not to be referred to in an international organization or institution by any reference other than the provisional designation (as "the former Yugoslav Republic of Macedonia"). It further notes that, just as other provisions of the Interim Accord impose obligations only on the Applicant, Article 11, paragraph 1, imposes an obligation only on the Respondent. The second clause contains an important exception to this obligation, but that does not transform it into an obligation upon the Applicant. Accordingly, the Court finds no breach by the Applicant of this provision.

B. Alleged breach by the Applicant of Article 5, paragraph 1

At the outset, the Court notes that although Article 5, paragraph 1, contains no express requirement that the Parties negotiate in good faith, such obligation is implicit under this provision. It observes that the failure of the Parties to reach agreement, 16 years after the conclusion of the Interim Accord, does not in itself establish that either Party has breached its obligation to negotiate in good faith. It therefore considers whether the Parties conducted themselves in such a way that negotiations may be meaningful. It notes that during the course of the negotiations pursuant to Article 5, paragraph 1, the Applicant had resisted suggestions that it depart from its constitutional name and that the Respondent had opposed the use of "Macedonia" in the name of the Applicant. It further notes that the political leaders of both Parties at times made public statements that suggested an inflexible position as to the name difference, including in the months prior to the Bucharest Summit. Moreover, it observes that there is also evidence that the United Nations mediator presented the Parties with a range of proposals over the years and, in particular, expressed the view that, in the time period prior to the Bucharest Summit, the Parties were negotiating in earnest. Taken as a whole, the Court considers that the evidence from this period indicates that the Applicant showed a degree of openness to proposals that differed from either the sole use of its constitutional name or the "dual formula", while the Respondent, for its part, apparently changed its initial position and in September 2007 declared that it would agree to the word "Macedonia" being included in the Applicant's name as part of a compound formulation. The Court notes in particular that, in March 2008, the United Nations mediator proposed that the Applicant adopt the name "Republic of Macedonia (Skopje)" for all purposes. According to the record before the Court, the Applicant expressed a willingness to put this name to a referendum. The record also indicates that it was the Respondent who rejected this proposed name. Thus, the Court concludes that the Respondent has not met its burden of demonstrating that the Applicant breached its obligation to negotiate in good faith.

C. Alleged breach by the Applicant of Article 6, paragraph 2

Article 6, paragraph 2, provides:

"The Party of the Second Part hereby solemnly declares that nothing in its Constitution, and in particular in Article 49 as amended, can or should be interpreted as constituting or will ever constitute the basis for the Party of the Second Part to interfere in the internal affairs of another State in order to protect the status and rights of any persons in other States who are not citizens of the Party to the Second Part."

The Court considers that the Respondent has presented no convincing evidence to suggest that the Applicant has interpreted its Constitution as providing a right to interfere in the Respondent's internal affairs on behalf of persons not citizens of the Applicant. The Court therefore does not find that the Applicant breached Article 6, paragraph 2, prior to the Bucharest Summit.

D. Alleged breach by the Applicant of Article 7, paragraph 1

Article 7, paragraph 1, provides:

"Each Party shall promptly take effective measures to prohibit hostile activities or propaganda by State-controlled agencies and to discourage acts by private entities likely to incite violence, hatred or hostility against each other."

The Court recalls that, according to the Respondent, the Applicant breached this provision based on its failure to take effective measures to prohibit hostile activities by State-controlled agencies, citing, for example, allegations relating to the content of school textbooks, and its failure to discourage acts by private entities likely to incite violence, hatred or hostility against the Respondent, citing, in particular, an incident on 29 March 2008 (in the days prior to the Bucharest Summit) in which several outdoor billboards in Skopje depicted an altered image of the Respondent's flag. The Court observes that the Respondent also alleges a consistent failure by the Applicant to protect the premises and personnel of the Respondent's Liaison Office in Skopje.

The Court considers that the evidence cannot sustain a finding that the Applicant committed a breach of Article 7, paragraph 1, prior to the Bucharest Summit. It finds that the textbook content in question does not provide a basis to conclude that the Applicant has failed to prohibit "hostile activities or propaganda". Furthermore, the Respondent has not demonstrated convincingly that the Applicant failed "to discourage" acts by private entities likely to incite violence, hatred or hostility towards the Respondent. After recalling the obligation to protect the premises of the diplomatic mission and to protect against any disturbance of the peace or impairment of its dignity contained in Article 22 of the Vienna Convention on Diplomatic Relations, the Court finds that the Applicant introduced evidence demonstrating its efforts to provide adequate protection to the Respondent's diplomatic staff and premises.

E. Alleged breach by the Applicant of Article 7, paragraph 2

Article 7, paragraph 2, provides:

"Upon entry into force of this Interim Accord, the Party of the Second Part shall cease to use in any way the symbol in all its forms displayed on its national flag prior to such entry into force."

The Court finds that the record does support the conclusion that there was at least one instance in which the Applicant's army used the symbol prohibited by Article 7, paragraph 2, of the Interim Accord.

F. Alleged breach by the Applicant of Article 7, paragraph 3

Article 7, paragraph 3, provides:

"If either Party believes one or more symbols constituting part of its historic or cultural patrimony is being used by the other Party, it shall bring such alleged use to the attention of the other Party, and the other Party shall take appropriate corrective action or indicate why it does not consider it necessary to do so."

The Court notes that, in contrast to Article 7, paragraph 2, the text of Article 7, paragraph 3, does not expressly prohibit the Applicant from using the symbols that it describes. Rather, it establishes a procedure for situations in which one Party believes the other Party to be using its historical or cultural symbols. Therefore, according to the Court, the question to consider is whether the Respondent brought its concern "to the attention" of the Applicant before the Bucharest Summit when the latter renamed the airport of the capital. To that end, it notes that although it does not appear that the Respondent did so, the Applicant was aware of the Respondent's concern, and the Applicant's Foreign Minister explained the rationale behind the renaming of the airport in a January 2007 interview to a Greek newspaper. The Court concludes that the Respondent has not discharged its burden to demonstrate a breach of Article 7, paragraph 3, by the Applicant.

In light of this analysis of the Respondent's allegations that the Applicant breached several of its obligations under the Interim Accord, the Court concludes that the Respondent has established only one such breach. Namely, the Respondent has demonstrated that the Applicant used the symbol prohibited by Article 7, paragraph 2, of the Interim Accord in 2004. After the Respondent raised the matter with the Applicant in 2004, the use of the symbol was discontinued during that same year.

G. Conclusions concerning the Respondent's additional justifications

1. Conclusion concerning the exceptio non adimpleti contractus

Having reviewed the Respondent's allegations of breaches by the Applicant, the Court returns to the Respondent's contention that the *exceptio*, as it is defined by the Respondent, precludes the Court from finding that the Respondent breached its obligation under Article 11, paragraph 1, of the Interim Accord. The Court recalls that in all but one instance (the use of the symbol prohibited by Article 7, paragraph 2), the Respondent failed to establish any breach of the Interim Accord by the Applicant. In addition, the Respondent has failed to show a connection between the Applicant's use of the symbol in 2004 and the Respondent's objection in 2008—that is, evidence that when the Respondent raised its objection to the Applicant's admission to NATO, it did so in response to the apparent violation of Article 7, paragraph 2, or, more broadly, on the basis of any belief that the *exceptio* precluded the wrongfulness of its objection. The Respondent has thus failed to establish that the conditions which it has itself asserted would be necessary for the application of the *exceptio* have been satisfied in this case. It is, therefore, unnecessary for the Court to determine whether that doctrine forms part of contemporary international law.

2. Conclusion concerning a response to material breach

The Court recalls that the Respondent also suggested that its objection to the Applicant's admission to NATO could have been regarded as a response, within Article 60 of the 1969 Vienna Convention, to material breaches of the Interim Accord allegedly committed by the Applicant. Article 60, paragraph 3 (b), of the 1969 Vienna Convention provides that a material breach consists in "the violation of a provision essential to the accomplishment of the object or purpose of the treaty". The Court further recalls its conclusion that the only breach which has been established is the display of a symbol in breach of Article 7, paragraph 2, of the Interim Accord, a situation which ended in 2004. The Court considers that this incident cannot be regarded as a material breach within the meaning of Article 60 of the 1969 Vienna Convention. Moreover, the Court considers that the Respondent has failed to establish that the action which it took in 2008 in connection with the Applicant's application to NATO was a response to the breach of Article 7, paragraph 2, approximately four years earlier. Accordingly, the Court does not accept that the Respondent's action was capable of falling within Article 60 of the 1969 Vienna Convention.

3. Conclusion concerning countermeasures

The Court recalls that the Respondent also argues that its objection to the Applicant's admission to NATO could be justified as a proportionate countermeasure in response to breaches of the Interim Accord by the Applicant. As the Court has already made clear, the only breach which has been established by the Respondent is the Applicant's use in 2004 of the symbol prohibited by Article 7, paragraph 2, of the Interim Accord. Having reached that conclusion and in the light of its analysis concerning the reasons given by the Respondent for its objection to the Applicant's admission to NATO, the Court is not persuaded that the Respondent's objection to the Applicant's admission was taken for the purpose of achieving the cessation of the Applicant's use of the symbol prohibited by Article 7, paragraph 2. As the Court noted, the use of the symbol that supports the finding of a breach of Article 7, paragraph 2, by the Applicant had ceased as of 2004. Thus, the Court rejects the Respondent's claim that its objection could be justified as a countermeasure precluding the wrongfulness of the Respondent's objection to the Applicant's admission to NATO. Accordingly, there is no reason for the Court to consider any of the additional arguments advanced by the Parties with respect to the law governing countermeasures.

For the foregoing reasons, the Court finds that the additional justifications submitted by the Respondent fail.

Lastly, the Court emphasizes that the 1995 Interim Accord places the Parties under a duty to negotiate in good faith under the auspices of the Secretary-General of the United Nations pursuant to the pertinent Security Council resolutions with a view to reaching agreement on the difference described in those resolutions.

V. Remedies (paras. 167–169)

The Court recalls that, in its final submissions pertaining to the merits of the present case, the Applicant seeks two remedies which it regarded as constituting appropriate redress for claimed violations of the Interim Accord by the Respondent. First, the Applicant seeks relief in the form of a declaration of the Court that the Respondent has acted illegally, and secondly, it requests relief in the form of an order of the Court that the Respondent henceforth refrain from any action that violates its obligations under Article 11, paragraph 1, of the Interim Accord.

At the end of its consideration, the Court has found a violation by the Respondent of its obligation under Article 11, paragraph 1, of the Interim Accord. As to possible remedies for such a violation, the Court finds that a declaration that the Respondent violated its obligation not to object to the Applicant's admission to or membership in NATO is warranted. Moreover, the Court does not consider it necessary to order the Respondent, as the Applicant requests, to refrain from any future conduct that violates its obligation under Article 11, paragraph 1, of the Interim Accord. As the Court previously explained, "[a]s a general rule, there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed" (*Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 267, para. 150).

The Court accordingly determines that its finding that the Respondent has violated its obligation to the Applicant under Article 11, paragraph 1, of the Interim Accord, constitutes appropriate satisfaction.

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Separate opinion of Judge Simma

Judge Simma finds himself in agreement with the findings of the Court as regards both jurisdiction and the merits of the case. His concern only relates to the way in which the Judgment treats the so-called *exceptio non adimpleti contractus*. He begins his analysis by outlining that, according to the Respondent, were the Court to find—as it in fact did—that Greece had violated the 1995 Interim Accord by objecting to the admission of FYROM to NATO in 2008, the wrongfulness of Greece's action would still be precluded. No less than three "defences" are thus advanced, all based on the allegation of prior breaches of the Accord committed by the FYROM: in the first instance, Greece presents the doctrine of the *exceptio non adimpleti contractus*; secondly, Greece's objection is explained as a response to material breaches of the Accord by the FYROM on the basis of the law of treaties; and thirdly, Greece portrays its behaviour as a countermeasure against the FYROM's preceding breaches recognized as justified by the law of State responsibility.

The Judgment rejects all of these defences, and according to Judge Simma rightly so, even though in his view the Court took care of the matter in too succinct a way. What Judge Simma does take issue with is the treatment by the Court of the *exceptio non adimpleti contractus* as a justification separate, and different, from the other two "defences" just mentioned. On this matter, the Parties to the case put forward different views. In the face of such conflicting statements about points of law, an authoritative clarification by the Court of the legal status and interrelationship of the *exceptio* vis-à-vis Article 60 of the Vienna Convention on the Law of Treaties (entitled "Termination or suspension of the operation of a treaty as a consequence of its breach") and the legal régime of countermeasures as developed by the International Law Commission would have been helpful.

Judge Simma's opinion engages in such a clarification. He traces the concept of the *exceptio* back to the idea of reciprocity, which in fully developed legal systems has been almost totally absorbed and supplanted by specific norms and institutions—"domesticated", as it were. In international law, reciprocity still lies closer to the surface, at the root of various methods of self-help by which States may secure their rights; it has been crystallized into international law's sanctioning mechanisms, among them countermeasures and reciprocal non-performance of an agreement with its *sedes materiae* in the law of treaties.

Judge Simma firmly states that the *exceptio non adimpleti contractus* belongs to the second category. It gave legal expression, and was conditioned by, the synallagmatic character of most international agreements—the rule *pacta sunt servanda* being linked to the rule *do ut des*. The widespread recognition of this functional synallagma in the law of contracts of the major legal systems allows to accept it as a general principle of law in the sense of Article 38 of the Court's Statute, and thus to apply it also in international legal relations. The question then is to what modifications such a concept developed *in foro domestico* will have to be subjected at the level of international law in order to secure it to function in an orderly way and not to become prone to abuse absent the judicial control of its application regularly available in domestic law. In the context of responses to treaty breach, unilateral invocation by one and denial of justification by the other side have been the rule to such an extent that it was difficult to give the *exceptio* a basis in customary international law.

Judge Simma's opinion highlights that it is precisely this circumstance which renders the codification of this principle in Article 60 of the Vienna Convention on the Law of Treaties so important. This provision puts reciprocity in treaty relations on the necessary leash—in particular by allowing the suspension or termination of a treaty only in the case of a material breach by another party and setting up a number of procedural conditions. Furthermore, as confirmed by Article 42, paragraph 2, of the Vienna Convention, Article 60 is meant to regulate the legal consequences of treaty breach in an exhaustive way. There is thus no place left for the application of the *exceptio* outside the ambit of Article 60 and free of

any procedural requirements to its exercise, as Greece wanted the Court to believe. Judge Simma acknowledges that, according to Article 73 of the Convention, its provisions do not prejudge questions of State responsibility arising in regard to treaty breach. The suspension of treaty provisions as a countermeasure undertaken against prior breaches by another party remains thus untouched by Article 60 and permissible subject to the rather tight régime set up by the ILC code on the matter. However, Judge Simma concludes that since the Respondent drew the necessary distinction in this regard, and the Judgment treats Greece's "defences" other than the *exceptio* in a satisfactory manner, there remains nothing to be said on the matter.

Declaration of Judge Bennouna

Judge Bennouna concurs in the final conclusions of the Court in the present case, yet he observes that it chose to avoid certain crucial legal questions raised and discussed at length by the Parties, notably the *exceptio non adimpleti contractus* and the countermeasures, by sheltering behind its assessment of the facts the Parties relied on in support of their arguments. According to Judge Bennouna, the Court could have analysed and pronounced on these questions, in light of their temporal and material evolution.

Dissenting opinion of Judge Xue

Judge Xue dissents from the Court's decision to exercise jurisdiction in the case. She takes the position that the case falls within the scope of Article 5, paragraph 1, rather than that of Article 11, paragraph 1, of the Interim Accord and the Application is not admissible on the ground of judicial propriety.

Judge Xue considers that the essential issue for the Court, in determining its jurisdiction, is whether the disputed objection of the Respondent to the membership of the Applicant to the North Atlantic Treaty Organization (NATO) at the 2008 Bucharest Summit relates to the interpretation or implementation of Article 11, paragraph 1, of the Interim Accord or is an issue under Article 5, paragraph 1, precluded from the jurisdiction of the Court by virtue of Article 21, paragraph 2, of that treaty. In her view, any interpretation of the provisions of the Interim Accord in relation to the name issue should give due consideration to the interim nature of the Accord and the ongoing negotiation between the Parties for the settlement of the name difference.

Judge Xue is of the view that in establishing its jurisdiction, the Court adopts a rather narrow interpretation of the term "difference" under Article 5, paragraph 1. By such interpretation, the "difference" under that article is reduced to the *solution* of the final name to be agreed on by the Parties in the negotiation and Article 11, paragraph 1, and Article 5, paragraph 1, are thus treated as entirely separate issues without substantive connection to each other in the implementation of the Interim Accord. She questions such treaty interpretation.

In Judge Xue's view, given the nature of the dispute between the Parties over the name issue and the object and purpose of the Interim Accord, Article 11, paragraph 1, and Article 5, paragraph 1, constitute two of the key provisions in the agreement. From the evidence before the Court, it is clear that the central issue of the dispute between the Parties on Article 11, paragraph 1, lies in the so-called "dual formula", as allegedly pursued by the Applicant. The conditional terms of Article 11, paragraph 1, have been subject to different interpretations of the Parties; they particularly disagree as to whether the Applicant could use its constitutional name when referring to itself or dealing with third States in international organizations. In the subsequent years after the conclusion of the Interim Accord, the Applicant has insisted on using its constitutional name when referring to itself and dealing with third States, while the Respondent has formed a general pattern of protests against such use, alleging it as a breach of resolution 817 and the Interim Accord.

The conclusion of the Interim Accord between the Parties, together with Security Council resolutions 817 and 845, recognizes the legal interests of both Parties in connection with the name issue. The temporary arrangement of the name difference under Article 11, paragraph 1, provides a means of ending the impasse between the Parties over the Applicant's membership in international organizations. The ambiguity of the conditional terms in Article 11, paragraph 1, with regard to whether, or to what extent, the Applicant's constitutional name may be used by the Applicant and third States in international organizations, shows that the Interim Accord, as a temporary measure for maintaining peace and good-neighbourly relations both in the region and between the Parties, requires a great deal of good faith and mutual trust from both Parties in its implementation. Such uncertainty can only be explained and justified by the interim nature of the treaty and the pending settlement of the name issue. Therefore, the implementation of Article 11, paragraph 1, is intrinsically linked with the duty of the two Parties to settle the name dispute through negotiations as required by Article 5, paragraph 1. Any issue relating to the negotiation process should fall within the scope of Article 5, paragraph 1.

The so-called "dual formula", as revealed in the proceedings, refers to the formula whereby, ultimately, the provisional name will be used only between the Respondent and the Applicant, while the Applicant's constitutional name is used with all other States. Judge Xue notes that in the present case, without looking into this so-called "dual formula", it would be impossible to examine fully the Respondent's actions at the Bucharest Summit in light of the object and purpose of the Interim Accord. If conducted, however, such examination would inevitably have to address the "difference" under Article 5, paragraph 1, thus going beyond the jurisdiction of the Court.

In Judge Xue's opinion, the Court's examination of the single act of the Respondent's objection to the Applicant's membership to NATO has isolated Article 11, paragraph 1, from the context of the treaty as a whole, and from its object and purpose. Article 11, paragraph 1, cannot be separated from Article 5, paragraph 1, as long as the settlement of the final name is involved.

On the question of judicial propriety, Judge Xue holds that even if by a strict interpretation of Article 21, paragraph 2, the Court finds that it has jurisdiction in the case, there are still good reasons for the Court to refrain from exercising it,

as it bears on the question of judicial propriety. As the Court pointed out in the *Northern Cameroons* case, even if the Court, "when seised, finds that it has jurisdiction, the Court is not compelled in every case to exercise that jurisdiction. There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore." (Case concerning the *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 29.)

She agrees with the Court's position that the issue before the Court is not whether NATO's decision may be attributed to the Respondent but rather whether the Respondent has breached its obligation under the Interim Accord as a result of its own conduct. The Court's decision to pronounce only on the lawfulness of the single act of the Respondent and to reject all other submissions of the Applicant, renders the Judgment devoid of any effect on NATO's decision to defer the invitation to the Applicant to become a NATO member.

In so far as NATO's decision remains valid, the Court's decision will have no practical effect on the future conduct of the Parties with respect to the Applicant's membership in that organization. In the *Northern Cameroons* case, the Court pronounced that its decision "must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations" (case concerning the *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 34). In Judge Xue's view, that requirement does not seem to have been met in the present case.

In addition, Judge Xue expresses concerns about the potential effect of the Judgment on the negotiation process, since the Court's decision is likely to be used by the Parties to harden their positions in the negotiation, thus not conducive to a speedy settlement of the name issue.

Dissenting opinion of Judge *ad hoc* Roucounas

After an introduction and brief history, Judge Roucounas presents the context in which the two Parties concluded the Interim Accord of 13 September 1995, which contains a number of significant "unusual features", in particular the fact that the Parties are not referred to by name, owing to the "difference" over the name of the "Party of the Second Part". That difference is ubiquitous in this case, and the other claims of the Applicant and reactions of the Respondent revolve around it. Judge Roucounas notes that the Interim Accord was concluded amid the tumult of the Balkan crises of the 1990s and describes the efforts of the European institutions between 1992 and 1994, the policies of the United Nations and the mediation by American envoys which led to the adoption of resolutions 817 and 845 and to the Interim Accord.

The judge disagrees with the interpretation upheld by the Court that the Applicant itself was not obliged to use the provisional name within international organizations. He points out that that interpretation is incompatible with the phrase "[is to be] referred to for all purposes", which is used in resolutions 817 and 845 and incorporated in the text of the Accord. Furthermore, the phrase "for all purposes" emphasizes the object of the negotiations, which are intended to achieve agreement on one name (and one name only). Judge Roucounas observes that the "dual formula" advanced by the Applicant, who contends that the purpose of the bilateral negotiations conducted under the auspices of the United Nations is simply to reach agreement on the name which will replace the provisional appellation of FYROM, and which is intended solely for use by the Respondent, while the Applicant, for its part, will continue to refer to itself, and to have itself referred to, as "Macedonia", is in breach of the Applicant's treaty obligations.

The judge points out that, throughout the period from 1993 to 2008, Greece repeatedly voiced its opposition, orally and in writing, to the FYROM's strategy of using its constitutional name in international organizations, and that the Respondent made its position perfectly clear in the face of the Applicant's shift towards a "dual formula". Moreover, it is not necessary, from a legal point of view, for those with objections to voice those objections at all times and on every occasion.

The judge goes on to say that the Interim Accord is synallagmatic, in the sense that it is based on reciprocity. Its provisions are closely inter-connected and the rights and obligations of the two Parties are legally dependent on one another. He states that it is difficult to see what benefit the Respondent would derive from the Interim Accord, other than the regularization of its relations with its northern neighbour, by joint acceptance of a name which would distinguish one from the other. Therefore, he believes that the Court should strive to make the object and purpose of the Interim Accord realizable by emphasizing the need for effective negotiations conducted in good faith, and take care not to prejudice those negotiations directly or indirectly.

The dissenting opinion questions the Court's jurisdiction to rule on the dispute submitted to it. The judge is of the view that Article 21, paragraph 2, excludes from the Court's jurisdiction not only the question of the attribution of a name for the Applicant, but also "the difference referred to in Article 5, paragraph 1", that is to say, it prohibits the Court's intervention on any question which, according to the Applicant, relates "directly or indirectly" to the question of the name. He adds that the exclusion under Article 21 is also linked to Article 22, which reflects Articles 8 and 10 of the North Atlantic Treaty, the Court having no jurisdiction to interpret that instrument. He finds it regrettable that the Court adopted a restrictive interpretation of Article 5 and, at the same time, a broad interpretation of the first part of Article 11 and a restrictive interpretation of the second part of that same Article. He believes that the Court has assumed a position capable of being interpreted as contributing to "faits accomplis", or which might lead to renewed deterioration of the negotiations and relations between the two States. He adds that the Court's lack of jurisdiction is corroborated by the fact that NATO's decision of 3 April 2008 is an act of that international organization, and that Greece does not have to answer for the acts of organizations of which it is a member.

Judge Roucounas then argues that the Applicant's conduct is incompatible with Article 5 of the Interim Accord, which sets out the Parties' obligation to conduct negotiations in good faith. He believes that resolution 817 was incorporated

into Article 5 of the Interim Accord precisely because it refers to "the difference . . . over the name". Article 5 establishes a balance between the Parties' rights and obligations. Its first paragraph requires negotiations "with a view to reaching agreement on the difference", firstly over what is meant by "name" and secondly over who should use it. The second paragraph of Article 5 reinforces the first, "without prejudice" to the difference over the name, by stipulating that the Parties must facilitate their relations, in particular their economic and commercial relations and "shall take practical measures" to that end. He believes that the intransigence of the Applicant in respect of the "dual formula" was compromising the negotiations between the Parties, which he considers is clearly illustrated by statements of the President and Prime Minister of the FYROM, which he cites verbatim and which, in his view, have a potentially destructive character, but on which the Judgment remains silent. He recalls that Greece altered its position and made known that it would be willing to accept a name which included the term "Macedonia", on the condition that it was accompanied by a qualifier and that that name should be used *erga omnes*. The FYROM, on the other hand, declared that the international use of a name which differed from its constitutional name was unacceptable. He adds that it is permissible to question whether the Applicant's actions were in compliance with the generally recognized conditions for the proper conduct of "meaningful" negotiations, and its good faith in a process which has been ongoing for 16 years without success.

The judge then examines the question of admission to "closed" or "regional" organizations, since NATO differs from the other organizations on account of its military and defence-related nature. He states that the competent organ within the organization can lay down additional conditions for the admission of a new member. Political factors, relating as much to the qualities of the candidate State as to its relations with the member States, also come into play during the admissions process, and it is for each member State to determine subjectively whether all the necessary criteria have been met before giving its assent. To admit a new member to NATO, the member States—once they have determined whether the European candidate State is in a position to further the principles of the Treaty and to contribute to the security of the North Atlantic area—decide by unanimous agreement to invite that State to accede to the organization (Art. 10 of the North Atlantic Treaty). It follows that all member States, without exception, have the right—the obligation even—to decide whether the candidate State meets the necessary conditions for its admission to the organization. And any member State whose relations with the candidate State are a source of direct concern cannot be prevented from expressing its opinion on the real state of those relations. Stating that it is not entitled to do so prevents that State from exercising its rights. NATO's decision followed calls by the organization directed towards the Applicant for "mutually acceptable solutions to outstanding issues".

The opinion disagrees with the interpretation given by the Court to Article 11 of the Interim Accord, which not only favours the first part of the first paragraph of the Article over the second part of the same paragraph, but also infringes the rights and obligations of the Respondent in relation to third parties. Thus, excessive weight is attached by the Court to the first part of Article 11, paragraph 1—which contains another "unusual feature" in the phrase "the Party of the First Part agrees not to object"—to the point of rendering it unintelligible. With no decisive argument, the Court minimizes the scope of the second part of paragraph 1, which sets outs the conditions for the use of the name FYROM. According to the judge, the idea that the second part of Article 11, paragraph 1, would only apply were the organization to admit the Applicant under a name other than FYROM is completely misconceived, and the distinction between what happens before and what happens after admission to the international organizations is not legally tenable, in view of the treaty and of the specific nature of NATO. As regards the admission procedure, Judge Roucounas notes that the Alliance's decision was taken in accordance with the usual practice, following consultation within and outside the organization. Since individual views are absorbed into the organization's decision, it is impossible to distinguish Greece's position from that of the organization. NATO has its own procedures based on the consensus of its member States.

The judge adds that the Court's reading of the phrase "the Party of the First Part agrees not to object" (to the admission to international organizations) results in depriving the Respondent of established international competencies. In contrast, a balanced reading of Article 11 would have enabled the Court to find that the Respondent was not prohibited, legally or politically, from making public the reasons why, in its view, the Applicant's deliberate attitude was in breach of the Interim Accord and failed to meet the conditions of Article 10 of the North Atlantic Treaty, despite repeated calls from the Alliance's organs for the Parties to settle the difference over the name.

As regards international protest, he recalls that this is a legal concept of customary law, whereby a subject of international law objects to an official act or conduct of another subject which it considers to be in breach of international law. Protest acquires greater weight when it opposes an act or conduct which is inconsistent with the international obligations of the other subject of international law. It has the effect of preserving the rights of the protesting subject and bringing to the fore the unlawful nature of the official act or conduct at issue. It is further strengthened by and becomes indisputable through its repetition. Judge Roucounas observes that the Court has never relied on *the number* of protests in order to determine their legal effect; in the present case, however, the Judgment finds the eight protests by Greece in the period between the adoption of resolution 817 and the conclusion of the Interim Accord to be insufficient, and contests the many others (approximately 85) voiced by Greece since the conclusion of the Interim Accord against the FYROM's use of its constitutional name within international organizations. Judge Roucounas expresses concern that, by using quantitative measures in this way to determine the legal status of an international act, the Court may undermine the very concept of international protest.

Judge Roucounas stresses the notion of good neighbourliness. The right of neighbourliness and the right of good neighbourliness are evolving concepts. When good neighbourliness

is embodied in an international treaty, it becomes a legal principle, to be read in conjunction with the fundamental principles laid down by the United Nations Charter, which the commentaries on the Charter generally regard as legally enshrining the mutual right of neighbouring States to the protection of their legitimate interests. He adds that the principle of good neighbourliness is not binding on States alone but, to the extent that its non-observance may compromise the actions of the organs of the international community, it is also an obligation incumbent on international organizations, which must ensure that it is respected. Judge Roucounas recalls that good neighbourliness is specifically mentioned in resolutions 817 and 845 and in NATO's communiqués, and that the Interim Accord limits the Parties' freedom of action in seven places, its object being precisely to regulate peaceful relations between the States. That is why provision was made in the Accord for the Applicant to be referred to provisionally and for all purposes as the FYROM within international organizations, pending the settlement of the difference by negotiation. According to Judge Roucounas, the Applicant's acts of provocation, which are in breach of those obligations, continue in various forms: irredentist claims concerning the geographical and ethnic frontiers of the FYROM, which extend beyond its political borders, school books, maps, official encyclopaedias and inflammatory speeches.

Article 22 is a response to the concern expressed by those who study the law of treaties regarding the problems of interpretation and uncertainties caused by the silence of international agreements on the relationship between those agreements and other earlier or subsequent treaties. It is not simply a standard clause, and is aimed at avoiding any potential doubt arising from the interpretation of Article 30, paragraph 2, of the Vienna Convention on the Law of Treaties. Article 22 applies to the whole of the Interim Accord and should be read in conjunction with Article 8 of the North Atlantic Treaty, which prevents a member State from waiving its rights and duties towards the Alliance. Moreover, in incorporating Article 22 in the Interim Accord, both Parties were deemed to be aware of its scope in light of the specific military and defence-related nature of NATO's constituent treaty.

With regard to the Respondent's reliance, in the alternative, on the principle of *exceptio non adimpleti contractus*, Judge Roucounas concludes that the *exceptio* expresses a principle so just and so equitable that it can be found in one form or another in every legal system. It is the corollary of reciprocity and of synallagmatic agreements and a general principle of law, independently of Article 60 of the Vienna Convention on the Law of Treaties. For, as the Court made clear in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, general international law and treaty law constantly overlap. Article 60 does not deprive the injured party of the right to invoke the *exceptio*. Greece has responded mildly to the Applicant's practices. In the case of the latter's application to join NATO, it did not seek a suspension or termination of the Accord as such; it made its position widely known, but without invoking specific articles of the Interim Accord. It is, however, important not to lose sight of the wording of Article 66, paragraph 5, of the Vienna Convention on the Law of Treaties, which provides that: "[w]ithout prejudice to article 45, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty on alleging its violation". Greece has satisfied the substantive conditions of proportionality and reversibility. In respect of the procedural conditions, flexibility is permitted, the International Law Commission's draft Articles being a mix of codification and progressive development.

Judge Roucounas then examines the Court's approach to countermeasures. He concludes that, taking into account the full extent of the injury suffered on account of the violations of Articles 5, 6, 7 and 11 of the Interim Accord, and whatever the current state of international law relating to countermeasures, the measure adopted by the Respondent satisfies the condition of proportionality. He believes that the Court's assessment of those violations fails to address the substance of the issues.

Declaration of Judge *ad hoc* Vukas

The author agrees with the conclusion of the Court that it has jurisdiction to entertain the Application of the former Yugoslav Republic of Macedonia and that this Application is admissible. He also shares the view of the Court that the Hellenic Republic violated Article 11, paragraph 1, of the Interim Accord signed by the Parties on 13 September 1995. However, he does not agree with the conclusion of the Court to reject the Applicant's request that the Court orders that the Respondent has to comply with its obligations under Article 11, paragraph 1, of the Interim Accord also in the future.

191. JUDGMENT No. 2867 OF THE ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL LABOUR ORGANIZATION UPON A COMPLAINT FILED AGAINST THE INTERNATIONAL FUND FOR AGRICULTURAL DEVELOPMENT

Advisory opinion of 1 February 2012

On 1 February 2012, the International Court of Justice gave its Advisory Opinion concerning the J*udgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a complaint filed against the International Fund for Agricultural Development*.

The Court was composed as follows: President Owada; Vice-President Tomka; Judges Koroma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue; Registrar Couvreur.

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* *

The final paragraph (para. 76) of the Advisory opinion reads as follows:

"…

The Court,

(1) Unanimously,

Finds that it has jurisdiction to give the advisory opinion requested;

(2) Unanimously,

Decides to comply with the request for an advisory opinion;

(3) *Is of the opinion*:

(a) with regard to Question I,

Unanimously,

That the Administrative Tribunal of the International Labour Organization was competent, under Article II of its Statute, to hear the complaint introduced against the International Fund for Agricultural Development on 8 July 2008 by Ms Ana Teresa Saez García;

(b) with regard to Questions II to VIII,

Unanimously,

That these questions do not require further answers from the Court;

(c) with regard to Question IX,

Unanimously,

That the decision given by the Administrative Tribunal of the International Labour Organization in its Judgment No. 2867 is valid."

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* *

Judges Cançado Trindade appended a separate opinion to the Advisory Opinion of the Court; Judge Greenwood appended a declaration to the Advisory Opinion of the Court.

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History of the proceedings (paras. 1-18)

The Court begins by recalling that the questions on which the advisory opinion has been requested are set forth in the resolution adopted by the Executive Board of the International Fund for Agricultural Development (hereinafter "IFAD" or the "Fund") on 22 April 2010 (That resolution is included as Annex 1 to the present Summary). The Court then gives a brief summary of the history of the proceedings.

The Court's Jurisdiction
(paras. 19-27)

The Court first addresses the question whether it possesses jurisdiction to reply to the request. After recalling that the request for an advisory opinion was submitted under Article XII of the Annex to the Statute of the Administrative Tribunal of the International Labour Organization (hereinafter "ILOAT"), the Court notes that the Executive Board has duly made the declaration recognizing the jurisdiction of the Tribunal, required by Article II, paragraph 5, of the Statute of the Tribunal. The Court observes that the power of the Executive Board to request an advisory opinion and the jurisdiction of the Court to give such an opinion are founded on the Charter of the United Nations and the Statute of the Court, and not on Article XII of the Annex to the Statute of the Tribunal alone. In addition to the latter provision, the Court examines Article 96 of the United Nations Charter, Article 65, paragraph 1, of its Statute and Article XIII, paragraph 2, of the Relationship Agreement between the United Nations and the Fund (hereinafter the "Relationship Agreement"). (These provisions are included in Annex 2 to this Summary.) The Court states that the Fund's request for review of a judgment concerning its hosting of the Global Mechanism and the question of whether it employed Ms Saez García do present "legal questions" which "arise within the scope of the Fund's activities". The Court notes that, while the authorization given to IFAD by Article XIII, paragraph 2, of the Relationship Agreement excludes "questions concerning the mutual relationships of the Fund and the United Nations or other specialized agencies", such exclusion does not prevent the Court from considering the relationships between the Fund and the Global Mechanism or the Conference of the Parties of the Convention on Desertification (hereinafter "COP"), which are not specialized agencies, so far as these relationships are raised by the questions put to the Court by IFAD. Accordingly, the Court finds that the Fund has the power to submit for an advisory opinion the question of the validity of the decision rendered by the ILOAT in its Judgment No. 2867 and that the Court has jurisdiction to consider the request for an advisory opinion.

Scope of the Court's jurisdiction
(paras. 28-32)

Under Article VI, paragraph 1, of the Statute of the ILOAT, the Tribunal's judgment is final and without appeal. How-

ever, pursuant to Article XII, paragraph 1, of the Statute of the ILOAT and Article XII, paragraph 1, of its Annex, respectively, the ILO and international organizations having made the declaration recognizing the jurisdiction of the ILOAT may nonetheless challenge the ILOAT judgment within the terms of these provisions. Under Article XII, paragraph 2, of the Statute of the ILOAT and of its Annex, the opinion of this Court given in terms of those provisions is "binding". As the Court said in *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco* (Advisory Opinion, *I.C.J. Reports 1956*, p. 77, hereinafter the "1956 Advisory Opinion"), that effect goes beyond the scope attributed by the Charter and the Statute of the Court to an advisory opinion. It does not affect the way in which the Court functions; that continues to be determined by its Statute and Rules. The power of the Court to review a judgment of the ILOAT by reference to Article XII of the Annex to the Statute of the ILOAT at the request of the relevant specialized agency is limited to two grounds: that the Tribunal wrongly confirmed its jurisdiction or the decision is vitiated by a fundamental fault in the procedure followed. The Court cites the relevant section of the 1956 Advisory Opinion, in which the Court emphasized the limits of the first of these grounds. The Court observes that the 1956 Advisory Opinion stated that the review is not in the nature of an appeal on the merits of the judgment and that the challenge cannot properly be transformed into a procedure against the manner in which jurisdiction has been exercised or against the substance of the decision. With regard to the other ground, the Court, referring to its Advisory Opinion on *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*, recalls that a fundamental fault in procedure occurs when an error of procedure "is of such a kind as to violate the official's right to a fair hearing . . . and in that sense to deprive him of justice" (*I.C.J. Reports 1973*, p. 209, para. 92.)

The Court's Discretion
(paras. 33-48)

The Court recalls that Article 65 of its Statute makes it clear that it has a discretion whether to reply to a request for an advisory opinion. In exercising it, the Court has to have regard to its character, both as a principal organ of the United Nations and as a judicial body. The Court early declared that the exercise of its advisory jurisdiction represents its participation in the activities of the Organization and, in principle, a request should not be refused (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, pp. 71-72). This is also reflected in the Court's later statement, in the only other challenge to a decision of the ILOAT brought to it, that "compelling reasons" would be required to justify a refusal (1956 Advisory Opinion, *I.C.J. Reports 1956*, p. 86).

The Court then examines the principle of equality before it of IFAD on the one hand and the official on the other, including equality of access to the Court and equalities in the proceedings before the Court. The Court considers that the principle of equality, which follows from the requirements of good administration of justice, must now be understood as including access on an equal basis to available appellate or similar remedies unless an exception can be justified on objective and reasonable grounds. Questions may now properly be asked whether the system established in 1946 meets the present-day principle of equality of access to courts and tribunals. While the Court is not in a position to reform this system, it can attempt to ensure, so far as possible, that there is equality in the proceedings before it. In the present case, the unequal position before the Court of the employing institution and its official, arising from provisions of the Court's Statute, has been substantially alleviated by the Court's decision that the President of the Fund was to transmit to it any statement setting forth the views of Ms Saez García which she might wish to bring to the attention of the Court, and by the Court's decision that there would be no oral proceedings (since the Court's Statute does not allow individuals to appear in hearings in such cases). Although the process of ensuring equality in the proceedings was not without its difficulties, the Court concludes that, by the end of that process, it does have the information it requires to decide on the questions submitted; that both the Fund and Ms Saez García have had adequate and in large measure equal opportunities to present their case and to answer that made by the other; and that, in essence, the principle of equality in the proceedings before the Court, required by its inherent judicial character and by the good administration of justice, has been met.

In light of the analysis above, the Court maintains its concern about the inequality of access to the Court and remains concerned about the length of time it took the Fund to comply with the procedures aimed at ensuring equality in the present proceedings. Nevertheless, taking the circumstances of the case as a whole, and in particular the steps it has taken to reduce the inequality in the proceedings before it, the Court considers that the reasons that could lead it to decline to give an advisory opinion are not sufficiently compelling to require it to do so.

Merits
(paras. 49-99)

The Court recalls that the request for an advisory opinion concerns the validity of the Judgment given by the ILOAT relating to Ms Saez García's contract of employment. Ms Saez García, a national of Venezuela, was offered by IFAD on 1 March 2000 a two-year fixed-term contract at P-4 level to serve as a Programme Officer in the Global Mechanism, an entity hosted by IFAD. The purpose of the Global Mechanism—established by the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa—is to mobilize and channel financial resources to developing countries. She accepted this offer on 17 March 2000. Subsequently, her contract was twice extended, to 15 March 2004 and 15 March 2006, respectively. In addition, her title changed to "Programme Manager, Latin America Region", from 22 March 2002, and is subsequently referred to, in the notice of non-renewal of her contract as "[P]rogramme [M]anager for GM's regional desk for Latin America and the Caribbean". By a memorandum of 15 December 2005, the Managing Director of the Global Mechanism informed her that the COP had decided to cut the Global Mechanism's budget for 2006-2007

by 15 per cent. As a result, the number of staff paid through the core budget had to be reduced. Her post would therefore be abolished and her contract would not be renewed upon expiry on 15 March 2006. He offered her a six-month contract as consultant from 26 March to 15 September 2006 as "an attempt to relocate her and find a suitable alternative employment". Ms Saez García did not accept that contract. On 10 May 2006, Ms Saez García requested a facilitation process, which ended with no settlement on 22 May 2007. She then challenged the Managing Director's decision by filing an appeal with the Joint Appeals Board of the Fund (hereinafter the "JAB") under IFAD's Human Resources Procedures Manual (hereinafter "HRPM"). On 13 December 2007 the JAB unanimously recommended that Ms Saez García be reinstated and that she be awarded a payment of lost salaries, allowances and entitlements. On 4 April 2008 the President of the Fund rejected the recommendations. Ms Saez García then filed on 8 July 2008 a complaint with the Tribunal requesting it to "quash the decision of the President of IFAD rejecting the complainant's appeal", order her reinstatement and make various monetary awards. In its Judgment of 3 February 2010, the Tribunal decided that "[t]he President's decision of 4 April 2008 is set aside" and made orders for the payment of damages and costs.

With respect to the powers of, and relationships between, the Fund, the Global Mechanism, the COP and the Permanent Secretariat of the Convention on Desertification, the Court examines the provisions of the Convention on Desertification and the Memorandum of Understanding between the Conference of the Parties of the Convention to Combat Desertification and the Fund regarding the Modalities and Administrative Operations of the Global Mechanism (hereinafter the "MOU"). The Court observes that, while the Permanent Secretariat is institutionally linked to the United Nations, it is not fully integrated in the work programme and management structure of any particular department or programme. The Court recalls that, under the Permanent Secretariat's Headquarters Agreement with Germany, the Convention Secretariat possesses the legal capacity to contract, to acquire and dispose of movable and immovable property and to institute legal proceedings in the host country. The Court observes that, under the Convention on Desertification, the COP and the Permanent Secretariat are expressly established as institutions and given various powers. By contrast, the Global Mechanism is not included in the Part of the Convention on "Institutions" and it is not given any express powers of contracting or entering into any agreements by the Convention nor by a headquarters agreement such as that relating to the Permanent Secretariat. Moreover, the record before the Court does not include any instances of it entering into contracts or agreements. The position of the Global Mechanism may also be contrasted with that of the Fund, which possesses international legal personality by virtue of Article 10, Section 1 of the Agreement establishing IFAD, and is given the capacity to contract and to acquire and dispose of movable and immovable property under Article II, Section 3 of the Convention on the Privileges and the Immunities of the Specialized Agencies of 21 November 1947. The Court notes that the Convention directs the COP to identify an organization to house it and to make appropriate arrangements with such an organization for its administrative operations. It was for this reason that a Memorandum of Understanding was concluded between the COP and IFAD in 1999 as described above. Neither the Convention nor the MOU expressly confer legal personality on the Global Mechanism or otherwise endow it with the capacity to enter into legal arrangements. Further, in light of the different instruments setting up IFAD, the COP, the Global Mechanism and the Permanent Secretariat, and of the practice included in the record before the Court, the Global Mechanism had no power and has not purported to exercise any power to enter into contracts, agreements or "arrangements", internationally or nationally.

A. Response to Question I

The Court then turns to the questions put to it for an advisory opinion and notes that such questions should be asked in neutral terms rather than assuming conclusions of law that are in dispute. They should not include reasoning or argument. The questions asked in this case depart from that standard as reflected in normal practice. The Court will nevertheless address them.

The Court is requested to give its opinion on the competence of the ILOAT to hear the complaint brought against the Fund by Ms Saez García on 8 July 2008. The competence of the Tribunal regarding complaints filed by staff members of organizations other than the ILO is based on Article II, paragraph 5, of its Statute, according to which "[t]he Tribunal shall also be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of any other international organization meeting the standards set out in the Annex" to the Statute of the ILOAT and having made a declaration recognizing the jurisdiction of the Tribunal.

The Fund considers Ms Saez García to be a staff member of the Global Mechanism, not the Fund, and therefore objected to the jurisdiction of the Tribunal over her complaint. Before the Tribunal, the Fund contended that its acceptance of the jurisdiction of the ILOAT did not extend to entities that are hosted by it pursuant to international agreements. It maintained that the Global Mechanism was not an organ of the Fund, and that, even if the Fund administered the Global Mechanism, this did not make the complainant a staff member of the Fund; nor did it make the actions of the Managing Director of the Global Mechanism attributable to the Fund. According to the Fund, despite the fact that the staff regulations, rules and policies of IFAD were applied to the complainant, she was not a staff member of the Fund. Conversely, the complainant submitted that she was a staff member of IFAD throughout the relevant period until her separation on 15 March 2006, and that her letters of appointment and renewal of contract all offered her an appointment with the Fund. In its Judgment No. 2867 of 3 February 2010, the Tribunal rejected the jurisdictional objections made by the Fund and declared itself competent to entertain all the pleas set out in the complaint submitted by Ms Saez García. It is this confirmation by the Tribunal of its "competence to hear" the complaint filed by Ms Saez García that is challenged by the Executive Board of the Fund and is the object of the first question put to the Court. Under Article II, paragraph 5, of its Statute,

the Tribunal could hear the complaint only if the complainant was an official of an organization that has recognized the jurisdiction of the Tribunal, and if the complaint related to the non-observance of the terms of appointment of such an official or the provisions of the staff regulations of the organization. The first set of conditions has to be examined with reference to the competence *ratione personae* of the Tribunal, while the second has to be considered within the context of its competence *ratione materiae*. The Court will examine these two sets of conditions below.

1. Jurisdiction ratione personae *of the Tribunal in relation to the complaint submitted by Ms Saez García*

Since recourse to the ILOAT is open to staff members of IFAD, the Court will now consider whether Ms Saez García was an official of the Fund, or of some other entity that did not recognize the jurisdiction of the Tribunal. The Court notes that the word "official" and the words "staff member" may be considered to have the same meaning in the present context and thus uses both terms interchangeably. The IFAD Human Resources Policy defines a staff member as "a person or persons holding a regular, career, fixed-term, temporary or indefinite contract with the Fund". To qualify as a staff member of the Fund, Ms Saez García would have to hold one of the above-mentioned contracts with the Fund. The Court notes that on 1 March 2000, Ms Saez García received an offer of employment, written on the Fund letterhead, for "a fixed-term appointment for a period of two years with the International Fund for Agricultural Development (IFAD)". The letter stated that the appointment "[would] be made in accordance with the General provisions of the IFAD Personnel Policies Manual . . . [and] with such Administrative Instructions as may be issued . . . regarding the application of the Manual". The offer of appointment also noted that her contract might be terminated by IFAD with one month's written notice and that she was subject to a probationary period as prescribed in the Personnel Policies Manual (hereinafter the "PPM"). Moreover, under the terms of the offer, she was required to give written notice of at least one month to IFAD of any desire to terminate her contract. The renewals of her contract to March 2004 and to March 2006, respectively, referred to an "extension of [her] appointment with the International Fund for Agricultural Development". It was also said in the letters of renewal that all other conditions of her employment would remain unchanged and that her appointment would "continue to be governed by the Personnel Policies Manual, together with the provisions of the Human Resources Handbook regarding the application of the Manual".

The Court observes that a contract of employment entered into between an individual and an international organization is a source of rights and duties for the parties to it. In this context, the Court notes that the offer of appointment accepted by Ms Saez García on 17 March 2000 was made on behalf of the Fund by the Director of its Personnel Division, and that the subsequent renewals of this contract were signed by personnel officers of the same Division of the Fund. The Fund does not question the authority vested in these officials to act on its behalf on personnel matters. These offers were made in accordance with the general provisions of the PPM, which then contained the regulations and rules applicable to staff members of the Fund. As the Court stated in its 1956 Advisory Opinion, staff regulations and rules of the organization in question "constitute the legal basis on which the interpretation of the contract must rest" (*I.C.J. Reports 1956*, p. 94). It follows from this that an employment relationship, based on the above-mentioned contractual and statutory elements, was established between Ms Saez García and the Fund. This relationship qualified her as a staff member of the organization.

Ms Saez García's legal relationship with the Fund as a staff member is further evidenced by the facts surrounding her appeal against the decision to abolish her post, and the consequent non-renewal of her fixed-term appointment. Her appeals were initially lodged with the internal machinery established by the Fund for handling staff grievances, namely the facilitation process and the JAB, both of which were conducted in accordance with the HRPM. The memorandum of 4 April 2008 by the President of IFAD rejecting the recommendations of the JAB does not contain any indication that Ms Saez García was not a staff member of the Fund. On the contrary, it is stated in the memorandum that "the non-renewal of your fixed-term contract was in accordance with section 1.21.1 of the IFAD HRPM". There is also nothing to suggest that, in rejecting the recommendation of the JAB, the President was acting otherwise than in his capacity as the President of IFAD.

The Court then rejects three additional arguments submitted by the Fund to support its contention that Ms Saez García was not a staff member of the Fund. With respect to the Fund's argument that an administrative instruction issued by IFAD in the form of a President's Bulletin on 21 January 2004 was meant "to refine and clarify the legal position of the personnel working for the Global Mechanism", and makes clear that "while Global Mechanism staff are not IFAD staff, some of IFAD's rules and regulations apply *mutatis mutandis* to Global Mechanism staff", the Court states its view that the provisions of the IFAD President's Bulletin constitute further evidence of the applicability of the staff regulations and rules of IFAD to the fixed-term contracts of Ms Saez García and provide an additional indication of the existence of an employment relationship between her and the Fund. With respect to the Fund's argument that the ILOAT lacked jurisdiction because neither the COP nor the Global Mechanism has recognized its jurisdiction, the Court observes that the Tribunal did not base its jurisdiction with respect to the complaint filed by Ms Saez García on such acceptance. With respect to the Fund's argument that the Tribunal did not have jurisdiction to review the decision not to renew Ms Saez García's contract which was taken by the Managing Director of the Global Mechanism as he was not a staff member of IFAD, the Court considers that the status of the Managing Director has no relevance to the Tribunal's jurisdiction *ratione personae*, which depends solely on the status of Ms Saez García.

In light of the above, the Court concludes that the Tribunal was competent *ratione personae* to consider the complaint brought by Ms Saez García against IFAD on 8 July 2008.

2. Jurisdiction ratione materiae *of the Tribunal*

As a staff member of the Fund, Ms Saez García had the right under the HRPM to submit her complaint to the ILOAT. The Fund, however, argues that, even if it were to be assumed that the Tribunal had jurisdiction *ratione personae* over the complainant because of her being a staff member of the Fund, the Tribunal would still not have jurisdiction *ratione materiae* over the complaint. The Fund argues that, based on the text of the complainant's pleadings submitted to the Tribunal, it is clearly not possible to fit her complaints under the two classes of complaints set forth in Article II, paragraph 5, of the Tribunal's Statute, namely: (1) complaints alleging "non-observance, in substance or form, of the terms of appointment of officials"; and (2) complaints alleging non-observance "of provisions of the Staff Regulations". The Fund also contends that the Tribunal was not competent to entertain the complainant's arguments as derived from the MOU, the Convention on Desertification or the COP's decisions, as these are outside the scope of Article II, paragraph 5, of the Tribunal's Statute. Ms Saez García asserts that the large number of jurisdictional questions raised by the Fund in its request for an advisory opinion suggest that it is indeed going beyond the rulings on jurisdiction made by the Tribunal, to question either the manner in which the Tribunal has exercised its jurisdiction or the breadth of its considerations in hearing the complaint.

The Court reiterates that the decision impugned before the Administrative Tribunal was that of the President of IFAD contained in a memorandum to Ms Saez García dated 4 April 2008 in which he rejected the recommendations of the JAB to reinstate Ms Saez García. Ms Saez García also challenged the decision of the Managing Director not to renew her contract, alleging that it was tainted with abuse of authority and that he was not entitled to determine the Global Mechanism's programme of work independently of the COP and of the President of IFAD. The Fund objected to the Tribunal's competence to examine these allegations since they would involve the examination by the Tribunal of the decision-making process of the Global Mechanism for which it had no jurisdiction. The Tribunal rejected these objections on the ground that "decisions of the Managing Director relating to [staff in the Global Mechanism] are, in law, decisions of the Fund".

The Court cannot agree with the arguments of the Fund that the Tribunal did not have competence to examine the decision of the Managing Director of the Global Mechanism. First, the Managing Director of the Global Mechanism was a staff member of the Fund when the decision of non-renewal of Ms Saez García's contract was taken, as evidenced by his letter of appointment and the conditions of his appointment. Secondly, Ms Saez García's complaint to the Tribunal falls within the category of allegations of non-observance of the "terms of appointment of an official" as specified in Article II, paragraph 5, of the Statute of the Tribunal. Thirdly, the letters of appointment and renewal of contract of Ms Saez García clearly stipulate that her appointment was made in accordance with the general provisions of the IFAD Personnel Policies Manual and any amendments thereto, as well as such administrative instructions as may be issued from time to time regarding the application of the Manual. The non-observance of the provisions of these instruments, or those adopted subsequently to replace them, could be impugned before the Tribunal in accordance with Article II, paragraph 5, of its Statute, and Ms Saez García did in fact allege violations of the HRPM before the Tribunal. The Court, therefore, concludes that Ms Saez García's complaint to the ILOAT, following the decision of the Fund not to renew her contract, falls within the scope of allegations of non-observance of her terms of appointment and of the provisions of the staff regulations and rules of the Fund, as prescribed by Article II, paragraph 5, of the Statute of the Tribunal. Consequently, the Court is of the view that the Tribunal was competent *ratione materiae* to consider the complaint brought before it by Ms Saez García in respect of the non-renewal of her contract by IFAD.

With regard to the Fund's contention that the Tribunal lacked jurisdiction to examine the provisions of the MOU and the decision-making process of the COP, as those matters are outside the scope of Article II, paragraph 5, of its Statute, the Court is of the opinion that the Tribunal could not avoid examining the legal arrangements governing the relationship between the Global Mechanism and the Fund, as well as the status and accountability of the Managing Director of the Global Mechanism. The Court states that, even if, contrary to the observation it has made above, the Global Mechanism did have a separate legal personality and the capacity to conclude contracts, the conclusions arrived at above would still be warranted, essentially on the basis of contractual documents and the provisions of the IFAD staff regulations and rules. The Court, therefore, finds, in response to the first question put to it by IFAD, that the ILOAT was competent to hear the complaint introduced against IFAD, in accordance with Article II of its Statute, in view of the fact that Ms Saez García was a staff member of the Fund, and her appointment was governed by the provisions of the staff regulations and rules of the Fund.

B. Response to Questions II to VIII

The Court, having decided to give an affirmative answer to the first question, and having concluded that the Tribunal was justified in confirming its jurisdiction, is of the view that its answer to the first question put to it by the Fund covers also all the issues on jurisdiction raised by the Fund in Questions II to VIII of its request for an advisory opinion. To the extent that Questions II to VIII seek the opinion of the Court on the reasoning underlying the conclusions reached by the Tribunal, the Court reiterates that, under the terms of Article XII of the Annex to the Statute of the ILOAT, a request for an advisory opinion is limited to a challenge of the decision of the Tribunal confirming its jurisdiction or to cases of fundamental fault of procedure. The Court has already addressed the IFAD Executive Board's challenge to the decision of the Tribunal confirming its jurisdiction. Not having a power of review with regard to the reasoning of the Tribunal or the merits of its judgments under Article XII of the Annex to the Statute of the ILOAT, the Court cannot give its opinion on those matters. As the Court observed in its 1956 Advisory Opinion, "the reasons given by the Tribunal for its decision on the merits, after it confirmed its jurisdiction, cannot properly form the basis of a challenge to the jurisdiction of the Tribunal" (*I.C.J. Reports 1956*, p. 99). With respect to the possible existence of

a "fundamental fault in the procedure followed", raised in Questions II to VIII, the Court recalls that this concept was explained by the Court in its Advisory Opinion of 1973 on the *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*, as set out above. Questions II to VIII do not identify any fundamental fault in the procedure which may have been committed by the Tribunal in its consideration of the complaint against the Fund. Thus, in the view of the Court, these questions constitute either a repetition of the question on jurisdiction, which the Court has already answered, or have an object which concerns wider issues falling outside the scope of Article XII of the Annex to the Statute of the ILOAT which was invoked by the Fund as the basis of its request for an advisory opinion.

C. Response to Question IX

Question IX put by the IFAD Executive Board in its request for an advisory opinion is formulated as follows: "What is the validity of the decision given by the ILOAT in its Judgment No. 2867?" The Court, having answered in the affirmative the first question of IFAD, and having therefore decided that the Tribunal was entirely justified in confirming its jurisdiction, and not having found any fundamental fault in procedure committed by the Tribunal, finds that the decision given by the ILOAT in its Judgment No. 2867 is valid.

Annex 1. Resolution adopted by the Executive Board of the International Fund for Agricultural Development on 22 April 2010

The Executive Board of the International Fund for Agricultural Development, at its ninety-ninth session held on 21-22 April 2010:

Whereas, by its Judgment No. 2867 of 3 February 2010, the Administrative Tribunal of the International Labour Organization (ILOAT) confirmed its jurisdiction in the complaint introduced by Ms A.T.S.G. against the International Fund for Agricultural Development,

Whereas Article XII of the Annex [to] the Statute of the Administrative Tribunal of the International Labour Organization provides as follows:

> "1. In any case in which the Executive Board of an international organization which has made the declaration specified in Article II, paragraph 5, of the Statute of the Tribunal challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed, the question of the validity of the decision given by the Tribunal shall be submitted by the Executive Board concerned, for an advisory opinion, to the International Court of Justice.
>
> 2. The opinion given by the Court shall be binding."

Whereas the Executive Board, after consideration, wishes to avail itself of the provisions of the said Article,

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

I. Was the ILOAT competent, under Article II of its Statute, to hear the complaint introduced against the International Fund for Agricultural Development (hereby the Fund) on 8 July 2008 by Ms A.T.S.G., an individual who was a member of the staff of the Global Mechanism of the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (hereby the Convention) for which the Fund acts merely as housing organization?

II. Given that the record shows that the parties to the dispute underlying the ILOAT's Judgment No. 2867 were in agreement that the Fund and the Global Mechanism are separate legal entities and that the Complainant was a member of the staff of the Global Mechanism, and considering all the relevant documents, rules and principles, was the ILOAT's statement, made in support of its decision confirming its jurisdiction, that "the Global Mechanism is to be assimilated to the various administrative units of the Fund for all administrative purposes" and that the "effect of this is that administrative decisions taken by the Managing Director in relation to staff in the Global Mechanism are, in law, decisions of the Fund" outside its jurisdiction and/or did it constitute a fundamental fault in the procedure followed by the ILOAT?

III. Was the ILOAT's general statement, made in support of its decision confirming its jurisdiction, that "the personnel of the Global Mechanism are staff members of the Fund" outside its jurisdiction and/or did it constitute a fundamental fault in the procedure followed by the ILOAT?

IV. Was the ILOAT's decision confirming its jurisdiction to entertain the Complainant's plea alleging an abuse of authority by the Global Mechanism's Managing Director outside its jurisdiction and/or did it constitute a fundamental fault in the procedure followed by the ILOAT?

V. Was the ILOAT's decision confirming its jurisdiction to entertain the Complainant's plea that the Managing Director's decision not to renew the Complainant's contract constituted an error of law outside its jurisdiction and/or did it constitute a fundamental fault in the procedure followed by the ILOAT?

VI. Was the ILOAT's decision confirming its jurisdiction to interpret the Memorandum of Understanding between the Conference of the Parties to the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa and IFAD (hereby the MoU), the Convention, and the Agreement Establishing IFAD beyond its jurisdiction and/or did it constitute a fundamental fault in the procedure followed by the ILOAT?

VII. Was the ILOAT's decision confirming its jurisdiction to determine that by discharging an intermediary and supporting role under the MoU, the President was acting on behalf of IFAD outside its jurisdiction and/or did it constitute a fundamental fault in the procedure followed by the ILOAT?

VIII. Was the ILOAT's decision confirming its jurisdiction to substitute the discretionary decision of the Managing Director of the Global Mechanism with its own outside

its jurisdiction and/or did it constitute a fundamental fault in the procedure followed by the ILOAT?

IX. What is the validity of the decision given by the ILOAT in its Judgment No. 2867?

Annex 2. Article XII of the Annex to the Statute of the Administrative Tribunal of the International Labour Organization

1. In any case in which the Executive Board of an international organization which has made the declaration specified in article II, paragraph 5, of the Statute of the Tribunal challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed, the question of the validity of the decision given by the Tribunal shall be submitted by the Executive Board concerned, for an advisory opinion, to the International Court of Justice.

2. The Opinion given by the Court shall be binding.

Article 96 of the Charter of the United Nations

1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

Article 65 of the Statute of the Court

1. The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.

2. Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question.

Article XIII, paragraph 2, of the Relationship Agreement between the United Nations and the International Fund for Agricultural Development

The General Assembly of the United Nations authorizes the Fund to request advisory opinions of the International Court of Justice on legal questions arising within the scope of the Fund's activities, other than questions concerning the mutual relationships of the Fund and the United Nations or other specialized agencies. Such requests may be addressed to the Court by the Governing Council of the Fund, or by its Executive Board acting pursuant to an authorization by the Governing Council. The Fund shall inform the Economic and Social Council of any such request it addresses to the Court.

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Separate opinion of Judge Cançado Trindade

1. In his Separate Opinion, composed of 15 parts, Judge Cançado Trindade begins by explaining that, though he concurred with his vote to the adoption of the present Advisory Opinion, he feels bound to leave on the records the foundations of his personal position on certain issues raised in the course of the present advisory proceedings, which touch on points of juridical epistemology that lay on the foundations of contemporary law as well as the internal law of the United Nations (part I), such as the emergence of individuals as subjects of international law, endowed with international juridical capacity, and their appeals for the observance of the principle of equality of arms in the international administrative *contentieux* (litigation).

2. He identifies the position of the individual as subject of rights in international law as the core of the matter before the Court in the present Advisory Opinion, after reviewing its factual background (part II), and drawing attention to the determination by the Administrative Tribunal of the ILO (the ILOAT) of compliance by IFAD with its Judgment n. 2867 of 2010, in favour of the individual complainant, Ms Ana Teresa Saez García (part III). Judge Cançado Trindade then draws attention to the persisting difficulty faced by the individual complainant (part IV), in that all communications coming from her had to be transmitted to the Court through the IFAD, thus raising the issue of the application of the principle of the good administration of justice (*la bonne administration de la justice*).

3. Turning to the individual complainant's appeal for equality of arms (*égalité des armes*), Judge Cançado Trindade identifies two distinct inequality claims in the present advisory proceedings (part V). The *first claim* concerns the fact that, pursuant to Article XII of the Annex to the ILOAT Statute, only the international organization at issue, the IFAD, can challenge an unfavourable decision of the ILOAT before the ICJ (a question which was examined by the ILOAT in its Judgment n. 3003 of 2011, concerning the IFAD's request for stay of execution of Judgment n. 2867 of the ILOAT, which found in favour of the complainant, Ms Saez García). The *second claim* of procedural inequality pertains to the position of the individual complainant in the present proceedings before this Court, and more particularly to an aspect not addressed in the ILOAT's Judgment n. 3003 of 2011,—but touched upon by Ms Saez García herself,—namely, the fact that only the IFAD (her opposing party in the present case) can address the Court directly, and that all her communications and submissions to the ICJ ought to be done through the IFAD.

4. The contrasting positions of the individual complainant and the IFAD in the present advisory proceedings are then singled out by Judge Cançado Trindade (part VI). He recalls that the same problem had led to the abolition, by the U.N. General Assembly in 1995, of the review procedure of the United Nations Administrative Tribunal (UNAT) rulings by the ICJ, keeping in mind the principle of the equality of parties. In the course of the present advisory proceedings before the ICJ, the difficulties encountered by the original complainant, Ms Saez García (ensuing from her dependence upon the IFAD for the simple transmission of documents to the Court),

twice required the intervention of the Court's Registry, having in mind the good administration of justice.

5. In part VII of his Separate Opinion, Judge Cançado Trindade then embarks on an examination of the lack of equality of arms as a recurring problem in review procedures of the kind before the ICJ. He begins by warning that, despite the fact that one is here before general principles of law such as the equality of arms (*égalité des armes*) before courts and tribunals, and the principle of *la bonne administration de la justice*, the fact remains that the problem at issue has regrettably persisted for more than half a century (56 years), "much to the detriment of individuals, subjects of rights under international administrative law, or the law of the United Nations".

6. He then proceeds to an overview of the five previous Advisory Opinions of the kind, delivered by the ICJ (in 1954, 1956, 1973, 1982 and 1987), preceding the present Advisory Opinion, so as to enable one "to appreciate the difficulties experienced by the Court when faced with a conception of international law which had the vain pretension to defy the passing of time (as legal positivists do)". Those were the Advisory Opinion of 1954 on the *Effect of Awards of Compensation Made by the U.N. Administrative Tribunal*; the Advisory Opinion of 1956 on *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO*; the Advisory Opinion of 1973 on the *Application for Review of Judgment n. 158 of the U.N. Administrative Tribunal*; the Advisory Opinion of 1982 on the *Application for Review of Judgement n. 273 of the U.N. Administrative Tribunal*; and the Advisory Opinion of the ICJ of 1987, on the *Application for Review of Judgement n. 333 of the U.N. Administrative Tribunal* .

7. At the end of his overview, Judge Cançado Trindade assesses that "[f]or 56 years the force of inertia and mental lethargy have prevailed in this regard. The abnormal procedure keeps on being followed by the Court (in respect of review of the ILOAT judgments), in 2011 as in 1956", on the basis of "the dogma of times past that individuals cannot appear before the ICJ because they are not subjects of international law. The result is the prehistoric and fossilized procedure that defies logic, common sense and the basic principle of the good administration of justice (*la bonne administration de la justice*)". He then recalls that, throughout the last 56 years, "well-founded expressions of discontent with the present situation emanated from Judges (also jurists) from different legal systems and traditions", his predecessors in the ICJ. To Judge Cançado Trindade, "[t]his is not surprising, as we are here before basic principles of law, such as those of the good administration of justice (*la bonne administration de la justice*) and of the equality of arms (*égalité des armes*) in (international) legal procedure".

8. He further recalls (part VIII) that, despite the persistence of the problem of the procedural inequality (in the proceedings of the five previous Advisory Opinions of the Court, 1954, 1956, 1973, 1982 and 1987), or parallel to it, "the inclination of the ICJ has been in the sense of confirming the validity of the decisions at issue of both the UNAT and the ILOAT, whether favourable to the original complainants or not. Thus, in its Advisory Opinions of 1954, 1973, 1982 and 1987, it upheld the prior decisions of the UNAT, while in its Advisory Opinion of 1956 and in the present one of 2012, it did the same in respect of prior decisions of the ILOAT (…). Yet, the handling of the issue of procedural inequality, — e.g., by deciding not to have oral hearings in the course of the proceedings, — has been and is", in his understanding, "most unsatisfactory: rather than a solution, it is the capitulation in face of a persisting problem".

9. This being so, it seems all too proper to him to rescue, for consideration in the present context, "the advances experienced by the *jus gentium* of our times with the emergence and consolidation of individuals as subjects of International Law, with their access to justice *lato sensu* (encompassing procedural equality), with their *locus standi in judicio* and their *jus standi*, in the hope that due consideration will be given to them in the operation of international administrative jurisdictions in general (encompassing the review procedure in particular) in future developments". That is what Judge Cançado Trindade does in the remaining parts of his Separate Opinion.

10. In part IX of it, he addresses the issue of the emergence of individuals as subjects of international law, endowed with international juridical capacity. He begins by singling out the legacy of the writings of the "founding fathers" of the *droit des gens* (Francisco de Vitoria, Alberico Gentili, Francisco Suárez, Hugo Grotius, Samuel Pufendorf, Christian Wolff, Cornelius van Bynkershoek), on the subjects of *jus gentium*. After reviewing subsequent doctrinal developments, he draws attention to the fact that the advent of permanent international jurisdictions, as from the early XXth century (starting with the 1907 Central American Court of Justice), "in fact transcended a purely inter-State outlook of the international *contentieux*".

11. In our days,—he proceeds,—the co-existence of international human rights tribunals (the European and Inter-American Courts of Human Rights, lately followed by the African Court of Human and Peoples' Rights) bears witness of the fact that individuals were erected into subjects of international law, "endowed with international procedural capacity". In fact,—Judge Cançado Trindade adds,—individuals have "always remained in contact, directly or indirectly, with the international legal order. In the inter-war period, the experiments of the *minorities* and *mandates systems* under the League of Nations, for example, bear witness thereof. They were followed, in that regard, by the *trusteeship system* under the United Nations era, parallel to the development under this latter, along the years, of the multiple mechanisms—conventional and extra-conventional—of international protection of human rights".

12. In part X of his Separate Opinion, Judge Cançado Trindade further recalls that the question of the procedural capacity of the individuals before the ICJ, and its predecessor the Permanent Court of International Justice (PCIJ), was effectively considered on the occasion of the original drafting, in 1920, by the Advisory Committee of Jurists appointed by the old League of Nations, of the Statute of the PCIJ. The view which prevailed in 1920, that "only the States were juridical persons in the international order", and which has been maintained in Article 34 (1) of the Statute of the ICJ (formerly the PCIJ) to date—"was promptly and strongly criticized in the more lucid doctrine of the epoch (already in the twenties)". In Judge Cançado Trindade's view, "[t]he option made by the

draftsmen of the Statute of the old PCIJ, stratified with the passing of time in the Statute of the ICJ up to the present time, is even more open to criticism if we consider that, already in the first half of the XXth century, there were experiments of International Law which in effect granted international procedural status to individuals".

13. This evolution of the right of international individual petition,—he adds,—"intensified and generalized in the era of the United Nations", with the adoption of the system of individual petitions under some universal human rights treaties of our times, in addition to human rights conventions at regional level. The question of access of individuals to international justice, with procedural equality, underwent a remarkable development in recent decades. And Judge Cançado Trindade proceeds:

> "The dogmatic position taken originally in 1920, on the occasion of the preparation and adoption of its Statute, did not hinder the PCIJ to occupy itself promptly of cases pertaining to the treatment of minorities and inhabitants of cities or territories with a juridical statute of their own. In considerations developed in the examination of such matters, the PCIJ went well beyond the inter-State dimension, taking into account the position of individuals themselves (as in, e.g., *inter alia*, the Advisory Opinion on *the Jurisdiction of the Courts of Danzig*, 1928). Ever since, the artificiality of such dimension became noticeable and acknowledged, already at an early stage of the case-law of the PCIJ."

14. He then refers to subsequent examples, in the case-law of the ICJ itself, to the same effect, namely: the *Nottebohm* case concerning double nationality (Liechtenstein *versus* Guatemala, 1955); the case concerning the *Application of the Convention of 1902 Governing the Guardianship of Infants* (The Netherlands *versus* Sweden, 1958); the cases of the *Trial of Pakistani Prisoners of War* (Pakistan *versus* India, 1973); of the *Hostages (U.S. Diplomatic and Consular Staff) in Teheran* case (United States *versus* Iran, 1980); of the *East-Timor* (Portugal *versus* Australia, 1995); the case of the *Application of the Convention against Genocide* (Bosnia-Herzegovina *versus* Yugoslavia, 1996); and the three successive cases concerning consular assistance—namely, the case *Breard* (Paraguay *versus* United States, 1998), the case *LaGrand* (Germany *versus* United States, 2001), the case *Avena and Others* (Mexico *versus* United States, 2004).

15. In those cases,—he further adds,—"one of their predominant elements was precisely the concrete situation of the individuals directly affected, and not merely abstract issues of exclusive interest of the litigating States in their relations *inter se*". Moreover, he further recalls that, in the case of *Armed Activities in the Territory of Congo* (D.R. Congo *versus* Uganda, 2000) the ICJ was concerned with "grave violations of human rights and of International Humanitarian Law"; in the *Land and Maritime Boundary between Cameroon and Nigeria* (1996), it was likewise concerned with "the victims of armed clashes". More recent examples wherein "the Court's concerns have gone beyond the inter-State outlook" include, e.g., the case on *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium *versus* Senegal, 2009) pertaining to the principle of universal jurisdiction under the U.N. Convention against Torture, the Advisory Opinion on the *Declaration of Independence of Kosovo* (2010), the case of *A.S. Diallo* (Guinea *versus* D.R. Congo, 2010) on detention and expulsion of a foreigner, the case of the *Jurisdictional Immunities of the State* (Germany *versus* Italy, counter-claim, 2010), the case of the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia *versus* Russian Federation, 2011), the case of the *Temple of Preah Vihear* (Cambodia *versus* Thailand, 2011).

16. The "artificiality of the exclusively inter-State outlook of the procedures before the ICJ" is thus "clearly disclosed by the very nature of some of the cases submitted to it", and remains susceptible of further criticisms, for not having accompanied the evolution of international law. This is the case of the review procedure, as in the present advisory proceedings before the Court; it defies the passing of time by insisting on the outdated lack of *locus standi in judicio* of individuals in the review procedures of the kind before the ICJ (part XII). In this connection, Judge Cançado Trindade recalls that, already at the Xth session of the U.N. General Assembly (1955), the then U.N. Secretary-General (Dag Hammarskjold) presented to it a *Memorandum* titled "*Participation of Individuals in Proceedings before the International Court of Justice*", stressing the need to devise an *equitable procedure* in that emerging domain, with "the possible participation of individuals in proceedings before the International Court of Justice", as *subjects* of rights. Thus,—Judge Cançado Trindade proceeds,—"by the mid-XXth century, the individuals' international legal standing, and the need to secure a *procès equitable* (also in the emerging law of international organizations) were already recognized".

17. In part XIII of his Separate Opinion, Judge Cançado Trindade strongly supports the "imperative of securing the equality of parties in the international legal process" before the ICJ, as "a component of the right of access to justice *lato sensu*". To that effect, he reviews the contribution of the relevant case-law on the matter of the European and Inter-American Courts of Human Rights. He then states that "[i]t is firmly established, in contemporary international procedural law, that contending parties are to be afforded the same opportunity to present their case and to take cognizance of, and to comment upon, the arguments advanced and the evidence adduced by each other, in the course of the proceedings". Likewise, "the *principe du contradictoire* has marked its presence in the most distinct contemporary international jurisdictions".

18. Part XIV of Judge Cançado Trindade's Separate Opinion is devoted to "the need to secure the *locus standi in judicio* and the *jus standi* to individuals before international tribunals, including the ICJ", in order to guarantee the equality of the parties in the international legal process (as a component of the right of access to justice *lato sensu*), in review procedures such as the one in the *cas d'espèce*. Due to "an outdated dogma, imposed upon this Court since its historical origins", individuals cannot appear before itself because they are still not regarded as subjects of international law. The result,—Judge Cançado Trindade points out critically,—is that "[o]nly the international organization concerned (the employer) has *jus standi* and *locus standi in judicio* before the ICJ, the indi-

vidual (the employee) depends on the decision (as to resorting to this Court) of the employer, and, if the matter is submitted to the Court, he or she cannot appear before it. This is certainly a double procedural inequality before the World Court".

19. In his concluding observations (part XV), Judge Cançado Trindade holds that the advisory jurisdiction of the ICJ seems to offer an adequate framework for the consideration of possible advances in this domain, going beyond a strictly inter-State outlook, and overcoming "a dogma entirely outdated", particularly in "an epoch, such as ours, of the *rule of law at national and international levels*". The high significance of this topic is that it appears to go beyond an unsatisfactory inter-State outlook, in the line of recent developments in several domains of contemporary international law. This, in his view, cannot pass unnoticed, or unexplored, in a World Court such as the ICJ. The participation of individuals in review procedures before the ICJ would, in his understanding, preserve the *principe du contradictoire*, "essential in the search for truth and the realization of justice, guaranteeing the equality of arms (*égalité des armes*) in the whole procedure before the Court, essential to *la bonne administration de la justice*".

20. To Judge Cançado Trindade, "[t]his is logical, since, to the international legal personality of the parties ought to correspond their full juridical capacity to vindicate their rights before the Court. In addition, their public participation in the proceedings before the Court recognizes the right of free expression of the contending parties themselves, in affording them the opportunity to act as true subjects of law. This provides those who feel victimized and are in search of justice a form of reparation, in directly contributing—with their participation—to the patient reconstitution and determination of the facts by the Court itself". All these considerations render the subject-matter at issue, in his view, suitable for further careful consideration from now onwards. He concludes that "as this Court is to perform its functions at the height of the challenges of our times, as the International Court *of Justice*, it is bound at last to acknowledge that individuals are subjects of international law, of the *jus gentium* of our times".

Declaration of Judge Greenwood

Judge Greenwood agrees with the answers given by the Court and the reasoning on which they are based. He expresses serious reservations about the one-sided nature of the provision for recourse to the Court in Article XII of the Annex to the Statute of the Administrative Tribunal of the International Labour Organization and about the difficulty of ensuring equality between the employing organization and the employee. He considers that it is beyond doubt that Ms Saez García was employed by IFAD. He would have supported an order that IFAD should pay at least part of Ms Saez García's legal costs had that been requested.

192. JURISDICTIONAL IMMUNITIES OF THE STATE (GERMANY *v.* ITALY: GREECE INTERVENING)

Judgment of 3 February 2012

On 3 February 2012, the International Court of Justice rendered its judgment in the case concerning *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening).*

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

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The operative paragraph (para. 139) of the Judgment reads as follows:

" . . .

The Court,

(1) By twelve votes to three,

Finds that the Italian Republic has violated its obligation to respect the immunity which the Federal Republic of Germany enjoys under international law by allowing civil claims to be brought against it based on violations of international humanitarian law committed by the German Reich between 1943 and 1945;

In favour: *President* Owada; *Vice-President* Tomka; *Judges* Koroma, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Greenwood, Xue, Donoghue;

Against: *Judges* Cançado Trindade, Yusuf; *Judge* ad hoc Gaja;

(2) By fourteen votes to one,

Finds that the Italian Republic has violated its obligation to respect the immunity which the Federal Republic of Germany enjoys under international law by taking measures of constraint against Villa Vigoni;

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

Against: *Judge* Cançado Trindade;

(3) By fourteen votes to one,

Finds that the Italian Republic has violated its obligation to respect the immunity which the Federal Republic of Germany enjoys under international law by declaring enforceable in Italy decisions of Greek courts based on violations of international humanitarian law committed in Greece by the German Reich;

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

Against: *Judge* Cançado Trindade;

(4) By fourteen votes to one,

Finds that the Italian Republic must, by enacting appropriate legislation, or by resorting to other methods of its choosing, ensure that the decisions of its courts and those of other judicial authorities infringing the immunity which the Federal Republic of Germany enjoys under international law cease to have effect;

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

Against: *Judge* Cançado Trindade;

(5) Unanimously,

Rejects all other submissions made by the Federal Republic of Germany."

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Judges Koroma, Keith and Bennouna appended separate opinions to the judgment of the Court; Judges Cançado Trindade and Yusuf appended dissenting opinions to the judgment of the Court; Judge *ad hoc* Gaja appended a dissenting opinion to the judgement of the Court.

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I. Historical and factual background of the case
(paras. 20-36)

The Court recalls that, on 23 December 2008, the Federal Republic of Germany (hereinafter "Germany") filed in the Registry of the Court an Application instituting proceedings against the Italian Republic (hereinafter "Italy") in respect of a dispute originating in "violations of obligations under international law" allegedly committed by Italy through its judicial practice "in that it has failed to respect the jurisdictional immunity which . . . Germany enjoys under international law". The Court further recalls that, by an Order of 4 July 2011, the Court authorized Greece to intervene in the case as a non-party, in so far as this intervention was limited to the decisions of Greek courts which were declared as enforceable in Italy. The Court then briefly describes the historical and factual background of the case, and in particular the proceedings brought before Italian courts by Italian and Greek nationals.

II. The subject-matter of the dispute and the jurisdiction of the Court
(paras. 37-51)

Germany requests the Court, in substance, to find that Italy has failed to respect the jurisdictional immunity which Germany enjoys under international law by allowing civil claims to be brought against it in the Italian courts, seeking reparation for injuries caused by violations of international humani-

tarian law committed by the German Reich during the Second World War; that Italy has also violated Germany's immunity by taking measures of constraint against Villa Vigoni, German State property situated in Italian territory; and that it has further breached Germany's jurisdictional immunity by declaring enforceable in Italy decisions of Greek civil courts rendered against Germany on the basis of acts similar to those which gave rise to the claims brought before Italian courts.

Italy, for its part, requests the Court to adjudge Germany's claims to be unfounded and therefore to reject them, apart from the submission regarding the measures of constraint taken against Villa Vigoni, on which point the Respondent indicates to the Court that it would have no objection to the latter ordering it to bring the said measures to an end. In its Counter-Memorial, Italy submitted a counter-claim "with respect to the question of the reparation owed to Italian victims of grave violations of international humanitarian law committed by forces of the German Reich"; this claim was dismissed by the Court's Order of 6 July 2010, on the grounds that it did not fall within the jurisdiction of the Court and was consequently inadmissible under Article 80, paragraph 1, of the Rules of Court.

The Court recalls that Germany's Application was filed on the basis of Article 1 of the European Convention for the Peaceful Settlement of Disputes, under the terms of which:

> "The High Contracting Parties shall submit to the judgement of the International Court of Justice all international legal disputes which may arise between them including, in particular, those concerning:
>
> *(a)* the interpretation of a treaty;
>
> *(b)* any question of international law;
>
> *(c)* the existence of any fact which, if established, would constitute a breach of an international obligation;
>
> *(d)* the nature or extent of the reparation to be made for the breach of an international obligation."

The Court notes that Article 27, subparagraph *(a)*, of the same Convention limits the scope of that instrument *ratione temporis* by stating that it shall not apply to "disputes relating to facts or situations prior to the entry into force of this Convention as between the parties to the dispute". It states in this connection that the Convention entered into force as between Germany and Italy on 18 April 1961.

Having observed that the claims submitted by Germany related to "international legal disputes" within the meaning of Article 1 as cited above, between two States which were both parties to the European Convention on the date when the Application was filed, the Court finds that the clause in the above-mentioned Article 27 imposing a limitation *ratione temporis* is not applicable to Germany's claims. In fact, the "facts or situations" which have given rise to the dispute before the Court are constituted by Italian judicial decisions that denied Germany the jurisdictional immunity which it claimed, and by measures of constraint applied to property belonging to Germany. The Court observes, however, that those decisions and measures were adopted between 2004 and 2011, thus well after the European Convention entered into force as between the Parties. The Court therefore has jurisdiction to deal with the dispute.

The Court notes that, while the Parties have not disagreed on the analysis set out above, they have on the other hand debated the extent of the Court's jurisdiction in the context of some of the arguments put forward by Italy and relating to the alleged non-performance by Germany of its obligation to make reparation to the Italian and Greek victims of the crimes committed by the German Reich in 1943-1945. It states in that connection that, although it is no longer called upon to rule on the question of whether Germany has a duty of reparation towards the Italian victims of the crimes committed by the German Reich, having decided, by Order of 6 July 2010, that Italy's counter-claim was inadmissible, it must nevertheless determine whether the failure of a State to perform completely a duty of reparation which it allegedly bears is capable of having an effect, in law, on the existence and scope of that State's jurisdictional immunity before foreign courts. The Court observes that, if this answer is in the affirmative, the second question will be whether, in the specific circumstances of the case, taking account in particular of Germany's conduct on the issue of reparation, the Italian courts had sufficient grounds for setting aside Germany's immunity.

III. Alleged violations of Germany's jurisdictional immunity in the proceedings brought by the Italian claimants
(paras. 52-108)

The Court first considers the issues raised by Germany's first submission, namely whether, by exercising jurisdiction over Germany with regard to the claims brought before them by the various Italian claimants, the Italian courts acted in breach of Italy's obligation to accord jurisdictional immunity to Germany.

1. The issues before the Court
(paras. 52-61)

The Court begins by observing that the proceedings in the Italian courts have their origins in acts perpetrated by German armed forces and other organs of the German Reich. It distinguishes three categories of cases: the first concerns the large-scale killing of civilians in occupied territory as part of a policy of reprisals, exemplified by the massacres committed on 29 June 1944 in Civitella in Val di Chiana, Cornia and San Pancrazio by members of the "Hermann Göring" division of the German armed forces, involving the killing of 203 civilians taken as hostages after resistance fighters had killed four German soldiers a few days earlier; the second involves members of the civilian population who, like Mr. Luigi Ferrini, were deported from Italy to what was in substance slave labour in Germany; the third concerns members of the Italian armed forces who were denied the status of prisoner of war, together with the protections which that status entailed, to which they were entitled, and who were similarly used as forced labourers.

While the Court finds that there can be no doubt that this conduct was a serious violation of the international law of armed conflict applicable in 1943-1945, it considers that it is not called upon to decide whether these acts were illegal, a point which is not contested, but whether, in proceedings

regarding claims for compensation arising out of those acts, the Italian courts were obliged to accord Germany immunity. In that context, the Court notes that there is a considerable measure of agreement between the Parties regarding the fact that immunity is governed by international law and is not a mere matter of comity. It states that, as between the Parties, the entitlement to immunity can be derived only from customary international law. Therefore, the Court must determine, in accordance with Article 38 (1) *(b)* of its Statute, whether "international custom, as evidence of a general practice accepted as law" conferring immunity on States, exists and, if so, what is the scope and extent of that immunity.

The Court notes that, although there has been much debate regarding the origins of State immunity and the identification of the principles underlying that immunity in the past, the International Law Commission (hereinafter the "ILC") concluded in 1980 that the rule of State immunity had been "adopted as a general rule of customary international law solidly rooted in the current practice of States". In the opinion of the Court, that conclusion was based upon an extensive survey of State practice and is confirmed by the record of national legislation, judicial decisions and the comments of States on what became the United Nations Convention on the Jurisdictional Immunities of States and their Property (hereinafter the "United Nations Convention"). It believes that practice to show that, whether in claiming immunity for themselves or according it to others, States generally proceed on the basis that there is a right to immunity under international law, together with a corresponding obligation on the part of other States to respect and give effect to that immunity.

The Court observes that the Parties are thus in broad agreement regarding the validity and importance of State immunity as a part of customary international law. It notes that their views differ, however, as to whether, as Germany contends, the law to be applied is that which determined the scope and extent of State immunity in 1943-1945, i.e., at the time that the events giving rise to the proceedings in the Italian courts took place, or, as Italy maintains, that which applied at the time the proceedings themselves occurred. The Court states that, in accordance with the principle stated in Article 13 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts, the compatibility of an act with international law can be determined only by reference to the law in force at the time when the act occurred. Since the relevant Italian acts, namely the denial of immunity and exercise of jurisdiction by the Italian courts, did not occur until the proceedings in the Italian courts took place, the Court concludes that it must examine and apply the law on State immunity as it existed at the time of the Italian proceedings, rather than that which existed in 1943-1945. In support of that conclusion, the Court adds that the law of immunity is essentially procedural in nature; it regulates the exercise of jurisdiction in respect of particular conduct and is thus entirely distinct from the substantive law which determines whether that conduct is lawful or unlawful.

The Court notes that the Parties also differ as to the scope and extent of the rule of State immunity. Although both agree that States are generally entitled to immunity in respect of *acta jure imperii*, they disagree as to whether immunity is applicable to acts committed by the armed forces of a State (and other organs of that State acting in co-operation with the armed forces) in the course of conducting an armed conflict. Germany maintains that immunity is applicable and that there is no relevant limitation on the immunity to which a State is entitled in respect of *acta jure imperii*. Italy, for its part, maintains that Germany is not entitled to immunity in respect of the cases before the Italian courts for two reasons: first, that immunity as to *acta jure imperii* does not extend to torts or delicts occasioning death, personal injury or damage to property committed on the territory of the forum State, and, secondly, that, irrespective of where the relevant acts took place, Germany was not entitled to immunity because those acts involved the most serious violations of rules of international law of a peremptory character for which no alternative means of redress was available. The Court addresses each of Italy's arguments in turn.

2. Italy's first argument: the territorial tort principle (paras. 62-79)

The Court considers that it is not called upon in the present proceedings to resolve the question whether there is in customary international law a "tort exception" to State immunity applicable to *acta jure imperii* in general. The issue before the Court is confined to acts committed on the territory of the forum State by the armed forces of a foreign State, and other organs of State working in co-operation with those armed forces, in the course of conducting an armed conflict.

The Court begins by examining whether Article 11 of the European Convention or Article 12 of the United Nations Convention affords any support to Italy's contention that States are no longer entitled to immunity in respect of the type of acts specified above. It explains that, as neither Convention is in force between the Parties to the present case, they are relevant only in so far as their provisions and the process of their adoption and implementation shed light on the content of customary international law.

Article 11 of the European Convention sets out the territorial tort principle in broad terms:

> "A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred."

The Court notes that that provision must, however, be read in the light of Article 31, which provides:

> "Nothing in this Convention shall affect any immunities or privileges enjoyed by a Contracting State in respect of anything done or omitted to be done by, or in relation to, its armed forces when on the territory of another Contracting State."

The Court finds that Article 31 excludes from the scope of the Convention all proceedings relating to acts of foreign armed forces, irrespective of whether those forces are present in the territory of the forum with the consent of the forum State and whether their acts take place in peacetime or in

conditions of armed conflict. It considers that Article 31 takes effect as a "saving clause", with the result that the immunity of a State for the acts of its armed forces falls entirely outside the Convention and has to be determined by reference to customary international law. In the Court's view, however, the consequence is that the inclusion of the "territorial tort principle" in Article 11 of the Convention cannot be treated as support for the argument that a State is not entitled to immunity for torts committed by its armed forces.

The Court notes that, unlike the European Convention, the United Nations Convention contains no express provision excluding the acts of armed forces from its scope. However, the ILC's commentary on the text of Article 12[1] states that that provision does not apply to "situations involving armed conflicts". The Court further observes that no State questioned this interpretation and that two of the States which have so far ratified the Convention made declarations in identical terms stating their understanding that the Convention does not apply to military activities, including the activities of armed forces during an armed conflict and activities undertaken by military forces of a State in the exercise of their official duties. The Court concludes that the inclusion in the Convention of Article 12 cannot be taken as affording any support to the contention that customary international law denies State immunity in tort proceedings relating to acts occasioning death, personal injury or damage to property committed in the territory of the forum State by the armed forces and associated organs of another State in the context of an armed conflict.

Turning to State practice in the form of national legislation, the Court notes that nine of the ten States referred to by the Parties which have legislated specifically for the subject of State immunity have adopted provisions to the effect that a State is not entitled to immunity in respect of torts occasioning death, personal injury or damage to property occurring on the territory of the forum State. The Court observes that two of these statutes contain provisions that exclude proceedings relating to the acts of foreign armed forces from their application. It further observes that, while none of the other seven States referred to by the Parties makes provision in its legislation for the acts of armed forces, the courts have not been called upon to apply that legislation in a case involving the armed forces of a foreign State, and associated organs of State, acting in the context of an armed conflict.

The Court next turns to State practice in the form of the judgments of national courts regarding State immunity in relation to the acts of armed forces. In the Court's opinion, that practice supports the proposition that State immunity for *acta jure imperii* continues to extend to civil proceedings for acts occasioning death, personal injury or damage to property committed by the armed forces and other organs of a State in the conduct of armed conflict, even if the relevant acts take place on the territory of the forum State. The Court notes that that practice is accompanied by *opinio juris*, as demonstrated by the positions taken by States and the jurisprudence of a number of national courts which have made clear that they considered that customary international law required immunity. It finds that the almost complete absence of contrary jurisprudence is also significant, as is the absence of any statements by States in connection with the work of the ILC regarding State immunity and the adoption of the United Nations Convention or, so far as the Court has been able to discover, in any other context asserting that customary international law does not require immunity in such cases.

In light of the foregoing, the Court concludes that customary international law continues to require that a State be accorded immunity in proceedings for torts allegedly committed on the territory of another State by its armed forces and other organs of State in the course of conducting an armed conflict. It adds that that conclusion is confirmed by the judgments of the European Court of Human Rights. Accordingly, the Court finds that the decision of the Italian courts to deny immunity to Germany cannot be justified on the basis of the territorial tort principle.

3. Italy's second argument: the subject-matter and circumstances of the claims in the Italian courts
(paras. 80-106)

The Court notes that Italy's second argument, which, unlike its first argument, applies to all of the claims brought before the Italian courts, is that the denial of immunity was justified on account of the particular nature of the acts forming the subject-matter of the claims before the Italian courts and the circumstances in which those claims were made. There are three strands to this argument. Firstly, Italy contends that the acts which gave rise to the claims constituted serious violations of the principles of international law applicable to the conduct of armed conflict, amounting to war crimes and crimes against humanity. Secondly, Italy maintains that the rules of international law thus contravened were peremptory norms *(jus cogens)*. Thirdly, Italy argues that the claimants having been denied all other forms of redress, the exercise of jurisdiction by the Italian courts was necessary as a matter of last resort. The Court considers each of these strands in turn, while recognizing that, in the oral proceedings, Italy contended that its courts had been entitled to deny immunity to Germany because of the combined effect of these three strands.

The gravity of the violations
(paras. 81-91)

The Court notes that the first strand is based upon the proposition that international law does not accord immunity to a State, or at least restricts its right to immunity, when that State has committed serious violations of the law of armed conflict. It recalls that, in the present case, the Court has already made clear that the actions of the German armed forces and other organs of the German Reich giving rise to the proceedings before the Italian courts were serious violations of the law of armed conflict which amounted to crimes under international law. In the Court's view, the question is,

[1] Article 12 of the United Nations Convention provides:

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

therefore, whether that fact operates to deprive Germany of its entitlement to immunity.

The Court begins by inquiring whether customary international law has developed to the point where a State is not entitled to immunity in the case of serious violations of human rights law or the law of armed conflict. After examining State and international practice, the Court concludes that, under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict. In reaching that conclusion, the Court emphasizes that it is addressing only the immunity of the State itself from the jurisdiction of the courts of other States; the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State is not in issue in the present case.

The relationship between jus cogens and the rule of State immunity
(paras. 92-97)

The Court next turns to the second strand in Italy's argument, which emphasizes the *jus cogens* status of the rules which were violated by Germany during the period 1943-1945. It notes that this strand of the argument rests on the premise that there is a conflict between *jus cogens* rules forming part of the law of armed conflict and according immunity to Germany. According to Italy, since *jus cogens* rules always prevail over any inconsistent rule of international law, and since the rule which accords one State immunity before the courts of another does not have the status of *jus cogens*, the rule of immunity must give way.

The Court is of the opinion that there is no conflict between a rule, or rules, of *jus cogens*, and the rule of customary law which requires one State to accord immunity to another. Assuming for this purpose that the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour are rules of *jus cogens*, the Court takes the view that there is no conflict between those rules and the rules on State immunity. The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful. That is why the application of the contemporary law of State immunity to proceedings concerning events which occurred in 1943-1945 does not infringe the principle that law should not be applied retrospectively to determine matters of legality and responsibility.

The Court observes that, in the present case, the violation of the rules prohibiting murder, deportation and slave labour took place in the period 1943-1945. The illegality of these acts is openly acknowledged by all concerned. The application of rules of State immunity to determine whether or not the Italian courts have jurisdiction to hear claims arising out of those violations cannot involve any conflict with the rules which were violated. The Court adds that the argument about the effect of *jus cogens* displacing the law of State immunity has been rejected by the national courts. It states that the judgments of the Italian courts which are the subject of the present proceedings are the only decisions of national courts to have accepted the reasoning on which Italy's argument is based. It observes, moreover, that none of the national legislation on State immunity has limited immunity in cases where violations of *jus cogens* are alleged.

The Court concludes that, even assuming that the proceedings in the Italian courts involved violations of *jus cogens* rules, the applicability of the customary international law on State immunity was not affected.

The "last resort" argument
(paras. 98-104)

The Court notes that the third and final strand of the Italian argument is that the Italian courts were justified in denying Germany the immunity to which it would otherwise have been entitled, because all other attempts to secure compensation for the various groups of victims involved in the Italian proceedings had failed.

The Court considers that it cannot accept Italy's contention that the alleged shortcomings in Germany's provisions for reparation to Italian victims entitled the Italian courts to deprive Germany of jurisdictional immunity. It can find no basis in the State practice from which customary international law is derived that international law makes the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress. Neither in the national legislation on the subject, nor in the jurisprudence of the national courts which have been faced with objections based on immunity is there any evidence that entitlement to immunity is subjected to such a precondition. States also did not include any such condition in either the European Convention or the United Nations Convention. Moreover, the Court cannot fail to observe that the application of any such condition, if it indeed existed, would be exceptionally difficult in practice, particularly in a context such as that of the present case, when claims have been the subject of extensive intergovernmental discussion.

Accordingly, the Court rejects Italy's argument that Germany could be refused immunity on this basis.

The combined effect of the circumstances relied upon by Italy
(paras. 105-106)

The Court observes that, in the course of the oral proceedings, counsel for Italy maintained that the three strands of Italy's second argument had to be viewed together; it was because of the cumulative effect of the gravity of the violations, the status of the rules violated and the absence of alternative means of redress that the Italian courts had been justified in refusing to accord immunity to Germany.

The Court states that it has already determined that none of the three strands of the second Italian argument would, of itself, justify the action of the Italian courts. It is not persuaded that they would have that effect if taken together. According to the Court, in so far as the argument based on the combined effect of the circumstances is to be understood

as meaning that the national court should balance the different factors, assessing the respective weight, on the one hand, of the various circumstances that might justify the exercise of its jurisdiction, and, on the other hand, of the interests attaching to the protection of immunity, such an approach would disregard the very nature of State immunity.

4. Conclusions
(paras. 107-108)

The Court holds that the action of the Italian courts in denying Germany the immunity to which the Court has held it was entitled under customary international law constitutes a breach of the obligations owed by the Italian State to Germany.

IV. The measures of constraint taken against property belonging to Germany located on Italian territory
(paras. 109-120)

The Court recalls that, on 7 June 2007, certain Greek claimants, in reliance on a decision of the Florence Court of Appeal of 13 June 2006, declaring enforceable in Italy the judgment rendered by the Court of First Instance of Livadia, in Greece, which had ordered Germany to pay them compensation, entered in the Land Registry of the Province of Como a legal charge against Villa Vigoni, a property of the German State located near Lake Como. It further recalls that Germany argued that such a measure of constraint violates the immunity from enforcement to which it is entitled under international law and that Italy, for its part, has not sought to justify that measure. It notes that the charge in question was suspended, in order to take account of the pending proceedings before the Court in the present case. The Court further notes that a dispute still exists between the Parties, inasmuch as Italy has not formally admitted that the legal charge on Villa Vigoni constituted a measure contrary to its international obligations; nor has it put an end to the effects of that measure.

The Court observes that the immunity from enforcement enjoyed by States in regard to their property situated on foreign territory goes further than the jurisdictional immunity enjoyed by those same States before foreign courts. Even if a judgment has been lawfully rendered against a foreign State, in circumstances such that the latter could not claim immunity from jurisdiction, it does not follow *ipso facto* that the State against which judgment has been given can be the subject of measures of constraint on the territory of the forum State or on that of a third State, with a view to enforcing the judgment in question. Similarly, any waiver by a State of its jurisdictional immunity before a foreign court does not in itself mean that that State has waived its immunity from enforcement as regards property belonging to it situated in foreign territory. The Court considers that, in the present case, the distinction between the rules of customary international law governing immunity from enforcement and those governing jurisdictional immunity (understood *stricto sensu* as the right of a State not to be the subject of judicial proceedings in the courts of another State) means that the Court may rule on the issue of whether the charge on Villa Vigoni constitutes a measure of constraint in violation of Germany's immunity from enforcement, without needing to determine whether the decisions of the Greek courts awarding pecuniary damages against Germany, for purposes of whose enforcement that measure was taken, were themselves in breach of that State's jurisdictional immunity.

Relying on Article 19 of the United Nations Convention, inasmuch as it reflects customary law on the matter, the Court finds that there is at least one condition that has to be satisfied before any measure of constraint may be taken against property belonging to a foreign State: that the property in question must be in use for an activity not pursuing government non-commercial purposes, or that the State which owns the property has expressly consented to the taking of a measure of constraint, or that that State has allocated the property in question for the satisfaction of a judicial claim. However, the Court concludes that it is clear in the present case that the property which was the subject of the measure of constraint at issue is being used for governmental purposes that are entirely non-commercial, and hence for purposes falling within Germany's sovereign functions. Villa Vigoni is in fact the seat of a cultural centre intended to promote cultural exchanges between Germany and Italy. Nor, the Court adds, has Germany in any way expressly consented to the taking of a measure such as the legal charge in question, or allocated Villa Vigoni for the satisfaction of the judicial claims against it.

In these circumstances, the Court finds that the registration of a legal charge on Villa Vigoni constitutes a violation by Italy of its obligation to respect the immunity owed to Germany.

V. The decisions of the Italian courts declaring enforceable in Italy decisions of Greek courts upholding civil claims against Germany
(paras. 121-133)

The Court notes that, in its third submission, Germany complains that its jurisdictional immunity was also violated by decisions of the Italian courts declaring enforceable in Italy judgments rendered by Greek courts against Germany in proceedings arising out of the Distomo massacre, committed by the armed forces of the German Reich in 1944.

According to the Court, the relevant question is whether the Italian courts did themselves respect Germany's immunity from jurisdiction in allowing the application for *exequatur*, and not whether the Greek court having rendered the judgment of which *exequatur* is sought had respected Germany's jurisdictional immunity. The Court observes that when a court is seised, as in the present case, of an application for *exequatur* of a foreign judgment against a third State, it is itself being called upon to exercise its jurisdiction in respect of the third State in question. Although the purpose of *exequatur* proceedings is not to decide on the merits of a dispute, but simply to render an existing judgment enforceable on the territory of a State other than that of the court which ruled on the merits, the fact nonetheless remains that, in granting or refusing *exequatur*, the court exercises a jurisdictional power which results in the foreign judgment being given effects corresponding to those of a judgment rendered on the merits in the requested State. The proceedings brought before that court must therefore be regarded as being conducted against the third State which was the subject of the foreign judgment. According to the Court, it follows that the court seised of

an application for *exequatur* of a foreign judgment rendered against a third State has to ask itself whether the respondent State enjoys immunity from jurisdiction—having regard to the nature of the case in which that judgment was given—before the courts of the State in which *exequatur* proceedings have been instituted. In other words, it has to ask itself whether, in the event that it had itself been seised of the merits of a dispute identical to that which was the subject of the foreign judgment, it would have been obliged under international law to accord immunity to the respondent State. The Court concludes that, in the light of this reasoning, it follows that the Italian courts which declared enforceable in Italy the decisions of Greek courts rendered against Germany have violated the latter's immunity. The Court considers that, in order to reach such a decision, it is unnecessary to rule on the question whether the Greek courts did themselves violate Germany's immunity, a question which is not before the Court, and on which, moreover, it cannot rule.

The Court concludes, therefore, that the decisions of the Italian courts declaring enforceable in Italy judgments rendered by Greek courts against Germany in proceedings arising out of the Distomo massacre constitute a violation by Italy of its obligation to respect the jurisdictional immunity of Germany.

VI. Germany's final submissions and the remedies sought (paras. 134-138)

The Court upholds Germany's first three requests, which ask it to declare, in turn, that Italy has violated the jurisdictional immunity which Germany enjoys under international law by allowing civil claims based on violations of international humanitarian law by the German Reich between 1943 and 1945; that Italy has also committed violations of the immunity owed to Germany by taking enforcement measures against Villa Vigoni; and, lastly, that Italy has violated Germany's immunity by declaring enforceable in Italy Greek judgments based on occurrences similar to those referred to above.

In respect of Germany's fourth submission, the Court does not consider it necessary to include an express declaration in the operative clause that Italy's international responsibility is engaged.

With regard to Germany's fifth submission, in which it asks the Court to order Italy to take, by means of its own choosing, any and all steps to ensure that all the decisions of its courts and other judicial authorities infringing Germany's sovereign immunity become unenforceable, the Court begins by recalling that the State responsible for an internationally wrongful act is under an obligation to cease that act, if it is continuing, and, even if the act in question has ended, the State responsible is under an obligation to re-establish, by way of reparation, the situation which existed before the wrongful act was committed, provided that re-establishment is not materially impossible and that it does not involve a burden for that State out of all proportion to the benefit deriving from restitution instead of compensation. The Court finds that the decisions and measures infringing Germany's jurisdictional immunities which are still in force must cease to have effect, and the effects which have already been produced by those decisions and measures must be reversed, in such a way that the situation which existed before the wrongful acts were committed is re-established. The Court adds that it has not been alleged or demonstrated that restitution would be materially impossible in this case, or that it would involve a burden for Italy out of all proportion to the benefit deriving from it. On the other hand, it observes that Italy has the right to choose the means it considers best suited to achieve the required result. Thus the Respondent is under an obligation to achieve this result by enacting appropriate legislation or by resorting to other methods of its choosing having the same effect.

The Court, however, does not uphold Germany's sixth submission, in which it asks the Court to order Italy to take any and all steps to ensure that in the future Italian courts do not entertain legal actions against Germany founded on the occurrences described in its first submission (namely violations of international humanitarian law committed by the German Reich between 1943 and 1945). As it has stated in previous cases, the Court recalls that, as a general rule, there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed. Accordingly, while the Court may order the State responsible for an internationally wrongful act to offer assurances of non-repetition to the injured State, or to take specific measures to ensure that the wrongful act is not repeated, it may only do so when there are special circumstances which justify this, which the Court must assess on a case-by-case basis. In the present case, however, the Court has no reason to believe that such circumstances exist.

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Separate opinion of Judge Koroma

In his separate opinion, Judge Koroma states that he has voted in favour of the Court's Judgment, which in his view accurately reflects the current state of international law with respect to the jurisdictional immunity of a State. Judge Koroma emphasizes, however, that the Court's Judgment should not be read as a licence for States to commit acts of torture or other similar acts tantamount to crimes against humanity.

Judge Koroma states that the case before the Court is not about the conduct of Germany's armed forces during the Second World War or Germany's international responsibility for such conduct. The question, in his view, is limited to whether Germany is legally entitled to immunity before the Italian domestic courts with respect to the conduct of its armed forces in the course of the armed conflict. Judge Koroma adds that the Court's jurisdiction is limited to addressing only the issue of immunity. According to Judge Koroma, the Court did not need to address the substantive matter of the legality of Germany's conduct to resolve the issue of jurisdictional immunity.

Judge Koroma notes that it is clear that the acts of the German armed forces in Italy during the Second World War constitute *acta jure imperii*. According to Judge Koroma, acts committed by a State's armed forces in the course of an international armed conflict are acts taken in exercise of sovereign power, because the execution of such acts is necessarily the

sovereign prerogative of a State. Judge Koroma adds that it is well established that States are generally entitled to immunity for *acta jure imperii*. The question, in his view, is whether any exception to this general rule exists that would deny States sovereign immunity for unlawful actions committed by their armed forces on the territory of another State during armed conflict or in the course of an occupation.

Judge Koroma observes that the law on sovereign immunity has evolved to provide a limited exception to immunity for certain types of tortious acts. He notes that this exception is codified in Article 12 of the United Nations Convention on Jurisdictional Immunities of States and Their Property, which can be considered to reflect the current state of customary international law. Judge Koroma points out, however, that the International Law Commission's commentary on the Convention makes clear that the drafters intended Article 12 to apply mainly to situations such as traffic accidents, and did not intend for the Article to apply to situations involving armed conflicts. Judge Koroma concludes that, therefore, States continue to be entitled to sovereign immunity for *acta jure imperii* committed by their armed forces during armed conflict. He emphasizes, however, that the Court's task is to apply the existing law, and that nothing in the Court's Judgment prevents the continued evolution of the law on State immunity.

Judge Koroma also considers it important to acknowledge and address the arguments made by Greece, a non-party intervenor in this case. In its written statement, Greece emphasized, *inter alia*, the "individual right to reparation in the event of grave violations of humanitarian law". Judge Koroma states that Greece is correct that international humanitarian law now regards individuals as the ultimate beneficiaries of reparations for human rights violations. In his view, however, it does not follow that international law provides individuals with a legal right to make claims for reparation *directly* against a State. Judge Koroma notes that nothing in the Fourth Hague Convention of 1907 or Article 91 of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 supports such a proposition. The relevant Articles of these two Conventions provide that States must "pay compensation" if they violate the Conventions, but, according to Judge Koroma, they do not purport to require that States pay compensation *directly to aggrieved individuals*. Judge Koroma observes that a provision requiring State payments to individuals would have been inconceivable in 1907, when the Fourth Hague Convention was concluded.

Judge Koroma concludes that the Court correctly found that Germany is entitled to sovereign immunity for the acts committed by its armed forces in Italy during the Second World War. He adds, however, that this finding does not preclude the Parties from entering into negotiations to resolve outstanding issues raised in this case, but that its resolution does not necessitate the overthrow of the existing law on jurisdictional immunity, which justly protects and preserves the sovereignty and sovereign equality of States.

Separate opinion of Judge Keith

Judge Keith agrees with the conclusions of the Court, and largely with its reasons. His purpose in preparing the opinion is to emphasize how international rules on State immunity are firmly based on principles of international law and on policies of the international legal order.

A fundamental principle at play in this area is that of the sovereign equality of States, according to which all States have equal rights and duties and are juridically equal. In cases raising issues of State immunity, that principle applies to two States: the State in whose court the case is brought and the foreign State which is the intended defendant. While, on the one hand, the court's jurisdiction arises from the sovereignty of the forum State, conversely, the sovereign equality and independence of the foreign State are principles supporting immunity from that jurisdiction.

For the last 200 years, national courts and national legislatures, in seeking to reconcile these two propositions, have given particular attention to the character of the act in issue: is it to be seen as the exercise of sovereign authority, or is it indistinguishable from the act of any other person subject to the local law? The same approach has been followed in more recent treaties and the diplomatic and other processes leading to them. Long-standing practice also underlines the distinction, critical in this case, between the substantive obligations of a foreign State and the procedural or institutional means by which that obligation is to be enforced.

With respect to the claims brought before Italian courts, Judge Keith emphasizes that Germany has accepted responsibility for the untold suffering which resulted from its illegal acts between 1943 and 1945. However it is not that illegality which is the subject of the present case. It is rather the question whether Italian courts may exercise jurisdiction over claims based on those facts, brought against Germany.

One basis for exercising that jurisdiction, Italy had argued, was the local tort rule. While that rule has long been recognized, Judge Keith concludes that it does not encompass the conduct in question in this case. First, this rule would apply to what were in essence damages claims under local law in respect of injury and damage which would in general be insurable. It would not apply to acts committed in the course of armed conflict between States: those are acts at the international level, of a sovereign nature and are to be assessed according to international law rather than local law. Second, Judge Keith notes the analogy between foreign State immunity and the rules on the immunity of the domestic sovereign from proceedings in their own courts, and recalls that domestic legislation even as it has narrowed that immunity has generally precluded claims arising from actions of the armed forces of the State. Third, at the international level claims in respect of war damages and losses against former belligerents are in practice dealt with by inter-State negotiations and agreements. This practice reflects post-war realities and strongly supports the conclusion that a former belligerent State may not be subject, without its consent, to the jurisdiction of a foreign court in cases such as those which are the subject of these proceedings.

Separate opinion of Judge Bennouna

Although he voted in favour of that part of the operative clause which found that Italy had violated Germany's jurisdictional immunity, Judge Bennouna considers that he can-

not endorse the approach adopted by the Court, or support the logic of its reasoning. In Judge Bennouna's view, the fact that responsibility is indissociable from the exercise of sovereignty means that it is only, where appropriate, by assuming its responsibility that a State can justify its claim to immunity before foreign courts on the basis of sovereign equality. Judge Bennouna takes the view that it is only in exceptional circumstances, where a State presumed to be the author of unlawful acts rejects any attribution of responsibility, in whatever form, that it could lose the benefit of immunity before the courts of the forum State. It is for the Court, in ruling on immunity, to ensure the unity of international law by taking account of all of its constituent elements.

Dissenting opinion of Judge Cançado Trindade

1. In his Dissenting Opinion, composed of 27 parts, Judge Cançado Trindade presents the foundations of his personal dissenting position, pertaining to the Court's decision as a whole, encompassing the adopted methodology, the approach pursued, the whole reasoning in its treatment of issues of substance, as well as the conclusions of the Judgment. He begins his Dissenting Opinion by identifying (part I) the wider 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 on the basis of *fundamental considerations of humanity*, whenever grave breaches of human rights and of international humanitarian law lie at their factual origins, as in the *cas d'espèce*.

2. Preliminarily, as to the inter-temporal dimension in the consideration of State immunity (part II), he sustains that one cannot take account of inter-temporal law only in a way that serves one's interests in litigation, accepting the passing of time and the evolution of law in relation to certain facts but not to others, of the same *continuing* situation. In approaching the interrelatedness between State immunities and war reparations claims, the *evolution* of law is to be kept in mind. The relationship between State immunities and war reparation claims in the present case is, in his view, indeed an ineluctable one.

3. Thus, despite the Court's Order of 06 July 2010 summarily dismissing the Italian counter-claim (with his dissent), it so happens that the facts underlying the dispute between the Parties, and conforming its historical background, continued to be referred to by the contending parties (Germany and Italy), throughout the whole proceedings (written and oral phases) before the Court. Judge Cançado Trindade adds that this confirms what he upheld in his previous Dissenting Opinion in the Court's Order of 06.07.2010 in the present case, namely, that State immunities cannot be considered in the void, and they constitute a matter which is ineluctably linked to the facts which give origin to a contentious case (part III).

4. Next, Judge Cançado Trindade singles out the significance of the commendable initiative of Germany to recognize, repeatedly before the Court (in the written and oral phases), State responsibility for the wrongful acts lying in the factual origins of the *cas d'espèce*, i.e., for the crimes committed by the Third Reich during the II world war (part IV). This discloses the uniqueness of the present case concerning the *Jurisdictional Immunities of the State*, an unprecedented one in the history of the ICJ, in that the complainant State recognizes its own responsibility for the harmful acts forming the factual background of the *cas d'espèce*.

5. In sequence, he reviews some doctrinal developments (part V), from a generation of jurists which witnessed the horrors of two world wars in the XXth century, which did not pursue a strict State-centric approach, and were centred on fundamental human values, and on the human person, guarding faithfulness to the historical origins of the *droit des gens*, as Judge Cançado Trindade thinks ought to be done nowadays as well. In his view, State immunities are a prerogative or a privilege, and they cannot keep on making abstraction of the evolution of international law, taking place nowadays in the light of *fundamental human values*. He adds that the work of learned institutions in international law (such as, e.g., the *Institut de Droit International* and the International Law Association) can further be recalled to the same effect.

6. Judge Cançado Trindade observes that the tension between State immunity and the right of access to justice is thus to be rightly resolved in favour of the latter, particularly in cases of international crimes (part VI). He expresses the concern with the need to abide by the imperatives of justice and to avoid impunity in cases of perpetration of international crimes, thus seeking to guarantee their non-repetition in the future. And he proceeds that the threshold of the *gravity* of the breaches of human rights and of international humanitarian law removes any bar to jurisdiction, in the quest for reparation to the victimized individuals (part VII). All mass atrocities are nowadays to be considered, in his view, in the light of the threshold of *gravity*, irrespective of who committed them; criminal State policies and the ensuing perpetration of State atrocities are not to be covered up by the shield of State immunity.

7. In part VIII of his Dissenting Opinion, Judge Cançado Trindade sustains that States cannot waive, *inter se*, rights which are not their own, but which are rather inherent to human beings. Purported inter-State waivers of rights inherent to the human person are, in his view, inadmissible; they stand against the international *ordre public*, and are to be deprived of any juridical effects. This is deeply-engraved in human conscience, in the *universal juridical conscience*, the ultimate *material* source of all Law.

8. He demonstrates, in part IX of his dissent, that, well before the II world war, deportation to forced labour (as a form of slave work) was already prohibited by international law. Its wrongfulness was widely acknowledged, at the normative level, by the IV Hague Convention of 1907 and by the 1930 ILO Convention on Forced Labour. There was recognition of that prohibition in works of codification of the epoch, and that prohibition has, furthermore, met with judicial recognition. The right to war reparation claims was likewise recognized well before the end of the II world war (in the IV Hague Convention of 1907) (part XII).

9. To Judge Cançado Trindade, what jeopardizes or destabilizes the international legal order, are the international crimes, and not the individuals' quest for reparation. What troubles the international legal order, are the cover-up of such international crimes accompanied by the impunity of the perpetrators, and not the victims' search for justice (parts X

and XIII). When a State pursues a criminal policy of murdering segments of its own population, and of the population of other States, it cannot, later on, place itself behind the shield of sovereign immunities, as these latter were never conceived for that purpose.

10. Judge Cançado Trindade proceeds to a review of all the responses provided by the contending parties (Germany and Italy), as well as the intervening State (Greece), to the questions he put to them at the end of the oral hearings before the Court, on 16.09.2011 (part XI). He sustains that grave breaches of human rights and of international humanitarian law, amounting to international crimes, are anti-juridical acts, are breaches of *jus cogens*, that cannot simply be removed or thrown into oblivion by reliance on State immunity (parts XII-XIII).

11. In sequence, Judge Cançado Trindade proceeds to a review of the prevailing tension, in the international and national case-law, between State immunity and the individual victims' right of access to justice (part XIV); he ascribes greater weight to this latter, in the current age of the *rule of law at national and international levels* (as reckoned nowadays by the United Nations General Assembly itself). Furthermore, he discards the traditional and eroded distinction between *acta jure gestionis* and *acta jure imperii* as being immaterial in the present case; in his understanding, international crimes perpetrated by States (such as those committed by the Third *Reich* in the II world war) are not acts *jure gestionis*, nor acts *jure imperii*; they are crimes, *delicta imperii*, for which there is no immunity (part XV).

12. The next line of considerations by Judge Cançado Trindade pertains to the human person and State immunities. This counterposition leads international law (the *droit des gens*) to free itself from the strict and short-sighted inter-State outlook (part XVI) of times past. He recalls that the term "immunity" (from Latin *immunitas*, deriving from *immunis*) entered the lexicon of international law by reference to "prerogatives" of the sovereign State, being associated with "cause of impunity". The term was meant to refer to something quite exceptional, an exemption from jurisdiction or from execution. It was never meant to be a principle, nor a norm of general application. It has certainly never been intended to except jurisdiction on, and to cover-up, international crimes, grave violations of human rights and of international humanitarian law.

13. Thus, in case of such crimes or grave violations, Judge Cançado Trindade sustains that the *direct access* of the individuals concerned to the international jurisdiction is thus fully justified, to vindicate the individual victims' rights, even against their own State (part XVII). To him, beyond the inter-State myopia, individuals are indeed subjects of international law (not merely "actors"), and whenever legal doctrine departed from this, the consequences and results were catastrophic. Individuals are *titulaires* of rights and bearers of duties which emanate *directly* from international law (the *jus gentium*). Converging developments, in recent decades, of the International Law of Human Rights, of International Humanitarian Law, and of the International Law of Refugees, followed by those of International Criminal Law, give unequivocal testimony of this.

14. To Judge Cançado Trindade, it is not at all State immunity that cannot be waived. There is no immunity for crimes against humanity (part XVIII-XIX). In cases of international crimes, of *delicta imperii*, what cannot be waived is the individual's right of access to justice, encompassing the right to reparation for the grave violations of the rights inherent to him as a human being. Without that right, there is no credible legal system at all, at national or international levels. One is here in the domain of *jus cogens*.

15. Accordingly, there are no State immunities for *delicta imperii*, such as massacres of civilians in situations of defencelessness (e.g., the massacre of Distomo, in Greece, in 1944, and the massacre of Civitella, in Italy, also in 1944), or deportation and subjection to forced labour in war industry (e.g., in 1943-1945) (part XVIIII). In the understanding of Judge Cançado Trindade, the finding of particularly grave violations of human rights and of international humanitarian law provides a valuable test for the removal of any bar to jurisdiction, in pursuance of the necessary realization of justice. It is immaterial whether the harmful act in grave breach of human rights was a governmental one, or a private one with the acquiescence of the State, or whether it was committed entirely in the *forum* State or not (deportation to forced labour is a transfrontier crime). State immunity does not stand in the domain of redress for grave violations of the fundamental rights of the human person.

16. In sequence, Judge Cançado Trindade sustains that the right of access to justice *lato sensu* comprises not only the formal access to justice (the right to institute legal proceedings), by means of an effective remedy, but also the guarantees of the due process of law (with equality of arms, conforming the *procès équitable*), up to the judgment (as the *prestation juridictionnelle*), with its faithful execution, with the provision of the reparation due (part XIX). Contemporary international case-law contains elements to this effect, pointing towards *jus cogens* (parts XX-XXI). The realization of justice is in itself a form of reparation, granting *satisfaction* to the victim. In this way those victimized by oppression have their right to the Law *(droit au Droit)* duly vindicated (part XXII).

17. Even in the domain of State immunities properly, ¾ he proceeds, ¾ there has been acknowledgment of the changes undergone by it, in the sense of restricting or discarding such immunities in the occurrence of those grave breaches, due to the advent of the International Law of Human Rights, with attention focused on the right of access to justice and international accountability. Judge Cançado Trindade adds that the State's duty to provide reparation to individual victims of grave violations of human rights and of international humanitarian law is a duty under customary international law and pursuant to a fundamental general principle of law (part XXII).

18. He then ponders that there is nowadays a growing trend of opinion sustaining the removal of immunity in cases of international crimes, for which reparation is sought by the victims. In effect,—he adds,—to admit the removal of State immunity in the realm of trade relations, or in respect of local personal tort (e.g., in traffic accidents), and at the same time to insist on shielding States with immunity, in cases of

international crimes ¾ marked by grave violations of human rights and of international humanitarian law ¾ in pursuance of State (criminal) policies, amounts, in his view, to a juridical absurdity.

19. Judge Cançado Trindade asserts that, in cases disclosing such *gravity* as the present one opposing Germany to Italy (and with Greece intervening), the right of access to justice *lato sensu* is to be approached with attention focused on its essence as a *fundamental* right (as in the case-law of the Inter-American Court of Human Rights), rather than on permissible or implicit "limitations" to it (as in the case-law of the European Court of Human Rights). In his understanding, grave breaches of human rights and of international humanitarian law amount to breaches of *jus cogens*, entailing State responsibility and the right to reparation to the victims (parts XXI and XXIII). This is in line, ¾ he adds, ¾ with the idea of *rectitude* (in conformity with the *recta ratio* of natural law), underlying the conception of Law (in distinct legal systems ¾ *Recht* / *Diritto* / *Droit* / *Direito* / *Derecho* / *Right*) as a whole (part XXIII).

20. The next line of reflections by Judge Cançado Trindade pertains to the individual victims' right to reparation, the indispensable complement of the grave breaches of international law which harmed them. This indissoluble whole, of breach and reparations, ¾ he adds, ¾ is recognized in the *jurisprudence constante* of The Hague Court (PCIJ and ICJ), and the wrongly assumed incidence of State immunity herein cannot dismantle that indissoluble whole. It appears groundless to him to claim that the regime of reparations for grave breaches of human rights and of international humanitarian law would exhaust itself at inter-State level, to the detriment of the individuals who suffered the consequences of war crimes and crimes against humanity.

21. Judge Cançado Trindade adds that it is clear from the records of the present case that there are "Italian Military Internees" (IMIs, i.e., former soldiers who were imprisoned and denied the status of prisoners of war), ¾ who were sent, also with civilians, to forced labour in the German war industry in the II world war (in 1943-1945), ¾ victims of Nazi Germany's grave violations of human rights and of international humanitarian law, who have in fact been left without reparation to date (part XXIV). Despite the fact that, as a result of the two 1961 Agreements between Germany and Italy, payments for reparation were made by Germany to Italy, it so remains that there were victims who remained uncovered by those Agreements. And Germany itself admits that there are "IMIs" who have not received reparation, on the basis of an interpretation given of the 2000 German law on the "Remembrance, Responsibility and Future" Foundation.

22. On the basis of an expert opinion, Germany did not make reparation to the "IMIs" through the Foundation; it resorted instead to an appraisal which led to a treatment of those victims which incurs, in Judge Cançado Trindade's understanding, into a double injustice to them: first, when they could have benefited from the rights attached to the status of prisoners of war, such status was denied to them; and secondly, now that they seek reparation for violations of international humanitarian law of which they were victims (including the violation of denying them the status of prisoners of war), they are seen to be treated as prisoners of war (part XXV). It is regrettably too late to consider them prisoners of war (and, worse still, to deny them reparation): they should have been so considered during the II world war and in its immediate aftermath (for the purpose of protection), but they were not.

23. In sum, there are victims of Nazi Germany's grave violations of human rights and of international humanitarian law who have in fact been left without reparation. In Judge Cançado Trindade's assessment, such individual victims of State atrocities cannot be left without any form of redress. State immunity is not supposed to operate as a bar to jurisdiction in circumstances such as those prevailing in the present case concerning the *Jurisdictional Immunities of the State*. It is not to stand in the way of the *realization of justice*. The pursuit of justice is to be preserved as the ultimate goal; securing justice to victims encompasses, *inter alia*, enabling them to seek and obtain redress for the crimes they suffered.

24. And the *realization of justice* is in itself a form of reparation (satisfaction) to the victims. It is the reaction of the Law to those grave violations, bringing one into the realm of *jus cogens*. In Judge Cançado Trindade's conception, through *reparatio* (from the Latin term *reparare*, "to dispose again"), the Law intervenes to cease the effects of its violations, and to guarantee the non-repetition of the harmful acts. The *reparatio* does not put an end to the human rights violations already perpetrated, but, in ceasing its effects, it at least avoids the aggravation of the harm already done (by the indifference of the social *milieu*, by impunity or by oblivion).

25. The *reparatio* is endowed, in Judge Cançado Trindade's understanding, with a double meaning: it provides satisfaction (as a form of reparation) to the victims, and at the same time it re-establishes the legal order broken by such violations, ¾ a legal order erected on the basis of the full respect for the rights inherent to the human person. The legal order, thus re-established, requires the guarantee of non-repetition of the harmful acts.

26. In the remaining line of reflections of his Dissenting Opinion, Judge Cançado Trindade sustains the primacy of *jus cogens* and presents a rebuttal of its deconstruction (part XXVI). In his view, one cannot embark on a wrongfully assumed and formalist lack of conflict between "procedural" and "substantive" rules (cf. *infra*), unduly depriving *jus cogens* of its effects and legal consequences. The fact remains that a conflict does exist, and the primacy is of *jus cogens*, which resists to, and survives, such groundless attempt at its deconstruction. There can be no prerogative or privilege of State immunity in cases of international crimes, such as massacres of the civilian population, and deportation of civilians and prisoners of war to subjection to slave labour: these are grave breaches of absolute prohibitions of *jus cogens*, for which there can be no immunities.

27. He stresses that one cannot approach cases of the kind ¾ involving grave breaches of human rights and of international humanitarian law ¾ without close attention to *fundamental human values*. Unlike what legal positivism assumes, law and ethics go ineluctably together, and this should be kept

in mind for the faithful realization of justice, at national and international levels. The central principles at issue here are, in his perception, the principle of humanity and the principle of human dignity. State immunity cannot, in his view, be unduly placed above State responsibility for international crimes and its ineluctable complement, the responsible State's duty of reparation to the victims.

28. The opposite (majority) view is arrived at, in pursuance of an empirical factual exercise of identifying the incongruous case-law of national courts and the inconsistent practice of a few national legislations on the subject-matter at issue. This exercise is characteristic of the methodology of legal positivism, over-attentive to facts and oblivious of values. Be that as it may, even in its own outlook, the examination of national courts' decisions, ¾ in Judge Cançado Trindade's view, ¾ is not at all conclusive for upholding State immunity in cases of international crimes.

29. Such are, in his perception, positivist exercises leading to the fossilization of international law, and disclosing its persistent underdevelopment, rather than its progressive development, as one would expect. Such undue methodology is coupled with inadequate and unpersuasive conceptualizations, such as that of the counterposition between "procedural" and "substantive" rules. It is, in his understanding, wrong to assume that no conflict exists, or can exist, between the substantive "rules of *jus cogens*" (imposing the prohibitions of "the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour") and the procedural rules of State immunity. This tautological assumption leads to the upholding of State immunity even in the grave circumstances of the present case.

30. There is thus a material conflict, even though a formalist one may not *prima facie* be discernible. To him, the fact remains that a conflict does exist, and it is regrettable to embark on such a groundless deconstruction of *jus cogens*, depriving this latter of its effects and legal consequences. Judge Cançado Trindade observes that this is not the first time that this happens; it has happened before, e.g., in the last decade, in the Court's Judgments in the cases of the *Arrest Warrant* (2002) and of the *Armed Activities on the Territory of the Congo* (D.R. Congo *v.*Rwanda, 2006), recalled by the Court with approval in the present Judgment. It is, in his view, high time to give *jus cogens* the attention it requires and deserves.

31. Its deconstruction, as in the present case, is ¾ in his perception ¾ to the detriment not only of the individual victims of grave violations of human rights and of international humanitarian law, but also of contemporary international law itself. In sum, in his understanding, there can be no prerogative or privilege of State immunity in cases of international crimes, such as massacres of the civilian population, and deportation of civilians and prisoners of war to subjection to slave labour: these are grave breaches of absolute prohibitions of *jus cogens*, for which there can be no immunities.

32. State immunities cannot keep on being approached in the light of an atomized or self-sufficient outlook (contemplating State immunities in a void), but rather pursuant to a comprehensive view of contemporary international law as a whole, and its role in the international community. He adds that international law cannot be "frozen" by continued and prolonged reliance on omissions of the past, either at normative level (e.g., in the drafting of the 2004 U.N. Convention on Jurisdictional Immunities of States and Their Property), or at judicial level (e.g., the majority decision of the Grand Chamber of the European Court of Human Rights in the *Al-Adsani* case, 2001, invoked by the Court in the present case).

33. In sum,—Judge Cançado Trindade concludes,—*jus cogens* stands above the prerogative or privilege of State immunity, with all the consequences that ensue therefrom, thus avoiding denial of justice and impunity. On the basis of all the aforesaid, his firm position is that there is no State immunity for international crimes, for grave violations of human rights and of international humanitarian law. In his understanding, this is what the International Court *of Justice* should have decided in the present Judgment.

Dissenting opinion of Judge Yusuf

In his dissenting opinion, Judge Yusuf states that he is unable to concur with the Court's majority in its finding because of the marginal way in which the core issue in dispute between the Parties was dealt with in the Judgment. This core issue is the link between the lack of reparations for international crimes and the denial of jurisdictional immunity to Germany. Could the protection of victims of international crimes from denial of justice constitute a violation of international law? Judge Yusuf considers that the Court has failed to seize a unique opportunity to clarify the law and to pronounce itself on the effect that the absence of other remedial avenues for reparations could have on immunity before domestic courts. This is an area in which international law is clearly evolving, and the Court, as the principal judicial organ of the United Nations, should have provided guidance on this evolution.

In addition, his disagreement relates to the following main points: the lack of adequate analysis of the obligation to make reparations after violations of international humanitarian law (an issue intimately linked to the denial of State immunity); the reasoning and conclusions on the scope and extent of immunity and the derogations that may be made from it; and the majority's approach towards the role of domestic courts in the identification and evolution of international customary norms particularly in the area of State immunity.

Noting that the issue of jurisdictional immunity of foreign States before national courts for cases concerning serious violations of international humanitarian law (hereafter, IHL) has been the subject of significant scholarly debate and has recently given rise to conflicting judicial decisions, Judge Yusuf states that the question presented to the Court is of a much limited and narrower scope, namely whether the refusal of Italian courts to grant jurisdictional immunity to Germany with respect to claims for reparation of victims of Nazi crimes who lacked other remedial avenues constituted an internationally wrongful act. The Court, however, directs its analysis to the more general issue of whether immunity is applicable to unlawful acts committed by armed forces of a State during armed conflict. In Judge Yusuf's view, this formulation of the core issues is "too abstract and formalistic" as

compared to the real life situation of certain categories of Italian victims of Nazi crimes who have sought redress for over 50 years, found it lacking, and have consequently submitted their claims to Italian courts in search of an alternative means of redress. This "last resort" argument is central to the dispute between Germany and Italy, but the Court does not assess the legal implications of Germany's failure to provide reparations to certain categories of victims on the grant or denial of immunity to Germany in the courts of the forum State under international law, and instead only expresses "regret" that this has been the case.

Judge Yusuf finds it regrettable that the Court did not examine the obligation to make reparations for violations of IHL in international law in as far as it has a direct bearing on the granting of immunity in the current proceedings. He states that this obligation is enshrined in Article 3 of the Hague Convention IV (1907) and Article 91 of the Additional Protocol I of 1977 to the Geneva Conventions (1949), and while compensation for such breaches has been handled at the inter-State level for a long time, this does not mean that individuals are not or were not meant to be the ultimate beneficiaries of such mechanisms or that they do not possess the right to make claims for compensation. In the last two decades, there have been more and more examples of individual claimants seeking compensation for serious breaches of IHL, e.g., the claims brought before the Japanese courts in the 1990s by persons who were subject to slave labour or torture, or were forced to work as comfort women during the Second World War; claims brought before United States courts by the Holocaust Restitution Movement on behalf of wartime labour slaves; the *Distomo* case in Greece and the *Ferrini* case in Italy. The law on State responsibility does not rule out the possibility that rights may accrue to individuals as a result of a wrongful act committed by a State and the International Committee of the Red Cross Commentary to Article 91 of the Additional Protocol I recognizes that since 1945 there has been a tendency to recognize the exercise of such rights by individuals. The key question before the Court therefore is what happens in the case of humanitarian law violations for which responsibility has been recognized by the foreign State but some victims are not covered by reparation schemes and are thus deprived of compensation. Should such a State be allowed to use immunity before domestic courts to shield against the obligation to make reparations?

On the scope of jurisdictional immunity, Judge Yusuf states that while State immunity is a rule of customary law and not merely a matter of comity, its coverage has been contracting over the past century as international law evolves from a State-centred legal system to one which also protects the rights of human beings vis-à-vis the State. The shrinking of immunity coverage has been spearheaded by domestic courts, and while immunity law is significant for the conduct of harmonious relations between States, it is not a rule of law whose coverage is well defined for all circumstances or whose stability is unimpaired. State immunity is as full of holes as Swiss cheese. Thus, it is not persuasive to characterize some exceptions to immunity as part of customary international law, despite the continued existence of divergent domestic judicial decisions, while interpreting other exceptions, based on similarly conflicting decisions, as supporting the non-existence of customary norms. It would be more appropriate, in his view, to recognize that customary law in this area remains fragmentary and unsettled. Judge Yusuf contends that these uncertainties of customary law cannot be resolved through a formalistic exercise that surveys the conflicting judicial decisions of domestic courts, which are already sparse as regards human rights and humanitarian law violations, and by conducting a mathematical calculation. For him, customary international law is not a question of relative numbers. Further, State immunity from jurisdiction cannot be interpreted in a vacuum. The specific features and circumstances of each case, the nature of the issues involved and the evolution of international law all have to be fully taken into account. Thus, when jurisdictional immunities come into conflict with basic rights consecrated under human rights or humanitarian law, a balance has to be sought between the intrinsic functions and purposes of immunity and the protection and realization of fundamental human rights and humanitarian law principles. In the present case these are the right to an effective remedy, the right to compensation for damages suffered as a result of breaches of humanitarian law, and the right to protection from denial of justice. Recourse should be had to those principles and there should be an assessment of the proportionality and legitimacy of purpose of granting immunity, whenever the customary law rules on State immunity or the exceptions to it are found to be either fragmentary or unsettled, as is the case here. Finally, the preliminary nature of immunity from jurisdiction does not preclude national courts, in this case the Italian courts, from assessing the context in which the claim has been made to ensure a proper legal characterization of the acts for which immunity is claimed and, where necessary, to balance the different factors underlying the case to determine whether the Court can assert jurisdiction.

Judge Yusuf further observes that the law relating to State immunity has historically evolved through the decisions of domestic courts and many exceptions currently accepted as such, for example the tort exception or the employment exception, were initially established by one or two courts at a time. Important exceptions to immunity, such as these, could have met a very different fate if, for example, the Austrian judgment in *Holubek* v. *Government of the United States of America* (*ILR*, Vol. 40, 1962, p. 73) had been found to be in violation of the international law on immunity. A nascent norm, which has come to reflect a widely-held *opinio juris* and State practice, would have been nipped in the bud. Similarly, the Italian decisions, as well as the *Distomo* decision, may be viewed as part of a broader evolutionary process in which decisions of domestic courts have given rise to a number of exceptions to jurisdictional immunity. It is evident that the rules on State immunity and the entitlement of individuals to reparations for international crimes committed by State agents are undergoing transformation. To the extent that there is a conflict between immunity from jurisdiction of States and claims arising from international crimes, State immunity should not be used as a screen to avoid reparations to which victims of crimes are entitled. In exceptional circumstances, such as those before the Court, where no other means of redress is available, such a conflict should be resolved in favour of the

victims of grave breaches of international humanitarian law. This does not harm the independence or the sovereignty of States. It simply contributes to the crystallization of an emerging exception to State immunity, which is based on the widely-held *opinio juris* of ensuring the realization of certain basic rights of human beings such as the right to an effective remedy, in those circumstances where the victims would otherwise remain deprived of remedial avenues.

In the final analysis, Judge Yusuf states that his comments should not be taken to mean that immunity is to be set aside whenever claims for reparations of international crimes committed by a foreign State are submitted to domestic courts. They rather indicate the necessity of interpreting the law in the sense in which it is already evolving of a limited and workable exception to State immunity in those circumstances where the victims of international crimes have no other means of redress. The assertion of jurisdiction by domestic courts in those exceptional circumstances where there is a failure to make reparations through other remedial avenues cannot upset the harmonious relations between States nor affect the sovereignty of another State. The protection of victims of international crimes from denial of justice by domestic courts cannot constitute a violation of international law. Such an exception to jurisdictional immunity, according to Judge Yusuf, brings the law on State immunity in line with the growing normative weight attached by the international community to the protection of human rights and humanitarian law and the realization of the right to effective remedy for victims of international crimes.

Dissenting opinion of Judge *ad hoc* Gaja

1. The Court finds that "customary international law continues to require that a State be accorded immunity in proceedings for torts allegedly committed on the territory of another State by its armed forces and other organs of State in the course of conducting an armed conflict". However, an analysis of the relevant State practice concerning the "tort exception" to State immunity does not appear to justify such a clear-cut conclusion.

2. The United Nations Convention on Jurisdictional Immunities of States and Their Property provides for a "tort exception". It does not grant foreign States immunity with regard to their military activities although the preparatory work includes elements suggesting that "situations involving armed conflicts" are not covered by the Convention.

3. Nine out of ten States which enacted legislation on foreign State immunity provide for a "tort exception". Some of these statutes consider that immunity nevertheless exists with regard to the conduct of foreign military forces, but they only refer to visiting forces, not to those of an occupying foreign State. The unchallenged practice of these nine States is significant. Were the stated exceptions to immunity unfounded under general international law, these States would incur international responsibility.

4. The variety of national judicial decisions shows that the issue lies in a "grey area" in which States may take different positions without necessarily departing from the requirements of general international law.

5. One factor that could contribute to justifying a restrictive approach to State immunity when applying the "tort exception" is the nature of the obligation (e.g., an obligation under a peremptory norm) for the breach of which a claim to reparation is brought against a foreign State.

6. The Court should have considered that at least for certain decisions of Italian courts the exercise of jurisdiction could not be regarded as contravening general international law.

193. AHMADOU SADIO DIALLO (REPUBLIC OF GUINEA *v.* DEMOCRATIC REPUBLIC OF THE CONGO) (COMPENSATION OWED BY THE DEMOCRATIC REPUBLIC OF THE CONGO TO THE REPUBLIC OF GUINEA)

Judgment of 19 June 2012

On 19 June 2012, the International Court of Justice rendered its Judgment in the case concerning *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)* (Compensation owed by the Democratic Republic of the Congo to the Republic of Guinea).

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; Judges *ad hoc* Mahiou, Mampuya; Registrar Couvreur.

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The operative paragraph (para. 61) of the Judgment reads as follows:

" . . .

The Court,

(1) By fifteen votes to one,

Fixes the amount of compensation due from the Democratic Republic of the Congo to the Republic of Guinea for the non-material injury suffered by Mr. Diallo at US$85,000;

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

Against: *Judge* ad hoc Mampuya;

(2) By fifteen votes to one,

Fixes the amount of compensation due from the Democratic Republic of the Congo to the Republic of Guinea for the material injury suffered by Mr. Diallo in relation to his personal property at US$10,000;

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

Against: *Judge* ad hoc Mampuya;

(3) By fourteen votes to two,

Finds that no compensation is due from the Democratic Republic of the Congo to the Republic of Guinea with regard to the claim concerning material injury allegedly suffered by Mr. Diallo as a result of a loss of professional remuneration during his unlawful detentions and following his unlawful expulsion;

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

Against: *Judge* Yusuf; *Judge* ad hoc Mahiou;

(4) Unanimously,

Finds that no compensation is due from the Democratic Republic of the Congo to the Republic of Guinea with regard to the claim concerning material injury allegedly suffered by Mr. Diallo as a result of a deprivation of potential earnings;

(5) Unanimously,

Decides that the total amount of compensation due under points 1 and 2 above shall be paid by 31 August 2012 and that, in case it has not been paid by this date, interest on the principal sum due from the Democratic Republic of the Congo to the Republic of Guinea will accrue as from 1 September 2012 at an annual rate of 6 per cent;

(6) By fifteen votes to one,

Rejects the claim of the Republic of Guinea concerning the costs incurred in the proceedings.

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

Against: *Judge* ad hoc Mahiou."

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Judge Cançado Trindade appended a separate opinion to the Judgment of the Court; Judges Yusuf and Greenwood appended declarations to the Judgment of the Court; Judges *ad hoc* Mahiou and Mampuya appended separate opinions to the Judgment of the Court.

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I. Procedural and factual background of the case
(paras. 1–17)

The Court begins by recalling the procedural background of the present case.

On 28 December 1998, the Republic of Guinea (hereinafter "Guinea") filed in the Registry of the Court an Application instituting proceedings against the Democratic Republic of the Congo (hereinafter the "DRC", named Zaire between 1971 and 1997) in respect of a dispute concerning "serious violations of international law" alleged to have been committed upon the person of Mr. Ahmadou Sadio Diallo, a Guinean national.

In its Judgment of 24 May 2007 on preliminary objections, the Court declared the Application of Guinea to be admissible "in so far as it concerns protection of Mr. Diallo's rights as an individual" and "in so far as it concerns protection of [his] direct rights as *associé* in Africom-Zaire and Africon-

tainers-Zaire". However, the Court declared the Application of Guinea to be inadmissible "in so far as it concerns protection of Mr. Diallo in respect of alleged violations of rights of Africom-Zaire and Africontainers-Zaire".

In its Judgment of 30 November 2010 on the merits, the Court found that, in respect of the circumstances in which Mr. Diallo had been expelled on 31 January 1996, the DRC had violated Article 13 of the International Covenant on Civil and Political Rights (hereinafter the "Covenant") and Article 12, paragraph 4, of the African Charter on Human and Peoples' Rights (hereinafter the "African Charter") (subpara. (2) of the operative part). The Court also found that, in respect of the circumstances in which Mr. Diallo had been arrested and detained in 1995-1996 with a view to his expulsion, the DRC had violated Article 9, paragraphs 1 and 2, of the Covenant and Article 6 of the African Charter (subpara. (3) of the operative part). In addition, the Court found that the DRC had violated Mr. Diallo's rights under Article 36, paragraph 1 *(b)*, of the Vienna Convention on Consular Relations (hereinafter the "Vienna Convention").

In its Judgment on the merits, the Court further decided that "the Democratic Republic of the Congo [was] under obligation to make appropriate reparation, in the form of compensation, to the Republic of Guinea for the injurious consequences of the violations of international obligations referred to in subparagraphs 2 and 3 [of the operative part]". The Court did not however order the DRC to pay compensation for the violation of Mr. Diallo's rights under Article 36, paragraph 1 *(b)* of the Vienna Convention. The Court decided that failing agreement between the Parties on the compensation owed by Guinea to the DRC within six months from the date of the said Judgment, the question would be settled by the Court. The time-limit of six months thus fixed by the Court having expired on 30 May 2011 without an agreement being reached between the Parties on the question, it was therefore for the Court to decide on the amount of compensation to be paid to Guinea as a result of the wrongful arrests, detentions and expulsion of Mr. Diallo by the DRC, in accordance with the conclusions set forth in its Judgment on the merits.

The Court notes that Guinea seeks compensation under four heads of damage: non-material injury (referred to by Guinea as "mental and moral damage"); and three heads of material damage: alleged loss of personal property; alleged loss of professional remuneration (referred to by Guinea as "loss of earnings") during Mr. Diallo's detentions and after his expulsion; and alleged deprivation of "potential earnings". As to each head of damage, the Court states that it will consider whether an injury is established. It will then "ascertain whether, and to what extent, the injury asserted by the Applicant is the consequence of wrongful conduct by the Respondent", taking into account "whether there is a sufficiently direct and certain causal nexus between the wrongful act . . . and the injury suffered by the Applicant". Lastly, the Court points out that if the existence of injury and causation is established, the Court will then determine the valuation.

II. Heads of damage in respect of which compensation is requested

(paras. 18-55)

(A) Compensation for the non-material injury suffered by Mr. Diallo

The Court is of the view that non-material injury can be established even without specific evidence. In the case of Mr. Diallo, the fact that he suffered non-material injury is an inevitable consequence of the wrongful acts of the DRC already ascertained by the Court. In its Judgment on the merits, the Court found that Mr. Diallo had been arrested without being informed of the reasons for his arrest and without being given the possibility to seek a remedy; that he was detained for an unjustifiably long period pending expulsion; that he was made the object of accusations that were not substantiated; and that he was wrongfully expelled from the country where he had resided for 32 years and where he had engaged in significant business activities. The Court therefore considers it reasonable to conclude that the DRC's wrongful conduct caused Mr. Diallo significant psychological suffering and loss of reputation.

Furthermore, the Court has taken into account the number of days for which Mr. Diallo was detained—he was continuously detained for 66 days, from 5 November 1995 until 10 January 1996, and was detained for a second time between 25 and 31 January 1996, that is, for a total of 72 days—and the conclusion in its Judgment on the merits that it had not been demonstrated that Mr. Diallo was mistreated in violation of Article 10, paragraph 1, of the Covenant.

The Court also notes that the circumstances of the case point to the existence of certain factors which aggravate Mr. Diallo's non-material injury, in particular the context in which the wrongful detentions and expulsion occurred. In addition to the fact that Mr. Diallo's arrests and detentions aimed at allowing the expulsion measure were arbitrary within the meaning of Article 9, paragraph 1, of the Covenant and Article 6 of the African Charter, the Court emphasizes that it also noted in its Judgment on the merits that it was difficult not to discern a link between Mr. Diallo's expulsion and the fact that he had attempted to recover debts which he believed were owed to his companies by the Zairean State or companies in which the State held a substantial portion of the capital. The Court observes that quantification of compensation for non-material injury necessarily rests on equitable considerations.

In the light of the circumstances set out above, the Court considers that the amount of US$85,000 would provide appropriate compensation for the non-material injury suffered by Mr. Diallo.

(B) Compensation for material injury suffered by Mr. Diallo

The Court explains that it will begin by addressing Guinea's claim relating to the loss of Mr. Diallo's personal property; it will then consider Guinea's claims concerning loss of professional remuneration during Mr. Diallo's unlawful detentions and following his unlawful expulsion from the DRC; and,

finally, it will turn to Guinea's claim in respect of "potential earnings".

1. Alleged loss of Mr. Diallo's personal property (including assets in bank accounts)

The Court notes that, according to Guinea, Mr. Diallo's abrupt expulsion prevented him from making arrangements for the transfer or disposal of personal property that was in his apartment and also caused the loss of certain assets in bank accounts. The Court states that it will address Guinea's claim for the loss of Mr. Diallo's personal property, without taking into account property of the two companies, given the Court's prior decision that Guinea's claims relating to the companies were inadmissible. The Court notes that the personal property at issue in Guinea's claim may be divided into three categories: furnishings of Mr. Diallo's apartment that appear on the inventory of personal property in the apartment, certain high-value items alleged to have been in Mr. Diallo's apartment, which are not specified on that inventory; and assets in bank accounts.

As to personal property that was located in Mr. Diallo's apartment, the Court notes that the inventory of the property in Mr. Diallo's apartment, which both Parties have submitted to the Court, was prepared approximately 12 days after Mr. Diallo's expulsion from the DRC. The Court considers that, although both Parties appear to accept that the items that are listed on the inventory were in the apartment at the time the inventory was prepared, there is, however, uncertainty about what happened to that property. Guinea has failed to prove the extent of the loss suffered by Mr. Diallo and the extent to which any such loss was caused by the DRC's unlawful conduct. The Court adds that even assuming that it could be established that the personal property on the inventory was lost and that any such loss was caused by the DRC's unlawful conduct, Guinea offered no evidence regarding the value of the items on the inventory. Despite the shortcomings in the evidence related to the property listed on the inventory, the Court recalls that Mr. Diallo lived and worked in the territory of the DRC for over 30 years, during which time he surely accumulated personal property. Even assuming that the DRC is correct in its contention that Guinean officials and Mr. Diallo's relatives were in a position to dispose of that personal property after Mr. Diallo's expulsion, the Court considers that, at a minimum, Mr. Diallo would have had to transport his personal property to Guinea or to arrange for its disposition in the DRC. Thus, the Court is satisfied that the DRC's unlawful conduct caused some material injury to Mr. Diallo with respect to personal property that had been in the apartment in which he lived, although it would not be reasonable to accept the very large sum claimed by Guinea for this head of damage. In such a situation, the Court considers it appropriate to award compensation based on equitable considerations in the amount of US$10,000.

The Court next considers Guinea's contention that Mr. Diallo's apartment contained certain high-value items not specified on the inventory described above. It notes that Guinea mentions several items in its Memorial, but offers few details and provides no evidence to support the assertion that Mr. Diallo owned those items at the time of his expulsion, that they were in his apartment if he did own them, or that they were lost as a result of his treatment by the DRC. For these reasons, the Court rejects Guinea's claims as to the loss of high-value items not specified on the inventory.

As to assets alleged to have been contained in bank accounts, the Court considers that Guinea offers no details and no evidence to support its claim. There is no information about the total sum held in bank accounts, the amount of any particular account or the name(s) of the bank(s) in which the account(s) were held. Further, there is no evidence demonstrating that the unlawful detentions and expulsion of Mr. Diallo caused the loss of any assets held in bank accounts. For example, Guinea does not explain why Mr. Diallo could not access any such accounts after leaving the DRC. Thus, it has not been established that Mr. Diallo lost any assets held in his bank accounts in the DRC or that the DRC's unlawful acts caused Mr. Diallo to lose any such financial assets. Accordingly, the Court rejects Guinea's claim as to the loss of bank account assets.

The Court therefore awards no compensation in respect of the high-value items and bank account assets.

2. Alleged loss of remuneration during Mr. Diallo's unlawful detentions and following his unlawful expulsion

At the outset, the Court notes that, in its submissions at the conclusion of its Memorial, Guinea claims US$6,430,148 for Mr. Diallo's loss of earnings during his detentions and following his expulsion. However, Guinea makes reference elsewhere in its Memorial to a sum of US$80,000 for Mr. Diallo's loss of earnings during his detentions. As presented by Guinea, this claim for US$80,000, although not reflected as a separate submission, is clearly distinct from its claim for US$6,430,148 which, in the reasoning of the Memorial, only concerns the alleged "loss of earnings" following Mr. Diallo's expulsion. The Court will interpret Guinea's submissions in light of the reasoning of its Memorial, as it is entitled to do. Therefore, it will first consider the claim of US$80,000 for loss of professional remuneration during Mr. Diallo's detentions and then will examine the claim of US$6,430,148 for loss of professional remuneration following his expulsion.

As to the alleged loss of professional remuneration during the unlawful detentions of Mr. Diallo, the Court recalls that Guinea maintains that, prior to his arrest on 5 November 1995, Mr. Diallo received monthly remuneration of US$25,000 in his capacity as gérant of Africom-Zaire and Africontainers-Zaire. Based on that figure, Guinea estimates that Mr. Diallo suffered a loss totalling US$80,000 during the 72 days of his detention, an amount that, according to Guinea, takes account of inflation. The Court notes that the DRC contends that Guinea has not produced any documentary evidence to support the claim for loss of remuneration. The DRC also takes the view that Guinea has failed to show that Mr. Diallo's detentions caused a loss of remuneration that he otherwise would have received. In particular, the DRC asserts that Guinea has failed to explain why Mr. Diallo, as the sole *gérant* and *associé* of the two companies, could not have directed that payments be made to him.

The Court considers whether Guinea has established that Mr. Diallo was receiving remuneration prior to his detention and that such remuneration was in the amount of US$25,000 per month.

The Court first observes that Guinea provides no proof that Mr. Diallo was earning US$25,000 per month as *gérant* of the two companies. There are no bank account or tax records; there are no accounting records of either company showing that it had made such payments. Moreover, the Court considers that there is evidence suggesting that Mr. Diallo was not receiving US$25,000 per month in remuneration from the two companies prior to his detentions. First, the evidence regarding Africom-Zaire and Africontainers-Zaire strongly indicates that neither of the companies was conducting business—apart from the attempts to collect debts allegedly owed to each company—during the years immediately prior to Mr. Diallo's detentions. Secondly, in contrast to Guinea's claim in the present phase of the proceedings devoted to compensation that Mr. Diallo was receiving monthly remuneration of US$25,000, Guinea told the Court, during the preliminary objections phase, that Mr. Diallo was "already impoverished in 1995". This statement to the Court is consistent with the fact that, on 12 July 1995, Mr. Diallo obtained in the DRC, at his request, a "Certificate of Indigency" declaring him "temporarily destitute" and thus permitting him to avoid payments that would otherwise have been required in order to register a judgment in favour of one of the companies. The Court therefore concludes that Guinea has failed to establish that Mr. Diallo was receiving remuneration from Africom-Zaire and Africontainers-Zaire on a monthly basis in the period immediately prior to his detentions in 1995-1996 or that such remuneration was at the rate of US$25,000 per month.

The Court notes that Guinea also does not explain how Mr. Diallo's detentions caused an interruption in any remuneration that Mr. Diallo might have been receiving in his capacity as *gérant* of the two companies. If the companies were in fact in a position to pay Mr. Diallo as of the time that he was detained, it is reasonable to expect that employees could have continued to make the necessary payments to the *gérant*. Moreover, Mr. Diallo was detained from 5 November 1995 to 10 January 1996, then released and then detained again from 25 January 1996 to 31 January 1996. Thus, there was a period of two weeks during which there was an opportunity for Mr. Diallo to make arrangements to receive any remuneration that the companies allegedly had failed to pay him during the initial 66-day period of detention.

Under these circumstances, the Court considers that Guinea has not proven that Mr. Diallo suffered a loss of professional remuneration as a result of his unlawful detentions.

As to the alleged loss of professional remuneration following Mr. Diallo's expulsion, the Court recalls that Guinea asserts that the unlawful expulsion of Mr. Diallo by the DRC deprived him of the ability to continue receiving remuneration as the *gérant* of Africom-Zaire and Africontainers-Zaire. Based on its claim that Mr. Diallo received remuneration of US$25,000 per month prior to his detentions in 1995-1996, Guinea asserts that, during the period that has elapsed since Mr. Diallo's expulsion on 31 January 1996, he has lost additional "professional income" in the amount of US$4,755,500. Guinea further asserts that this amount should be adjusted upward to account for inflation, such that its estimate of Mr. Diallo's loss of professional remuneration since his expulsion is US$6,430,148. The Court notes that the DRC reiterates its position regarding the claim for unpaid remuneration from the period of Mr. Diallo's detentions, in particular the lack of evidence to support the claim that Mr. Diallo was receiving remuneration of US$25,000 per month prior to his detentions and expulsion.

The Court observes that it has already rejected the claim for loss of professional remuneration during the period of Mr. Diallo's detentions. It considers that those reasons also apply with respect to Guinea's claim relating to the period following Mr. Diallo's expulsion. Moreover, Guinea's claim with respect to Mr. Diallo's post-expulsion remuneration is highly speculative and assumes that Mr. Diallo would have continued to receive US$25,000 per month had he not been unlawfully expelled. While an award of compensation relating to loss of future earnings inevitably involves some uncertainty, such a claim cannot be purely speculative. Thus, the Court concludes that no compensation can be awarded for Guinea's claim relating to unpaid remuneration following Mr. Diallo's expulsion.

The Court therefore awards no compensation for remuneration that Mr. Diallo allegedly lost during his detentions and following his expulsion.

3. Alleged deprivation of potential earnings

The Court notes that Guinea makes an additional claim that it describes as relating to Mr. Diallo's "potential earnings". Specifically, Guinea states that Mr. Diallo's unlawful detentions and subsequent expulsion resulted in a decline in the value of the two companies and the dispersal of their assets. Guinea also asserts that Mr. Diallo was unable to assign his holdings *(parts sociales)* in these companies to third parties and that his loss of potential earnings can be valued at 50 per cent of the "exchange value of the holdings", a sum that, according to Guinea, totals US$4,360,000. The Court notes that the DRC considers that Guinea's calculation of the alleged loss to Mr. Diallo is based on assets belonging to the two companies, and not assets that belong to Mr. Diallo in his individual capacity. Furthermore, the DRC contends that Guinea provides no proof that the companies' assets have, in fact, been lost or that specific assets of the two companies to which Guinea refers could not be sold on the open market.

The Court considers that Guinea's claim concerning "potential earnings" amounts to a claim for a loss in the value of the companies allegedly resulting from Mr. Diallo's detentions and expulsion. Such a claim is beyond the scope of the proceedings, given this Court's prior decision that Guinea's claims relating to the injuries alleged to have been caused to the companies are inadmissible. For these reasons, the Court awards no compensation to Guinea in respect of its claim relating to the "potential earnings" of Mr. Diallo.

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Having analysed the components of Guinea's claim in respect of material injury caused to Mr. Diallo as a result of

the DRC's unlawful conduct, the Court awards compensation to Guinea in the amount of US$10,000.

III. Total sum awarded and post-judgment interest
(paras. 56–57)

The Court concludes that the total sum awarded to Guinea is US$95,000 to be paid by 31 August 2012. The Court expects timely payment and has no reason to assume that the DRC will not act accordingly. Nevertheless, considering that the award of post-judgment interest is consistent with the practice of other international courts and tribunals, the Court decides that, should payment be delayed, post-judgment interest on the principal sum due will accrue as from 1 September 2012 at an annual rate of 6 per cent. This rate has been fixed taking into account the prevailing interest rates on the international market and the importance of prompt compliance. The Court recalls that the sum awarded to Guinea in the exercise of diplomatic protection of Mr. Diallo is intended to provide reparation for the latter's injury.

IV. Procedural costs
(paras. 58–60)

The Court notes that Guinea requests the Court to award costs in its favour, in the amount of US$500,000, because, "as a result of having been forced to institute the present proceedings, the Guinean State has incurred unrecoverable costs which it should not, in equity, be required to bear". The DRC asks the Court "to dismiss the request for the reimbursement of costs submitted by Guinea and to leave each State to bear its own costs of the proceedings, including the costs of its counsel, advocates and others".

The Court recalls that Article 64 of the Statute provides that, "[u]nless otherwise decided by the Court, each party shall bear its own costs". While the general rule has so far always been followed by the Court, Article 64 implies that there may be circumstances which would make it appropriate for the Court to allocate costs in favour of one of the parties. However, the Court does not consider that any such circumstances exist in the present case. Accordingly, each party shall bear its own costs.

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Separate opinion by Judge Cançado Trindade

1. In his Separate Opinion, composed of 10 parts, Judge Cançado Trindade presents the foundations of his personal position on the matters dealt with in the present Judgment of the Court. He supports the Court's decision to order reparations for the damages suffered by Mr. A. S. Diallo, as an individual, under two human rights treaties (the U.N. Covenant on Civil and Political Rights, Article 13, and the African Charter on Human and Peoples' Rights, Article 12 (4)), in addition to the Vienna Convention on Consular Relations (his right to information on consular assistance, under Article 36 (1) *(b)*). He further supports the decision of the ICJ to take into account the experience of other contemporary international tribunals in the matter of reparations for damages.

2. He singles out (part I) the particular importance of the case-law of the international tribunals of human rights (in particular that of the Inter-American and the European Courts of Human Rights—IACtHR and ECtHR), to the determination of reparations to be awarded to individuals for damages inflicted upon them. Although he agrees with the Court's majority as to the determination of reparations in the present Judgment, there are some points, not fully reflected in the reasoning of the Court, that he feels obliged to dwell upon in his Separate Opinion, so as to clarify the matter dealt with by the Court, and the foundations of his own personal position thereon.

3. Judge Cançado Trindade begins his reflections by identifying the subject of the rights breached and the subject of the right to reparations (part II), in the framework of the position of individuals as subjects of contemporary international law, and, accordingly, as *titulaires* of the right to reparation for the damages they have suffered. In effect, as made clear by the legal proceedings and the Judgment (of 30.11.2010) on the merits of the present case, the subject of the rights violated in the *cas d'espèce* was a human being, Mr. A. S. Diallo, not a State. Likewise, the subject of the corresponding right to reparation is a human being, Mr. A. S. Diallo, not a State. He is the *titulaire* of such right to reparation, and the beneficiary of the reparations ordered by the Court in the present Judgment.

4. This has also been reckoned in the legal proceedings and the present Judgment on reparations, wherein the relevant case-law of the IACtHR and the ECtHR has been taken into account. Judge Cançado Trindade adds that "[t]he fact that the mechanism for dispute-settlement by the ICJ is, as disclosed by its *interna corporis*, an inter-State one, does not mean that the Court's findings, and its corresponding reasoning, ought to be invariably limited to a strict inter-State approach" (para. 9). He then refers to a series of cases, settled by the ICJ throughout the last decades (in addition to the exercise of its advisory function), that have directly concerned the *condition of individuals*, in the light of which—he proceeds—"[t]he insufficiency, if not artificiality, of the exclusively inter-State outlook of the procedures before the ICJ has become manifest" (para. 11).

5. Judge Cançado Trindade adds that "[d]espite the limitations of the inter-State conception of its mechanism of operation, the Court can at least disclose its preparedness *to reason* in the light of the progressive development of international law, thus contributing to it, beyond the outdated inter-State outlook" (para. 11). To his satisfaction, the Court does so in the Judgments on the merits (2011) and now on reparations in the present case *A. S. Diallo*. And he adds that, "[a]fter all, breaches of international law are perpetrated not only to the detriment of States, but also to the detriment of human beings, subjects of rights—and bearers of obligations—emanating directly from international law itself. States have lost the monopoly of international legal personality a long time ago" (para. 12). And Judge Cançado Trindade concludes, on this particular point, that

> "Individuals,—like States and international organizations,—are likewise subjects of international law. A breach of their rights entails the obligation to provide reparations

to them. This is precisely the case of Mr. A. S. Diallo; the present case bears eloquent witness of that, and of the limits imposed by contemporary international law upon State voluntarism. States cannot dispose of human beings the way they want, irrespective of their rights acknowledged in the *corpus juris* of the International Law of Human Rights; if they breach their rights enshrined therein, they are to bear the consequences thereof, in particular the ineluctable obligation to provide reparation to the individual victims" (para. 13).

6. In part III of his Separate Opinion, Judge Cançado Trindade embarks on an examination of the historical roots of the duty of reparation (in the light of the basic principle *neminem laedere*), going back to the origins of the law of nations (the writings of Francisco de Vitoria, Hugo Grotius, Samuel Pufendorf and Christian Wolff, in addition to those of Alberico Gentili, Francisco Suárez and Cornelius van Bynkershoek). He ponders that the teachings (during the XVIth to the XVIIIth centuries) of the "founding fathers" of the law of nations on the matter have never faded away. Successive grave violations of the rights of the human person (some on a massive scale) awakened human conscience to the need to restore to the human being the central position from where he had been unduly displaced by the exclusive inter-State thinking which prevailed in the XIXth century.

7. Judge Cançado Trindade adds that "[t]he reconstruction, on human foundations, as from the mid-XXth century onwards, took, as conceptual basis, the canons of the human being as subject of rights *(titulaire de droits)*, of the collective guarantee of the realization of these latter, and of the objective character of the obligations of protection, and of the realization of superior common values. The individual came again to be perceived as subject of the right to reparation for damages suffered" (para. 21). He then turns (part IV) to the distinct theoretical frameworks of legal writing on the *rationale* of the duty of reparation for international wrongs, as from the late XIXth century onwards (such as, e.g., the writings of Dionisio Anzilotti, Hans Kelsen, Paul Fauchille, Hildebrando Accioly, F. V. García-Amador).

8. He further recalls the contribution of the Permanent Court of International Justice (PCIJ), mainly in its Judgment of 1927 in the *Chorzów Factory* case, to the acknowledgment of the obligation of reparation as corresponding to a *principle of international law*, and as conforming an "indispensable complement" to the wrongful act, so as to efface *all the consequences* of this latter (i.e., the provision of full reparation). In Judge Cançado Trindade's perception, "[t]he duty of reparation within the realm of international responsibility is attached to subjectivity in international law, ensuing from the condition of being subject of rights and bearer of duties in the law of nations *(droit des gens)*" (para. 32). He adds that the advent of the International Law of Human Rights and of contemporary International Criminal Law has had the impact of clarifying this whole matter, "leaving no doubts that individuals—no longer only States—are also subjects of rights and bearers of duties emanating directly from international law (the *droit des gens*)" (para. 32).

9. In part V of his Separate Opinion, Judge Cançado Trindade focuses attention on what he terms as the *indissoluble whole* conformed by the breach of international law and the compliance with the duty of reparation for damages. In this respect, he evokes his own Dissenting Opinion in the Court's Judgment of 03.02.2012, in the recent case concerning the *Jurisdictional Immunities of the State* (Germany *versus* Italy, Greece intervening), to sustain once again his view that compliance with the State's obligation of reparation ineluctably ensues from the occurrence of the breaches of international law, as their "*indispensable complement*"; that obligation is governed by international law in all its aspects (e.g., scope, forms, beneficiaries), and cannot be modified or suspended by the invocation of alleged difficulties of domestic law.

10. In the understanding of Judge Cançado Trindade, the breach of international law and the ensuing compliance with the duty of reparation for injuries are two sides of the same coin: they form an *indissoluble whole*, which cannot at all be disrupted by an undue invocation of State sovereignty or State immunity. This is the view he has firmly sustained in his Dissenting Opinion in the recent case on the *Jurisdictional Immunities of the State* (Judgment of 03.02.2012), and which he again sustains in the present Judgment of the *A. S. Diallo* case. In his view, the regime of reparations for breaches of human rights does not exhaust itself at inter-State level; after all, the individual victims of those breaches "are the *titulaires* of the right to reparation".

11. In upholding this "humanized outlook", Judge Cançado Trindade ponders that the full *reparatio* (from the Latin *reparare*, "to dispose again") does not actually "erase" the human rights violations perpetrated, but rather ceases all its effects, thus at least avoiding the aggravation of the harm already done, besides restoring the integrity of the legal order, as well as that of the victims. He further warns that the duty of reparation is a *fundamental* (not a secondary) obligation, and this becomes clearer if one looks into it from the perspective of the centrality of the victims, which is his own. "The indissoluble whole that violation and reparation conform admits no disruption by means of the undue invocation, by the responsible State, of its sovereignty or its immunities, so as to evade the indispensable consequence of the international breaches incurred into: the reparations due to the victims" (para. 40).

12. In part VI of his Separate Opinion, Judge Cançado Trindade concentrates his thoughts on the centrality of the victims in the present domain of protection and its implications for reparations. The rights at issue, being inherent to the human person, and anterior and superior to the State, are not reduced to those which the State is prepared to "grant" or "concede" to persons under its jurisdiction, at its sole discretion. The *centrality* of their position in the present domain of protection is well-established, responding to a true *need* of the international community itself,—as perceived and heralded, some decades ago, in the first half of the XXth century, in a pioneering way, by a generation of jurists (André N. Mandelstam, Georges Scelle, Charles de Visscher).

13. In our times,—he proceeds,—the growing acknowledgment, by the international legal order, of the importance of reparations to victims of human rights violations, is a sign of

its maturity, even though there remains a long way to go. In this way, the historical process of the *humanization* of international law, intuitively detected and propounded, a couple of decades ago, by another generation of jurists with a humanist formation (M. Bourquin, A. Favre, S. Sucharitkul, S. Glaser), will keep on advancing, with particular attention to those—individually or in groups—who find themselves in a situation of special vulnerability.

14. The implications of the international subjectivity of individuals for reparations due to them were to challenge the postulates of traditional doctrine of State responsibility, and in particular its unsatisfactory and artificial inter-State outlook. As the present case *A. S. Diallo* clearly shows, the damage was done to an individual, and not to a State, and it is that damage that is taken as "the measure" for the determination of the reparation due to the individual. In effect,—he adds,—the U.N. International Law Commission (ILC) itself, in the 2001 *Report* on its work on the international responsibility of a State, admitted the possibility of this happening, and of the beneficiary of a reparation being an individual and not the State. In the perception of Judge Cançado Trindade, the *cas d'espèce*, in clarifying this point in respect of reparations, bears witness of the reassuring historical process, presently in course, of the *humanization* of international law,—as he has been pointing out and supporting since the nineties.

15. In circumstances such as those of the present case *A. S. Diallo*, a strict inter-State approach to the State's compliance with the duty to provide reparation appears anachronistic and unsustainable. It has in fact been in the domain of international human rights protection,—Judge Cançado Trindade adds,—that reparations have been reckoned as comprising, in the light of the general principle of *neminem laedere*, the *restitutio in integrum* (reestablishment of the prior situation of the victim, whenever possible), in addition to the indemnizations, the rehabilitation, the satisfaction, and the guarantee of non-repetition of the acts or omissions in violation of human rights.

16. Contemporary doctrine,—he proceeds,—has identified the aforementioned distinct *forms* of reparation *from the perspective of the victims*, of their claims, needs and aspirations. It goes beyond solutions of private law, and the essentially patrimonial content (ensuing from civil law analogies) of traditional doctrine. Judge Cançado Trindade further sustains that reparations are to be constantly reassessed as from the perspective of the integrality of the personality of the victims themselves, bearing in mind the fulfillment of their aspirations as human beings and the restoration of their dignity.

17. The 2005 U.N. Basic Principles and Guidelines on the Right to a Remedy and Reparations are also *victim-oriented*, having been preceded by a unique and innovative jurisprudential construction of the IACtHR on this subject-matter (in particular on the distinct forms of reparation), which took place largely in the years 1998-2004, and which has been attracting growing attention of expert writing in recent years. That jurisprudential construction of the IACtHR has, in its conceptualization, for the purposes of reparation, gone further than the 2005 U.N. Basic Principles and Guidelines, in fostering the expansion of the notion of victim, by encompassing as such the next of kin, also regarded as "direct victims" in their own right (given their intense suffering), without conditionalities (such as that of accordance with domestic law), in individualized as well as collective cases.

18. Judge Cançado Trindade next reviews in detail (part VII) the pioneering contribution of the case-law on reparations of both the IACtHR and ECtHR. He finds it reassuring that the ICJ takes their contribution into account in the present case *A. S. Diallo* (reparations), "given the common mission of contemporary international tribunals of securing the *realization of justice*" (para. 62). Furthermore, in the perspective of legal history, he stresses the importance of fundamental principle *neminem laedere* for reparation of moral damages inflicted upon individuals (part VIII). He points out that "consideration of moral damages inevitably turns attention to human suffering, proper to human beings rather than to States. In fact, States do not suffer; not seldom, they tend to inflict suffering upon human beings under their respective jurisdictions or elsewhere. The importance of moral damages became manifest in face of the need of protection of individuals" (para. 77).

19. He further observes the analogies with solutions proper to common law or to civil law *(droit civil)* have never appeared convincing or satisfactory to him, by focusing—for the purpose of reparation—on the relationship of the human person with material goods; he insists on the need to go beyond the short-minded patrimonial or financial approach, and to look also into the human person's aspirations, freedom and integrity. And he stresses the importance to reparations for moral damages, and the particular relevance of the *rehabilitation* of victims (part IX),—to be considered as from the integrality of the personality of the victims,—in the framework of *restorative* justice. The *realization of justice* (an imperative of *jus cogens*) is in itself a form of reparation (satisfaction) to the victims. He adds that *reparatio* does not put an end to the suffering ensuing from the human rights violations, but, in ceasing the effects of those breaches, it at least alleviates the suffering of the individual victims (as *titulaires* of the right to reparation), by removing the indifference and oblivion of the social *milieu*, and the impunity of the perpetrators.

20. In his concluding reflections (part X), Judge Cançado Trindade recalls the State obligations *vis-à-vis* the human person—individually or in groups (as in the *"solidarisme de la liberté"* of Léon Duguit, opposing abuses perpetrated under the guise of absolute State sovereignty), as well as the jusphilosophical contribution of juridical *"personalism"*, aiming at doing justice to the *individuality of the human person*, to her inner life and the need for transcendence on the basis of her own experience of life (as in the writings of Emmanuel Mounier and Gabriel Marcel).

21. He adds that such trends of humanist thinking, almost forgotten in our hectic days, can, in his view, still shed much light towards further development of reparations for moral damages done to the human person. Another lesson he extracts from the present case of *A. S. Diallo* (Guinea *versus* D.R. Congo), unprecedented in this Court's history, is that the determination of reparations for human rights breaches is not

a matter of legal technique only, as the incidence of *considerations of equity* fully demonstrates.

22. In sum,—Judge Cançado Trindade concludes,—the reasserted presence (and a central one) of the individual in the framework of the law of nations has much contributed to the more recent progressive development of international law in respect of reparations for damages ensuing from violations of human rights. In the *cas d'espèce*, where damage was done to an individual, the Court, in the *dispositif* of the present Judgment, fixes the amount of compensation for *non-material* as well as *material* damage "suffered by Mr. Diallo" (resolutory points (1) and (2)). The ultimate subject *(titulaire)* of the right to reparation and its beneficiary is Mr. A. S. Diallo, the individual who suffered the damages. The amounts of compensation have been determined by the Court to *his benefit*. This is, in the perception of Judge Cançado Trindade, the proper meaning of resolutory points (1) and (2) of the *dispositif* of the present Judgment, in combination with paragraph 57 of the reasoning of the Court.

Declaration of Judge Yusuf

1. In appending a declaration to the Judgment, Judge Yusuf expresses his disagreement with point three of the operative paragraph in which the Court rejects Guinea's claim for material injury "allegedly suffered by Mr. Diallo as a result of a loss of professional remuneration during his unlawful detentions and following his unlawful expulsion". He first observes that the Court reformulates to a "loss of professional remuneration" the material damage characterized in Guinea's Memorial as a "loss of earnings." In his assessment there is no legal or logical reason for this restrictive reformulation of Guinea's claim for compensation for material injury. He states that as a businessman, Mr. Diallo was not only remunerated for his managerial responsibilities but had overall responsibility, being the sole *associé*, for the income-generating activities of the companies. The detention of a businessman for such a long period of time did not only disturb his commercial and entrepreneurial activities, but had a direct effect on Mr. Diallo's personal earnings as a businessman and as the sole *associé* of the two companies. Thus, in Judge Yusuf's view, the reformulation by the Court does not constitute a proper qualification of the actual material injury suffered in this case, nor does it correspond to the context in which the damage was caused or the particular circumstances of the victim of the human rights violations recognized by the Court.

2. Secondly, Judge Yusuf addresses the conclusions reached by the Court on the lack of evidence on the amount of Mr. Diallo's pre-detention monthly earnings. While he acknowledges the Republic of Guinea's failure to produce satisfactory evidence of the sums claimed, he nevertheless argues that this lack of evidence cannot negate the existence of a causal link between the unlawful detentions and the material injury suffered. The existence of this injury and its causal link with the wrongful act can be ascertained through the determination of the extent to which it prevented the individual from engaging in his or her habitual income-generating activities. By focusing solely on the lack of reliable evidence relating to Mr. Diallo's monthly earnings, the Court lost sight of the actual injury caused by the unlawful detention of Mr. Diallo—i.e., the disruption of his income-generating activities and the fact that the detention prevented him from engaging in such activities.

3. Furthermore, he notes that the absence of reliable evidence or information on the earnings of the victims of unlawful acts by States has not deterred international courts, tribunals and commissions from awarding compensation on the basis of equitable considerations. Those courts and tribunals have adopted a flexible approach, based on equity, in assessing lost earnings where evidence of earnings was either insufficient or was not established to the satisfaction of the court. He observes that the Court failed to take this practice into consideration despite claiming to do so in paragraph 13 of the Judgment.

4. Finally, he finds it regrettable that the Court appears to overlook in this Judgment as well as in the previous one on the merits the fact that Mr. Diallo was the central figure and the sole *associé gérant* of two companies which were in reality unipersonal companies, though they were incorporated as companies with limited liability. Alluding to his joint dissenting opinion with Judge Al-Khasawneh, Judge Yusuf notes that the unlawful detentions of Mr. Diallo undermined his ability to manage the activities of his companies, to recover the debts owed to the companies by the Government of Zaire (DRC), and thus to generate the revenue from which his activities would be compensated. This prevention had a direct impact on his ability to continue to receive an income from his businesses which suffered from further perturbation and interruption of their activities. It is the causal link between the unlawful detentions and the material damage suffered by Mr. Diallo during this period in the form of loss of earnings that should have been used by the Court to determine compensation on grounds of equity.

Declaration of Judge Greenwood

Judge Greenwood considers that the comparatively low amount awarded to Guinea, relative to the sums claimed, is justified in light of the absence of any evidence to sustain the claims for material damage and the fact that the Court, in its Judgments in 2007 and 2010, had excluded damage to the companies (Africom Zaire and Africontainers) from the scope of the case. With regard to the compensation for moral damage, equitable principles had to be applied in a consistent and coherent manner, which required that the amount awarded should be just, not only by reference to the facts of each particular case, but by comparison with other cases. For this reason, Judge Greenwood would have awarded a smaller sum for moral damage in the present case.

Separate opinion of Judge *ad hoc* Mahiou

The Court has seldom had occasion to rule on the issue of compensation, and in particular to determine its amount. In the celebrated case concerning the *Factory at Chorzów* it identified the principles which should govern reparation of an injury resulting from an illegal act of a State, and it ruled on the amount of reparation in the *Corfu Channel* case. The rules governing compensation are now quite firmly established in international law, as a result of the decisions of various inter-

national courts and tribunals and of the work of the International Law Commission.

Applying those rules to the present case, I have agreed with the Court's reasoning and solution regarding Guinea's four heads of claim concerning, respectively, non-material or moral injury, loss of personal property, loss of assets of the companies and the fixing of a time-limit for the payment of compensation, together with a rate of interest to be applied with effect from a specific date. On the other hand, I have been unable to subscribe to the Court's overall reasoning, nor *a fortiori* to its solution of outright dismissal, regarding Guinea's claims concerning the professional remuneration due to Mr. Diallo, and, to a lesser extent, the procedural costs.

Separate opinion of Judge *ad hoc* Mampuya

Judge *ad hoc* Mampuya largely supported the principal conclusions adopted by the Court in its Judgment, but was unable to agree with the majority on two points.

1. Excessive amount of the compensation for non-material or moral injury

The first disagreement concerns a simple matter of fact, relating not to the principle of compensation, which he fully accepts, but to the amount of the compensation which should be awarded to Guinea for the non-material or moral injury sustained by Mr. Diallo. In his reasoning, Judge *ad hoc* Mampuya develops a line of argument which, while addressing this issue of fact, relies on legal principles deriving both from jurisprudence and from doctrine. Thus, stating that the sum of US$85,000 awarded by the Court is too high, he refers in support of his argument to the practice of other courts and tribunals. This reference can be explained by the fact that, with the sole exception of the case concerning the *Corfu Channel ((United Kingdom* v. *Albania), Assessment of Amount of Compensation, Judgment, I.C.J. Reports 1949*, pp. 244 *et seq.)*, the Court has very little experience in determining compensation; in contrast, certain other international courts and tribunals, in particular the regional human rights courts (the European Court and the Inter-American Court), as well as joint claims tribunals (such as the Iran-United States Claims Tribunal and the United States/Mexico General Claims Commission) and international arbitral bodies, have extensive and rich experience in this area, experience which the Court has itself readily agreed to draw upon. Among the principles which emerge from this jurisprudence is the undeniable principle that, while the primary aim of compensation is to remedy as fully as possible all forms of loss suffered as a result of an internationally wrongful act, compensation is in no way intended to punish the responsible State and should not have an expressive or exemplary character. This approach was adopted by the ILC in its very first reports on State responsibility, citing the doctrinal principle laid down, *inter alia*, by Jiménez de Aréchaga: "punitive or exemplary damages . . . are incompatible with the basic idea underlying the duty of reparation" (E. Jiménez de Aréchaga, "International Responsibility", in *Manual of Public International Law*, London, Macmillan, 1968, cited in UN doc. A/CN.4/425 & Corr.1 and Add.1 & Corr.1, *Second Report on State Responsibility*, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur, 1989, para. 24). It is incorporated in the ILC's Draft Articles on State Responsibility, first in the commentary on Article 36, relating to compensation, and then in Article 37, paragraph 3, in respect of satisfaction. This principle, which may be described as the principle of proportionality between the reparation and the injury, is well established: the extent of the injury should be the measure of the level or amount of compensation, thus ensuring that the latter simply represents fair compensation for the injury suffered; it even appears in the case law of the Inter-American Court of Human Rights, which is, however, extremely favourable to the compensation claims of victims of human rights violations. Notwithstanding its necessarily dissuasive role, compensation must correspond to the principle of full reparation and should not, therefore, represent anything more than an amount of compensation reflecting not only as fully as possible, but at the same time as precisely as possible, the scale of the injury sustained.

Furthermore, Judge *ad hoc* Mampuya recognizes that the amount of compensation awarded may also depend on whether or not there were particular circumstances accompanying the State's internationally wrongful act: the conditions of detention or expulsion, for example, solitary confinement, torture, the duration of the wrongful or arbitrary detention, ill-treatment, etc., might explain a higher or lower award. In the present case, however, the Court recognized that Mr. Diallo did not suffer inhuman or degrading treatment during his detentions, while recalling the specific circumstances—which it does not expressly describe as aggravating—of the latter's detentions and expulsion, as set out in its Judgment on the merits (Judgment of 30 November 2010, paras. 74-84, 89).

This is why, in general, the compensation awarded for non-material injury is relatively modest, in keeping with the nature of the injury suffered, especially if that injury has had no proven significant somatic effects (frequently such awards are between €8,000 and €50,000; on the other hand, lower sums have sometimes been awarded in respect of more serious situations). Accordingly, Judge *ad hoc* Mampuya believes that "with regard to the circumstances of this case", the sum of US$85,000 is grossly excessive, and does not appear to him to be "appropriate".

2. The compensation for the material injury resulting from the loss of personal property has no legal basis

The second point with which the judge disagrees relates to a question of law concerning the absence of proof and legal basis in respect of the compensation awarded for the material injury caused by the loss of Mr. Diallo's personal property. He disagrees because there is an important legal question of principle at issue: that of evidence in relation to reparation, even though the US$10,000 compensation awarded is modest. Here, too, with regard to the fundamental question of evidence, the Court's source of reference, as in the previous point, is its Judgment in the *Corfu Channel* case (the only judgment it has delivered on the question of determining compensation), and the jurisprudence since followed by the other international courts.

In his opinion, Judge *ad hoc* Mampuya first sets out the current rules adhered to in the jurisprudence and doctrine to date, and which the Court disregarded when it determined the

reparation due on account of the material injury allegedly suffered by Mr. Diallo. Having set out those rules, the judge then considers the present case, concluding in particular that the Court failed to adhere scrupulously to the traditional requirements governing evidence. The point of law at issue here is that of the burden of proof: proof of the existence of the injury, which is the effective basis and measure of compensation, and proof of the causal link between the injury and the wrongful conduct of the responsible State.

In respect of the existence of the injury, it is indeed well established that "[a]s a general rule, it is for the party which alleges a fact in support of its claims to prove the existence of that fact", as the Court recalled in its Judgment on the merits in the present case (Judgment on the merits of 30 November 2010, para. 54). This is why judges and arbitrators have always demanded a higher standard of proof to substantiate allegations of material injury, requiring the applicant to support its allegations with "sufficient proof" or "proof to the satisfaction of the Court". Judge *ad hoc* Mampuya bases this view on jurisprudence which has been well established by the European Court of Human Rights, the Inter-American Court of Human Rights, the Iran-United States Claims Tribunal and a number of arbitral awards. With respect to material injury, although the courts have occasionally based reparation on considerations of equity, they have not done so because there were doubts as to the existence of the injury itself, but simply for the purpose of estimating the value required as basis for the calculation of compensation.

Compensation also depends on evidence of the causal link between the injury and the wrongful conduct of the responsible State: the alleged injury must have a direct causal link to the alleged misconduct; this has always been required by the courts.

In the present case, a problem is posed by certain property which Mr. Diallo claims has been lost, but whose very existence is not substantiated by the inventory drawn up in his apartment by the Guinean Embassy. The Court indeed appears to take the view that there is no clearly established causal link that would support the conclusion that the alleged loss of that property "was caused by the DRC's unlawful conduct" (para. 32), since "Guinea has failed to prove the extent of the loss of Mr. Diallo's personal property listed on the inventory and the extent to which any such loss was caused by the DRC's unlawful conduct" (para. 31); therefore, it should have rejected this head of claim.

Paradoxically, however, having concluded that there is no "definite" proof, the Court nevertheless decides to award an amount of compensation which is no longer justified by the loss of the property in question, or in terms of the responsibility of the Congolese Government. The compensation awarded thus lacks any legal basis.

Judge *ad hoc* Mampuya thus concludes his opinion by stating that his disagreement with the majority is fully justified, because the latter failed to assess the situation correctly in holding that it was proper to award compensation for the loss of physical property, whose existence and value had not been demonstrated, or indeed its loss, or the DRC's responsibility for that loss.

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

Judgment of 20 July 2012

On 20 July 2012, the International Court of Justice rendered its Judgment in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*.

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; Judges *ad hoc* Sur, Kirsch; Registrar Couvreur.

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The operative paragraph (para. 122) of the Judgment reads as follows:

" . . .

The Court,

(1) Unanimously,

Finds that it has jurisdiction to entertain the dispute between the Parties concerning the interpretation and application of Article 6, paragraph 2, and Article 7, paragraph 1, of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, which the Kingdom of Belgium submitted to the Court in its Application filed in the Registry on 19 February 2009;

(2) By fourteen votes to two,

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

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

Against: *Judge* Abraham; *Judge* ad hoc Sur;

(3) By fourteen votes to two,

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

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

Against: *Judge* Xue; *Judge* ad hoc Sur;

(4) By fourteen votes to two,

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

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

Against: *Judges* Yusuf, Xue;

(5) By fourteen votes to two,

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

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

Against: *Judge* Xue; *Judge* ad hoc Sur;

(6) Unanimously,

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

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

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The Court begins by setting out the history of the proceedings (paras. 1-14). It recalls that, on 19 February 2009, Belgium filed in the Registry of the Court an Application instituting proceedings against Senegal in respect of a dispute concerning "Senegal's compliance with its obligation to prosecute Mr. H[issène] Habré[, former President of the Republic of Chad, for acts including crimes of torture and crimes against humanity which are alleged against him as perpetrator, co-perpetrator or accomplice,] or to extradite him to Belgium for the purposes of criminal proceedings". In its Application, Belgium based its claims on the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading

Treatment or Punishment of 10 December 1984 (hereinafter "the Convention against Torture" or the "Convention"), as well as on customary international law. The Court notes that in the said Application, Belgium invoked, as the basis for the jurisdiction of the Court, Article 30, paragraph 1, of the Convention against Torture and the declarations made under Article 36, paragraph 2, of the Statute of the Court, by Belgium on 17 June 1958 and by Senegal on 2 December 1985.

On 19 February 2009, in order to protect its rights, Belgium also filed a Request for the indication of provisional measures, on which the Court made an Order on 28 May 2009. In that Order, 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 under Article 41 of the Statute to indicate provisional measures.

I. Historical and factual background
(paras. 15-41)

The Court recalls that, after taking power on 7 June 1982 at the head of a rebellion, Mr. Hissène Habré was President of the Republic of Chad for eight years, during which time large-scale violations of human rights were allegedly committed, including arrests of actual or presumed political opponents, detentions without trial or under inhumane conditions, mistreatment, torture, extrajudicial executions and enforced disappearances. Overthrown on 1 December 1990, Mr. Habré requested political asylum from the Senegalese Government, a request which was granted; he has been living in Dakar ever since.

From 25 January 2000 onwards, a number of proceedings relating to crimes alleged to have been committed during Mr. Habré's presidency were instituted before both Senegalese and Belgian courts by Chadian nationals, Belgian nationals of Chadian origin and persons with dual Belgian-Chadian nationality, together with an association of victims. The issue of the institution of proceedings against Mr. Habré was also referred by Chadian nationals to the United Nations Committee against Torture and the African Court on Human and People's Rights.

On 19 September 2005, the Belgian investigating judge issued an international warrant in absentia for the arrest of Mr. Habré, indicted as the perpetrator or co-perpetrator, inter alia, of serious violations of international humanitarian law, torture, genocide, crimes against humanity and war crimes, on the basis of which Belgium requested the extradition of Mr. Habré from Senegal and Interpol circulated a "red notice" serving as a request for provisional arrest with a view to extradition.

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

The day after the delivery of the said judgment, Senegal referred to the African Union the issue of the institution of proceedings against Mr. Habré. In July 2006, the Union's Assembly of Heads of State and Government *inter alia* "decide[d] to consider the Hissène Habré case as falling within the competence of the African Union, . . . mandate[d] the Republic of Senegal to prosecute and ensure that Hissène Habré is tried, on behalf of Africa, by a competent Senegalese court with guarantees for fair trial" and "mandate[d] the Chairperson of the [African] Union, in consultation with the Chairperson of the Commission [of the Union], to provide Senegal with the necessary assistance for the effective conduct of the trial".

By Note Verbale of 11 January 2006, Belgium, referring to the ongoing negotiation procedure provided for in Article 30 of the Convention against Torture and taking note of the referral of the "Hissène Habré case" to the African Union, stated that it interpreted the said Convention, and more specifically the obligation aut dedere aut judicare (that is to say, "to prosecute or extradite") provided for in Article 7 thereof, "as imposing obligations only on a State, in this case, in the context of the extradition request of Mr. Hissène Habré, the Republic of Senegal". Belgium further asked Senegal to "kindly notify it of its final decision to grant or refuse the . . . extradition application" in respect of Mr. Habré. According to Belgium, Senegal did not reply to this Note. By Note Verbale of 9 March 2006, Belgium again referred to the ongoing negotiation procedure provided for in Article 30 and explained that it interpreted Article 4, Article 5, paragraphs (1) (c) and (2), Article 7, paragraph (1), Article 8 paragraphs (1), (2) and (4), and Article 9, paragraph (1), of the Convention as "establishing the obligation, for a State in whose territory a person alleged to have committed any offence referred to in Article 4 of the Convention is found, to extradite him if it does not prosecute him for the offences mentioned in that Article". Consequently, Belgium asked Senegal to "be so kind as to inform it as to whether its decision to refer the Hissène Habré case to the African Union [was] to be interpreted as meaning that the Senegalese authorities no longer intend[ed] to extradite him to Belgium or to have him judged by their own Courts".

By Note Verbale dated 4 May 2006, Belgium, having noted the absence of an official response from the Senegalese authorities to its earlier Notes and communications, again made it clear that it interpreted Article 7 of the Convention against Torture as requiring the State on whose territory the alleged offender is located to extradite him if it does not prosecute him, and stated that the "decision to refer the Hissène Habré case to the African Union" could not relieve Senegal of its obligation to either judge or extradite the person accused of these offences in accordance with the relevant articles of the Convention. It added that an unresolved dispute regarding this interpretation would lead to recourse to the arbitration procedure provided for in Article 30 of the Convention. By Note Verbale of 9 May 2006, Senegal explained that its Notes Verbales of 7 and 23 December 2005 constituted a response to Belgium's request for extradition. It stated that, by referring the case to the African Union, Senegal, in order not to create a legal impasse, was acting in accordance with the spirit of

the "aut dedere aut punire" principle. Finally, it took note of "the possibility [of] recourse to the arbitration procedure provided for in Article 30 of the Convention". In a Note Verbale of 20 June 2006, which Senegal claims not to have received, Belgium "note[d] that the attempted negotiation with Senegal, which started in November 2005, ha[d] not succeeded" and accordingly asked Senegal to submit the dispute to arbitration "under conditions to be agreed mutually", in accordance with Article 30 of the Convention. Furthermore, according to a report of the Belgian Embassy in Dakar following a meeting held on 21 June 2006 between the Secretary-General of the Senegalese Ministry of Foreign Affairs and the Belgian Ambassador, the latter expressly invited Senegal to adopt a clear position on the request to submit the matter to arbitration. According to the same report, the Senegalese authorities took note of the Belgian request for arbitration and the Belgian Ambassador drew their attention to the fact that the six month time-limit under Article 30 began to run from that point.

The Court further notes that the United Nations Committee against Torture found, in a decision of 17 May 2006, that Senegal had not adopted such "measures as may be necessary" to establish its jurisdiction over the crimes listed in the Convention, in violation of Article 5, paragraph 2, of the latter. The Committee also stated that Senegal had failed to perform its obligations under Article 7, paragraph 1, of the Convention, to submit the case concerning Mr. Habré to its competent authorities for the purpose of prosecution or, in the alternative, since a request for extradition had been made by Belgium, to comply with that request.

The Court then observes that, in 2007, Senegal implemented a number of legislative reforms in order to bring its domestic law into conformity with Article 5, paragraph 2, of the Convention against Torture. The new Articles 431-1 to 431-5 of its Penal Code defined and formally proscribed the crime of genocide, crimes against humanity, war crimes and other violations of international humanitarian law. In addition, under the terms of the new Article 431-6 of the Penal Code, any individual could "be tried or sentenced for acts or omissions . . . , which at the time and place where they were committed, were regarded as a criminal offence according to the general principles of law recognized by the community of nations, whether or not they constituted a legal transgression in force at that time and in that place". Furthermore, Article 669 of the Senegalese Code of Criminal Procedure was amended to read as follows: "Any foreigner who, outside the territory of the Republic, has been accused of being the perpetrator of or accomplice to one of the crimes referred to in Articles 431-1 to 431-5 of the Penal Code . . . may be prosecuted and tried according to the provisions of Senegalese laws or laws applicable in Senegal, if he is under the jurisdiction of Senegal or if a victim is resident in the territory of the Republic of Senegal, or if the Government obtains his extradition." A new Article 664*bis* was also incorporated into the Code of Criminal Procedure, according to which "[t]he national courts shall have jurisdiction over all criminal offences, punishable under Senegalese law, that are committed outside the territory of the Republic by a national or a foreigner, if the victim is of Senegalese nationality at the time the acts are committed".

Senegal informed Belgium of these legislative reforms by Notes Verbales dated 20 and 21 February 2007. In its Note Verbale of 20 February, Senegal also recalled that the Assembly of the African Union, during its eighth ordinary session held on 29 and 30 January 2007, had "[a]ppeal[ed] to Member States [of the Union], . . . international partners and the entire international community to mobilize all the resources, especially financial resources, required for the preparation and smooth conduct of the trial [of Mr. Habré]". In its Note Verbale of 21 February, Senegal stated that "the principle of non-retroactivity, although recognized by Senegalese law[,] does not block the judgment or sentencing of any individual for acts or omissions which, at the time they were committed, were considered criminal under the general principles of law recognized by all States". After having indicated that it had established "a working group charged with producing the proposals necessary to define the conditions and procedures suitable for prosecuting and judging the former President of Chad, on behalf of Africa, with the guarantees of a just and fair trial", Senegal stated that the said trial "require[d] substantial funds which Senegal cannot mobilize without the assistance of the [i]nternational community".

By Note Verbale dated 8 May 2007, Belgium recalled that it had informed Senegal, in a Note Verbale of 20 June 2006, "of its wish to constitute an arbitral tribunal to resolve th[e] difference of opinion in the absence of finding a solution by means of negotiation as stipulated by Article 30 of the Convention [against Torture]". It noted that "it ha[d] received no response from the Republic of Senegal [to its] proposal of arbitration" and reserved its rights on the basis of the above-mentioned Article 30. It took note of Senegal's new legislative provisions and enquired whether those provisions would allow Mr. Habré to be tried in Senegal and, if so, within what time frame. Finally, Belgium made Senegal an offer of judicial co-operation, which envisaged that, in response to a letter rogatory from the competent Senegalese authorities, Belgium would transmit to Senegal a copy of the Belgian investigation file against Mr. Habré. By Note Verbale of 5 October 2007, Senegal informed Belgium of its decision to organize the trial of Mr. Habré and invited Belgium to a meeting of potential donors, with a view to financing that trial. Belgium reiterated its offer of judicial co-operation by Notes Verbales of 2 December 2008, 23 June 2009, 14 October 2009, 23 February 2010, 28 June 2010, 5 September 2011 and 17 January 2012. By Notes Verbales of 29 July 2009, 14 September 2009, 30 April 2010 and 15 June 2010, Senegal welcomed the proposal of judicial co-operation, stated that it had appointed investigating judges and expressed its willingness to accept the offer as soon as the forthcoming Donors' Round Table had taken place. The Belgian authorities received no letter rogatory to that end from the Senegalese judicial authorities.

In 2008, Senegal amended Article 9 of its Constitution in order to provide for an exception to the principle of non-retroactivity of its criminal laws, making it possible to prosecute, try and punish "any person for any act or omission which, at the time when it was committed, was defined as criminal under the rules of international law concerning acts of genocide, crimes against humanity and war crimes".

As indicated above, on 19 February 2009, Belgium filed in the Registry the Application instituting the present proceedings before the Court. On 8 April 2009, during the hearings relating to the Request for the indication of provisional measures submitted by Belgium—at the end of which it asked the Court "to indicate, pending a final judgment on the merits," provisional measures requiring the Respondent to take "all the steps within its power to keep Mr. H. Habré under the control and surveillance of the judicial authorities of Senegal so that the rules of international law with which Belgium requests compliance may be correctly applied"—, Senegal solemnly declared before the Court that it would not allow Mr. Habré to leave its territory while the case was pending. During the same hearings, it asserted that "[t]he only impediment . . . to the opening of Mr. Hissène Habré's trial in Senegal [was] a financial one" and that Senegal "agreed to try Mr. Habré but at the very outset told the African Union that it would be unable to bear the costs of the trial by itself".

The Court goes on to observe that, by a judgment of 18 November 2010, the Court of Justice of the Economic Community of West African States (hereinafter the "ECOWAS Court of Justice") ruled on an application filed on 6 October 2008, in which Mr. Habré requested the court to find that his human rights would be violated by Senegal if proceedings were instituted against him. Having observed *inter alia* that evidence existed pointing to potential violations of Mr. Habré's human rights as a result of Senegal's constitutional and legislative reforms, that Court held that Senegal should respect the rulings handed down by its national courts and, in particular, abide by the principle of *res judicata*, and, accordingly, ordered it to comply with the absolute principle of non-retroactivity. It further found that the mandate which Senegal received from the African Union was in fact to devise and propose all the necessary arrangements for the prosecution and trial of Mr. Habré to take place, within the strict framework of special *ad hoc* international proceedings.

Following the delivery of that judgment by the ECOWAS Court of Justice, in January 2011 the Assembly of African Union Heads of State and Government "request[ed] the Commission to undertake consultations with the Government of Senegal in order to finalize the modalities for the expeditious trial of Hissène Habré through a special tribunal with an international character consistent with the ECOWAS Court of Justice Decision". At its seventeenth session, held in July 2011, the Assembly "confirm[ed] the mandate given to Senegal to try Hissène Habré on behalf of Africa" and "urge[d] [the latter] to carry out its legal responsibility in accordance with the United Nations Convention against Torture[,] the decision of the United Nations . . . Committee against Torture[,] as well as the said mandate to put Hissène Habré on trial expeditiously or extradite him to any other country willing to put him on trial".

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

On 15 March 2011, 5 September 2011 and 17 January 2012, Belgium addressed to Senegal three further requests for the extradition of Mr. Habré. The first two requests were declared inadmissible; the third is still pending before the Senegalese courts.

At its eighteenth session, held in January 2012, the Assembly of the Heads of State and Government of the African Union observed that the Dakar Court of Appeal had not yet taken a decision on Belgium's fourth request for extradition. It noted that Rwanda was prepared to organize Mr. Habré's trial and "request[ed] the Commission [of the African Union] to continue consultations with partner countries and institutions and the Republic of Senegal[,] and subsequently with the Republic of Rwanda[,] with a view to ensuring the expeditious trial of Hissène Habré and to consider the practical modalities as well as the legal and financial implications of the trial".

II. Jurisdiction of the Court
(paras. 42-63)

Having recalled the two bases of jurisdiction relied on by Belgium—namely Article 30, paragraph 1, of the Convention against Torture and the declarations made by the Parties under Article 36, paragraph 2, of the Statute of the Court—, the Court notes that Senegal contests the existence of its jurisdiction on either basis, maintaining that the conditions set forth in the relevant instruments have not been met and, in the first place, that there is no dispute between the Parties.

A. The existence of a dispute
(paras. 44-55)

The Court recalls that, in the claims included in its Application, Belgium requested the Court to adjudge and declare that "the Republic of Senegal is obliged to bring criminal proceedings against Mr. H. Habré for acts including crimes of torture and crimes against humanity which are alleged against him as perpetrator, co-perpetrator or accomplice; failing the prosecution of Mr. H. Habré, the Republic of Senegal is obliged to extradite him to the Kingdom of Belgium so that he can answer for these crimes before the Belgian courts". In its final submissions, Belgium asked the Court to find that Senegal breached its obligations under Article 5, paragraph 2, of the Convention against Torture, and that, by failing to take action in relation to Mr. Habré's alleged crimes, Senegal has breached and continues to breach its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of that instrument and under certain other rules of international law. The Court notes that, for its part, Senegal submits that there is no dispute between the Parties with regard to the interpretation or application of the Convention against Torture or any other relevant rule of international law and that, as a consequence, the Court lacks jurisdiction in the present case. The Court observes, therefore, that the Parties have thus presented radically divergent views about the existence of a dispute between them and, if any dispute exists, its subject-matter. Given that the existence of a dispute is a condition of its jurisdiction under both bases of jurisdiction invoked by Belgium, the Court begins by examining this issue.

Relying on its earlier jurisprudence, the Court recalls in this connection that, in order to establish whether a dispute

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

The Court begins by examining Belgium's first request that the Court should declare that Senegal breached Article 5, paragraph 2, of the Convention against Torture, which requires a State party to the Convention to "take such measures as may be necessary to establish its jurisdiction" over acts of torture when the alleged offender is "present in any territory under its jurisdiction" and that State does not extradite him to one of the States referred to in paragraph 1 of the same article. The Court notes that, while Belgium contends that the fact that Senegal did not comply with its obligation under Article 5, paragraph 2, "in a timely manner" produced negative consequences concerning the implementation of some other obligations under the Convention, it acknowledges, however, that Senegal has finally complied with its obligation through, on the one hand, its 2007 legislative reforms (which extend the jurisdiction of Senegalese courts over certain offences, including torture, war crimes, crimes against humanity and the crime of genocide allegedly committed by a foreign national outside Senegal's territory, irrespective of the nationality of the victim) and, on the other, its 2008 Constitutional amendment (which now precludes the principle of non-retroactivity in criminal matters from preventing the prosecution of an individual for acts which were crimes under international law at the time when they were committed).

The Court considers that any dispute that may have existed between the Parties with regard to the interpretation or application of Article 5, paragraph 2, of the Convention had ended by the time the Application was filed. It concludes, therefore, that it lacks jurisdiction to decide on Belgium's claim relating to the obligation deriving from that treaty provision. It states, however, that this does not prevent the Court from considering the consequences that Senegal's conduct in relation to the measures required by this provision may have had on its compliance with certain other obligations under the Convention, should the Court have jurisdiction in that regard.

The Court next considers Belgium's contention that Senegal breached two other treaty obligations, which respectively require a State party to the Convention, when a person who has allegedly committed an act of torture is found on its territory, to hold "a preliminary inquiry into the facts" (Art. 6, para. 2) and, "if it does not extradite him", to "submit the case to its competent authorities for the purpose of prosecution" (Art. 7, para. 1). On this point, the Court notes that Senegal maintains that there is no dispute with regard to the interpretation or application of these provisions, not only because there is no dispute between the Parties concerning the existence and scope of the obligations contained therein, but also because it has met those obligations. On the basis of the Parties' diplomatic exchanges, the Court considers that Belgium's claims founded on the interpretation and application of Articles 6, paragraph 2, and 7, paragraph 1, of the Convention were positively opposed by Senegal; it concludes, therefore, that a dispute existed at the time of the filing of the Application and notes that this dispute still exists.

The Court observes that the Application of Belgium also includes a request that the Court declare that Senegal breached an obligation under customary international law to "bring criminal proceedings against Mr. H. Habré" for crimes against humanity allegedly committed by him; Belgium later extended this request to cover war crimes and genocide, both in its Memorial and at the hearings. On this point, Senegal also contends that no dispute has arisen between the Parties.

The Court notes that, while it is the case that the Belgian international arrest warrant in respect of Mr. Habré—transmitted to Senegal with a request for extradition on 22 September 2005—referred to violations of international humanitarian law, torture, genocide, crimes against humanity, war crimes, murder and other crimes, neither document stated or implied that Senegal had an obligation under international law to exercise its jurisdiction over those crimes if it did not extradite Mr. Habré. In terms of the Court's jurisdiction, what matters is whether, on the date when the Application was filed, a dispute existed between the Parties regarding the obligation for Senegal, under customary international law, to take measures in respect of the above-mentioned crimes attributed to Mr. Habré. In the light of the diplomatic exchanges between the Parties, the Court considers that such a dispute did not exist on that date. The only obligations referred to in the diplomatic correspondence between the Parties are those under the Convention against Torture. The Court considers that, under those circumstances, there was no reason for Senegal to address at all in its relations with Belgium the issue of the prosecution of alleged crimes of Mr. Habré under customary international law. The Court states that the facts which constituted those alleged crimes may have been closely connected to the alleged acts of torture. However, the issue whether there exists an obligation for a State to prosecute crimes under customary international law that were allegedly committed by a foreign national abroad is clearly distinct from any question of compliance with that State's obligations under the Convention against Torture and raises quite different legal problems.

The Court concludes that, at the time of the filing of the Application, the dispute between the Parties did not relate to breaches of obligations under customary international law and that it thus has no jurisdiction to decide on Belgium's claims related thereto. It is, therefore, only with regard to the dispute concerning the interpretation and application of Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention against Torture that the Court will have to determine whether there exists a legal basis of jurisdiction.

B. Other conditions for jurisdiction
(paras. 56-63)

The Court next turns to the other conditions which should be met for it to have jurisdiction under Article 30, paragraph 1, of the Convention against Torture, under the terms of which: "Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court." These conditions are that the dispute cannot be settled through negotiation and that, after a request for arbitration has been made by one of the parties, they have been unable to agree on the organization of the arbitration within six months from that request.

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

The Court notes that, while Belgium expressly stated that the numerous exchanges of correspondence and various meetings which were held between the Parties between 11 January 2006 and 21 June 2006 fell within the framework of the negotiating process under Article 30, paragraph 1, of the Convention against Torture, Senegal did not object to the characterization by Belgium of the diplomatic exchanges as negotiations. In view of Senegal's position that, even though it did not agree on extradition and had difficulties in proceeding towards prosecution, it was nevertheless complying with its obligations under the Convention, negotiations did not make any progress towards resolving the dispute. Having noted that this divergence of the Parties' views persisted until the oral phase, the Court concludes that the condition set forth in Article 30, paragraph 1, of the Convention that the dispute cannot be settled by negotiation has been met.

With regard to the submission to arbitration of the dispute on the interpretation of Article 7 of the Convention against Torture, a Note Verbale of the Belgian Ministry of Foreign Affairs of 4 May 2006 observed that "[a]n unresolved dispute regarding this interpretation would lead to recourse to the arbitration procedure provided for in Article 30 of the Convention against Torture". In a Note Verbale of 9 May 2006 the Ambassador of Senegal in Brussels responded that: "As to the possibility of Belgium having recourse to the arbitration procedure provided for in Article 30 of the Convention against Torture, the Embassy can only take note of this, restating the commitment of Senegal to the excellent relationship between the two countries in terms of cooperation and the combating of impunity." Having subsequently made a direct request to resort to arbitration in a Note Verbale of 20 June 2006, Belgium remarked, in that Note, that "the attempted negotiation with Senegal, which started in November 2005, ha[d] not succeeded" and that Belgium, "in accordance with Article 30, paragraph 1, of the Torture Convention, consequently ask[ed] Senegal to submit the dispute to arbitration under conditions to be agreed mutually".

The Court observes that Belgium reiterated this request for arbitration in its Note Verbale of 8 May 2007, to which Senegal failed to respond. Although Belgium did not make any detailed proposal for determining the issues to be submitted to arbitration and the organization of the arbitration proceedings, in the Court's view, this does not mean that the condition that "the Parties are unable to agree on the organization of the arbitration" has not been fulfilled, since a State may defer proposals concerning these aspects to the time when a positive response is given in principle to its request to settle the dispute by arbitration. The Court recalls that it has said, with regard to a similar treaty provision, that "the lack of agreement between the parties as to the organization of an arbitration cannot be presumed. The existence of such disagreement can follow only from a proposal for arbitration by the applicant, to which the respondent has made no answer or which it has expressed its intention not to accept." (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 41, para. 92). The Court concludes that the present case is one in which the inability of the Parties to agree on the organization of the arbitration results from the absence of any response on the part of the State to which the request for arbitration was addressed.

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

Having determined that the conditions set out in Article 30, paragraph 1, of the Convention against Torture have been met, the Court concludes that it has jurisdiction to entertain the dispute between the Parties concerning the interpretation and application of Article 6, paragraph 2, and Article 7, paragraph 1, of that instrument. Having reached this conclusion, the Court does not find it necessary to consider whether its jurisdiction also exists with regard to the same dispute on the basis of the declarations made by the Parties under Article 36, paragraph 2, of its Statute.

III. Admissibility of Belgium's claims
(paras. 64-70)

The Court notes the divergence of views between the Parties concerning the standing of Belgium, which based its claims not only on its status as a party to the Convention, but also on the existence of a special interest that would distinguish Belgium from the other parties to the Convention and give it a specific entitlement in the case of Mr. Habré.

Relying on the object and purpose of the Convention, which is "to make more effective the struggle against torture . . . throughout the world", the Court finds that the States parties to the Convention have a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity, regardless of the nationality of the offender or the victims, or of the place where the alleged offences occurred. The Court considers that all the other States parties have a common interest in compliance with these obligations by the State in whose territory the alleged offender is present, that common interest implying that the obligations in question are owed by any State party to all the other States parties to the Convention. It follows that all the States parties "have a legal interest" in the protection of the rights involved (Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Judgment, I.C.J. Reports 1970, p. 32, para. 33) and that these obligations may be defined as "obligations erga omnes partes" in the sense that each State party has an interest in compliance with them in any given case.

The Court concludes that Belgium, as a State party to the Convention against Torture, has standing to invoke the responsibility of Senegal for the alleged breaches of its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention in the present proceedings. Therefore, the claims of Belgium based on these treaty provisions are admissible. In view of this admissibility, the Court considers that there is no need for it to pronounce on whether Belgium also has a special interest with respect to Senegal's compliance with the relevant provisions of the Convention in the case of Mr. Habré.

IV. The alleged violations of the Convention against Torture
(paras. 71-117)

The Court recalls that, while in its Application instituting proceedings, Belgium requested it to adjudge and declare that Senegal is obliged to bring criminal proceedings against Mr. Habré and, failing that, to extradite him to Belgium, in its final submissions, it requested the Court to adjudge and declare that Senegal breached and continues to breach its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of that Convention by failing to bring criminal proceedings against Mr. Habré, unless it extradites him. The Applicant also pointed out during the proceedings that the obligations deriving from those two treaty provisions and Article 5 are closely linked with each other in the context of achieving the object and purpose of the Convention, which is to make more effective the struggle against torture. Hence, incorporating the appropriate legislation into domestic law (Art. 5, para. 2) would allow the State in whose territory a suspect is present immediately to make a preliminary inquiry into the facts (Art. 6, para. 2), a necessary step in order to enable that State, with knowledge of the facts, to submit the case to its competent authorities for the purpose of prosecution (Art. 7, para. 1).

The Court notes that Senegal contests Belgium's allegations and considers that it has not breached any provision of the Convention against Torture. The Respondent contends that the Convention breaks down the *aut dedere aut judicare* obligation into a series of actions which a State should take and that the measures it has taken hitherto show that it has complied with its international commitments, which are, to a very large extent, left to the discretion of the State concerned. Having asserted that it has resolved not to extradite Mr. Habré, but to organize his trial and to try him, Senegal maintains that it adopted constitutional and legislative reforms in 2007-2008, in accordance with Article 5 of the Convention, to enable it to hold a fair and equitable trial of the alleged perpetrator of the crimes in question reasonably quickly. It further states that the measures it has taken to restrict the liberty of Mr. Habré, pursuant to Article 6 of the Convention, as well as other measures taken in preparation for Mr. Habré's trial, contemplated under the aegis of the African Union, must be regarded as constituting the first steps towards fulfilling the obligation to prosecute laid down in Article 7 of the Convention.

The Court asserts that, although it has no jurisdiction over the alleged violation of Article 5, paragraph 2, of the Convention mentioned earlier, it should be noted that the performance by the State of its obligation to establish the universal jurisdiction of its courts over the crime of torture (Art. 5, para. 2) is a necessary condition for enabling a preliminary inquiry (Art. 6, para. 2), and for submitting the case to its competent authorities for the purpose of prosecution (Art. 7, para. 1). The purpose of all these obligations is to enable proceedings to be brought against the suspect, in the absence of his extradition, and to achieve the object and purpose of the Convention, which is to make more effective the struggle against torture by avoiding impunity for the perpetrators of such acts.

The Court observes that the obligation for the State to criminalize torture and to establish its jurisdiction over it, which finds its equivalent in the provisions of many international conventions for the combating of international crimes, has to be implemented by the State concerned as soon as it is bound by the Convention. This obligation has in particular a preventive and deterrent character, since by equipping themselves with the necessary legal tools to prosecute this type of offence, the States parties ensure that their legal systems will operate to that effect and commit themselves to co-ordinating their efforts to eliminate any risk of impunity. In this connection, the Court considers that, by not adopting the necessary legislation until 2007, Senegal delayed the submission of the case to its competent authorities for the purpose of prosecution, to the extent that, on 4 July 2000 and 20 March 2001 respectively, the Dakar Court of Appeal and the Senegalese Court of Cassation were led to conclude that the Senegalese courts lacked jurisdiction to entertain proceedings against Mr. Habré, who had been indicted for crimes against humanity, acts of torture and barbarity, in the absence of appropriate legislation allowing such proceedings within the domestic

legal order. The Court concludes that the delay in the adoption of the required legislation necessarily affected Senegal's implementation of the obligations imposed on it by Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention. The Court, bearing in mind the link which exists between the different provisions of the Convention, then analyses the alleged breaches of Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention.

A. The alleged breach of the obligation laid down in Article 6, paragraph 2, of the Convention
(paras. 79-88)

Having recalled that, under the terms of Article 6, paragraph 2, of the Convention, the State in whose territory a person alleged to have committed acts of torture is present "shall immediately make a preliminary inquiry into the facts", the Court notes that, while Belgium considers that the obligation deriving from this provision is a procedural one—in the sense that the said State should take effective measures to gather evidence, if necessary through mutual judicial assistance, by addressing letters rogatory to countries likely to be able to assist it—, Senegal takes the view that it is simply an obligation of result, because the inquiry is aimed at establishing the facts, and does not necessarily lead to prosecution, since the prosecutor may, in the light of the results, consider that there are no grounds for such proceedings. In any event, Senegal claims to have fulfilled the said obligation.

In the opinion of the Court, the preliminary inquiry provided for in Article 6, paragraph 2, is intended, like any inquiry carried out by the competent authorities, to corroborate or not the suspicions regarding the person in question. That inquiry is conducted by those authorities which have the task of drawing up a case file and collecting facts and evidence; this may consist of documents or witness statements relating to the events at issue and to the suspect's possible involvement in the matter concerned. The Court considers that the co-operation of the Chadian authorities should have been sought in this instance, and that of any other State where complaints have been filed in relation to the case, so as to enable Senegal to fulfil its obligation to make a preliminary inquiry. The Court observes that Senegal has not included in the case file any material demonstrating that the latter has carried out such an inquiry in respect of Mr. Habré. It considers that it is not sufficient, as Senegal maintains, for a State party to the Convention to have adopted all the legislative measures required for its implementation; it must also exercise its jurisdiction over any act of torture which is at issue, starting by establishing the facts. The questioning at first appearance which the investigating judge at the *Tribunal régional hors classe* in Dakar conducted in order to establish Mr. Habré's identity and to inform him of the acts of which he was accused cannot be regarded as performance of the obligation laid down in Article 6, paragraph 2, as it did not involve any inquiry into the charges against Mr. Habré.

The Court notes that, while the choice of means for conducting the inquiry remains in the hands of the States parties, taking account of the case in question, Article 6, paragraph 2, of the Convention requires that steps must be taken as soon as the suspect is identified in the territory of the State, in order to conduct an investigation of that case. The establishment of the facts at issue, which is an essential stage in that process, has been imperative in the present case at least since the year 2000, when a complaint was filed in Senegal against Mr. Habré. Moreover, Senegal did not open an inquiry into the facts in 2008, when a further complaint against Mr. Habré was filed in Dakar after the legislative and constitutional amendments made in 2007 and 2008.

Since Senegal itself stated in 2010 before the ECOWAS Court of Justice that no proceedings were pending or prosecution ongoing against Mr. Habré in Senegalese courts, the Court concludes that Senegal has breached its obligation under Article 6, paragraph 2, of the Convention by not immediately initiating a preliminary inquiry as soon as its competent authorities had reason to suspect Mr. Habré, who was in their territory, of being responsible for acts of torture. The Court considers that that point was reached, at the latest, when the first complaint was filed against Mr. Habré in 2000.

B. The alleged breach of the obligation laid down in Article 7, paragraph 1, of the Convention
(paras. 89-117)

Having cited Article 7, paragraph 1, of the Convention, which provides: "[t]he State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in Article 4 is found shall in the cases contemplated in Article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution", the Court observes that the obligation to submit the case to the competent authorities for the purpose of prosecution (hereinafter the "obligation to prosecute"), which derives from this provision, was formulated in such a way as to leave it to those authorities to decide whether or not to initiate proceedings, thus respecting the independence of States parties' judicial systems. The authorities thus remain responsible for deciding on whether to initiate a prosecution, in the light of the evidence before them and the relevant rules of criminal procedure. In the present case, the Court is of the view that Belgium's claim relating to the application of Article 7, paragraph 1, raises a certain number of questions regarding the nature and meaning of the obligation contained therein and its temporal scope, as well as its implementation in the present case.

The nature and meaning of the obligation laid down in Article 7, paragraph 1
(paras. 92-95)

The Court clarifies the nature and meaning of the obligation to prosecute by indicating that Article 7, paragraph 1, requires the State in whose territory the suspect is present to submit the case to its competent authorities for the purpose of prosecution, irrespective of the existence of a prior request for the extradition of the suspect. That State is thus obliged to make a preliminary inquiry (Article 6, paragraph 2) immediately from the time that the suspect is present in its territory, it being understood that the obligation to submit the case to the competent authorities, under Article 7, paragraph 1, may or may not result in the institution of proceedings, in the light of the evidence before them, relating to the charges against the suspect. The Court states that if, however, the State in whose

territory the suspect is present has received a request for extradition in any of the cases envisaged in the provisions of the Convention, it can relieve itself of its obligation to prosecute by acceding to that request. The choice between extradition or submission for prosecution, pursuant to the Convention, does not mean that the two alternatives are to be given the same weight because, while extradition is an option offered to the State by the Convention, prosecution, on the other hand, is an international obligation laid down by the Convention, the violation of which is a wrongful act engaging the responsibility of the State.

The temporal scope of the obligation laid down in Article 7, paragraph 1
(paras. 96-105)

With respect to the question relating to the temporal application of Article 7, paragraph 1, of the Convention, according to the time when the offences are alleged to have been committed and the dates of entry into force of the Convention for Senegal (26 June 1987) and Belgium (25 June 1999), the Court, having found that there is no clear divergence between the Parties' views on the question, considers that the prohibition of torture is part of customary international law and it has become a peremptory norm *(jus cogens)*. That prohibition is grounded in a widespread international practice and on the *opinio juris* of States, taking account of the fact that it appears in numerous international instruments of universal application and has been introduced into the domestic law of almost all States, and that acts of torture are regularly denounced within national and international fora.

However, the Court states that, pursuant to the provisions of Article 28 of the Vienna Convention on the Law of Treaties, which reflects customary law on the matter of treaty interpretation, the obligation to prosecute the alleged perpetrators of acts of torture under the Convention applies only to facts having occurred after its entry into force for the State concerned. It thus notes that nothing in the Convention against Torture reveals an intention to require a State party to criminalize, under Article 4, acts of torture that took place prior to its entry into force for that State, or to establish its jurisdiction over such acts in accordance with Article 5. It follows that the obligation to prosecute does not apply to such acts. This was confirmed by the United Nations Committee against Torture in its decision of 23 November 1989 in the case of *O.R., M.M. and M.S.* v. *Argentina*, in which it stated that "'torture' for purposes of the Convention can only mean torture that occurs subsequent to the entry into force of the Convention".

The Court concludes that Senegal's obligation to prosecute pursuant to Article 7, paragraph 1, of the Convention does not apply to acts alleged to have been committed before the Convention entered into force for it on 26 June 1987. It notes however that, since the complaints against Mr. Habré include a number of serious offences allegedly committed after that date, Senegal is under an obligation to submit the allegations concerning those acts to its competent authorities for the purpose of prosecution. The Court further asserts that, although Senegal is not required under the Convention to institute proceedings concerning acts that were committed before 26 June 1987, nothing in that instrument prevents it from doing so.

With respect to the question concerning the effect of the date of entry into force of the Convention, for Belgium, on the scope of Senegal's obligation to prosecute, the Court observes a notable divergence between the Parties' views. While Belgium contends that Senegal was still bound by the obligation to prosecute Mr. Habré after Belgium had itself become party to the Convention, and that it was therefore entitled to invoke before the Court breaches of the Convention occurring after 25 July 1999, Senegal disputes Belgium's right to engage its responsibility for acts alleged to have occurred prior to that date, given that the obligation provided for in Article 7, paragraph 1, belongs, according to the Respondent, to "the category of divisible *erga omnes* obligations" and that only the injured State could call for its breach to be sanctioned. Senegal accordingly concludes that Belgium was not entitled to rely on the status of injured State in respect of acts prior to 25 July 1999 and could not seek retroactive application of the Convention.

The Court considers that Belgium has been entitled, with effect from 25 July 1999, the date when it became party to the Convention, to request the Court to rule on Senegal's compliance with its obligation under Article 7, paragraph 1 (the same conclusion also being valid in respect of Art. 6, para. 2). In the present case, the Court notes that Belgium invokes Senegal's responsibility for the latter's conduct starting in the year 2000, when a complaint was filed against Mr. Habré in Senegal.

Implementation of the obligation laid down in Article 7, paragraph 1
(paras. 106-117)

The Court recalls the respective positions of the Parties regarding the implementation of the obligation to prosecute. Belgium, while recognizing that the time frame for implementation of the said obligation depends on the circumstances of each case, and in particular on the evidence gathered, considers, in the first instance, that the State in whose territory the suspect is present cannot indefinitely delay performing the obligation incumbent upon it to submit the matter to its competent authorities for the purpose of prosecution, since procrastination on that State's part could violate both the rights of the victims and those of the accused. Belgium is also of the opinion that the financial difficulties invoked by Senegal cannot justify the fact that the latter has done nothing to conduct an inquiry and initiate proceedings. Finally, the Applicant alleges that Senegal's referral of the matter to the African Union in January 2006 does not exempt it from performing its obligations under the Convention, particularly since, at its Seventh session in July 2006, the Assembly of Heads of State and Government of the African Union mandated Senegal "to prosecute and ensure that Hissène Habré is tried, on behalf of Africa, by a competent Senegalese court with guarantees for fair trial". Belgium further contends that Senegal cannot rely on its domestic law, or the judgment of the ECOWAS Court of Justice of 18 November 2010, in order to avoid its international responsibility.

The Court notes that, for its part, Senegal has repeatedly affirmed, throughout the proceedings, its intention to com-

ply with its obligation under Article 7, paragraph 1, of the Convention, by taking the necessary measures to institute proceedings against Mr. Habré. Senegal contends that it only sought financial support in order to prepare the trial under favourable conditions, given its unique nature, having regard to the number of victims, the distance that witnesses would have to travel and the difficulty of gathering evidence and that, in referring the matter to the African Union, it was never its intention to relieve itself of its obligations. In respect of the judgment of the ECOWAS Court of Justice, Senegal observes that it is not a constraint of a domestic nature, asserting that, while bearing in mind its duty to comply with its conventional obligation, it is nonetheless subject to the authority of that court, which required it to make fundamental changes to the process begun in 2006, designed to result in a trial at the national level, and to mobilize effort in order to create an *ad hoc* tribunal of an international character, the establishment of which would be more cumbersome.

The Court considers that Senegal's duty to comply with its obligations under the Convention cannot be affected by the decision of the ECOWAS Court of Justice, that the financial difficulties raised by Senegal cannot justify the fact that it failed to initiate proceedings against Mr. Habré and that the referral of the matter to the African Union cannot justify Senegal's delays in complying with its obligations under the Convention. The Court observes that, under Article 27 of the Vienna Convention on the Law of Treaties, which reflects customary law, Senegal cannot justify its breach of the obligation provided for in Article 7, paragraph 1, of the Convention against Torture by invoking provisions of its internal law, in particular by invoking the decisions as to lack of jurisdiction rendered by its courts in 2000 and 2001, or the fact that it did not adopt the necessary legislation pursuant to Article 5, paragraph 2, of that Convention until 2007.

The Court notes that, while Article 7, paragraph 1, of the Convention does not contain any indication as to the time frame for performance of the obligation for which it provides, it is necessarily implicit in the text that it must be implemented within a reasonable time, in a manner compatible with the object and purpose of the Convention, which is why proceedings should be undertaken without delay. In the present case, the Court concludes that the obligation provided for in Article 7, paragraph 1, required Senegal to take all measures necessary for its implementation as soon as possible, in particular once the first complaint had been filed against Mr. Habré in 2000. Having failed to do so, Senegal has breached and remains in breach of its obligations under Article 7, paragraph 1, of the Convention.

V. Remedies
(paras. 118-121)

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

The Court recalls that Senegal's failure to adopt until 2007 the legislative measures necessary to institute proceedings on the basis of universal jurisdiction delayed the implementation of its other obligations under the Convention. The Court further recalls that Senegal was in breach of its obligation under Article 6, paragraph 2, of the Convention to make a preliminary inquiry into the crimes of torture alleged to have been committed by Mr. Habré, as well as of the obligation under Article 7, paragraph 1, to submit the case to its competent authorities for the purpose of prosecution. The purpose of these treaty provisions is to prevent alleged perpetrators of acts of torture from going unpunished, by ensuring that they cannot find refuge in any State party. The State in whose territory the suspect is present does indeed have the option of extraditing him to a country which has made such a request, but on the condition that it is to a State which has jurisdiction in some capacity, pursuant to Article 5 of the Convention, to prosecute and try him.

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

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Declaration of Judge Owada

Judge Owada states that, although he has voted in favour of the Judgment in support of all the points contained in its operative paragraph, he nevertheless entertains some divergence of views from the position taken by the Judgment with regard to the methodology of handling the case.

On the issue of jurisdiction, Judge Owada points out that, in their pleadings, both Parties focus upon the entire conduct of Senegal in the Habré affair. Belgium alleges that Senegal failed to act on its obligation to punish crimes under international humanitarian law alleged against Mr. Habré. Senegal claims that it has never repudiated its duty to try Mr. Habré and that no dispute exists between the Parties. According to Judge Owada, despite the Parties' positions, the Judgment chooses to focus on the specific issue of Article 5, paragraph 2, of the Convention, concluding that the Court lacks jurisdic-

tion to decide on Belgium's claim relating to Senegal's obligation under that Article.

In Judge Owada's opinion, the better approach would have been to interpret the subject-matter of the dispute to be one comprising in its scope the whole of the process of implementation by Senegal of the system of *aut dedere aut judicare* as contained in the Convention and to treat the whole of the Belgian claim as falling within the jurisdiction of the Court. In Judge Owada's view, the purpose of the Convention is to create a comprehensive legal framework for enforcing the principle of *aut dedere aut judicare*. Judge Owada states that the Convention is not looked at as a mere collection of independent international obligations, where each violation is assessed separately on its own and independently of the others.

Judge Owada adds that it would have been sufficient for the Court to make a declaratory finding that there had been a breach of the obligation under Article 5 of the Convention. This declaratory finding, in Judge Owada's view, should form the legal basis for the Court's subsequent ruling on the breach of obligations under Articles 6 and 7 of the Convention. Judge Owada emphasizes that the violation of the obligations under Articles 6 and 7 is *a legal consequence* that flows directly from the Court's determination that there had been a breach of the obligation under Article 5, paragraph 2, of the Convention.

On the matter of admissibility, Judge Owada accepts the Court's finding that the claims of Belgium are admissible, but wishes to underline that this finding of the Court is built on its reasoning that Belgium's entitlement to standing derives from its status as a State party to the Convention, and nothing else. In addressing the question of Belgium's standing in this way, Judge Owada notes that the Judgment avoids squarely addressing the primary, though more contentious, claim of Belgium on the issue of its standing under the Convention—the claim that it has the right to invoke the responsibility of Senegal as an "injured State" under Article 42 *(b)* (i) of the Articles on State Responsibility.

Judge Owada emphasizes that the legal consequence of adopting this approach is that Belgium is entitled in its capacity as a State party to the Convention, like any other State party, only to insist on compliance by Senegal with the obligations arising under the Convention. It can go no further. According to Judge Owada, since the Judgment has not ruled upon the Belgian claim that it can claim a particular position as an injured State, Belgium is therefore in a legal position neither to claim the extradition of Mr. Habré under Article 5, paragraph 2, of the Convention, nor to demand an immediate notification as a State party to which it is entitled under Article 6, paragraph 4, of the Convention.

Judge Owada adds that, in any case, the legal situation under the Convention is that, as the Judgment clearly states, extradition is nothing more than an option open to States on whose territory an alleged offender is present, and is not an obligation. Judge Owada emphasizes that, be that as it may, Belgium's standing as recognized by the present Judgment cannot allow Belgium to claim any special interest under Article 5 of the Convention. As a result, Judge Owada concludes that the request of Belgium contained in paragraph 2 *(b)* of its final submissions, asking the Court to adjudge and declare that Senegal extradite Mr. Habré *to Belgium* without further ado, has to fail on this ground.

Separate opinion of Judge Abraham

In his separate opinion, Judge Abraham first sets out the grounds on which the Court should, in his view, have found that it had jurisdiction to entertain the claims of Belgium relating to customary international law. Judge Abraham considers that the Court was wrong to find that there was no dispute between the Parties concerning this aspect of Belgium's claim. As a general rule, the conditions governing the jurisdiction of the Court must be met on the date when the Application is filed, but Judge Abraham recalls that the Court accepts that a condition that was initially lacking can be met during the course of the proceedings. In the present case, the exchanges between the Parties before the Court concerning Belgium's claims arising under customary international law show that a dispute on this aspect of the case clearly exists at the time of the Judgment, even if the existence of that dispute had not been established when the case was submitted to the Court. Judge Abraham therefore concludes that the Court should have found that it had jurisdiction, pursuant to the optional declarations made by the Parties under Article 36 (2) of the Statute of the Court, to entertain that part of the claim concerning alleged breaches of obligations under customary international law.

Judge Abraham is moreover of the view that Belgium's claims relating to this aspect of the case could not have been upheld by the Court on the merits. In his opinion, there is at present no customary rule compelling States to prosecute persons suspected of war crimes, crimes against humanity or genocide before domestic courts where the alleged offences occur outside the territory of that State and neither the perpetrator nor the victims are nationals of that State, regardless of whether or not the suspect is present in the territory of the State in question. Consequently, the claims presented by Belgium on the basis of customary international law were, in any event, doomed to fail.

Separate opinion of Judge Skotnikov

Judge Skotnikov supports the Court's conclusions set forth in the operative clause. However, he is of the view that the Court has erred as to the grounds on which to base its finding that Belgium's claims are admissible.

In the opinion of Judge Skotnikov, the Court could have confined itself to observing that Belgium has instituted criminal proceedings against Mr. Habré, in accordance with its legislation in force; that it has requested Mr. Habré's extradition from Senegal to Belgium; and that it has engaged in diplomatic negotiations with Senegal on the subject of Mr. Habré's prosecution in Senegal or his extradition to Belgium.

The Court has chosen instead to conclude that any State party to the Convention against Torture has standing before this Court to invoke the responsibility of any other State party. This allows the Court to avoid dealing at the merits stage with the question as to whether Belgium has established its jurisdiction in respect of Mr. Habré in accordance with Article 5, paragraph 1, of the Convention, despite the fact that

none of the alleged victims who have filed complaints against Mr. Habré was of Belgian nationality at the time of the alleged offences. This question is directly related to the issue of the validity of Belgium's request for Mr. Habré's extradition.

During the oral phase, Belgium confirmed that it appeared before this Court as an injured State. In the alternative Belgium, responding to a question posed by one of the judges, claimed *locus standi* as a party other than an injured State. In its final submissions, Belgium clearly positions itself as an injured State, that is, as a party having a special interest in Senegal's compliance with the Convention. Therefore, the Court's decision not to pronounce on the question of whether Belgium has a special interest in Senegal's compliance with the relevant provisions of the Convention in the case of Mr. Habré is surprising. One inevitable implication of this decision is that the issue of the validity of Belgium's request for extradition remains unresolved.

Judge Skotnikov considers that the Court's conclusion that Belgium, simply as a State party to the Convention against Torture, has standing to invoke the responsibility of Senegal for the alleged breaches of its obligations because the States parties have a common interest in attaining the goals of the Convention, is not properly explained, nor is it justified.

Indeed, obligations which are owed by any State party to all other States parties are contained in numerous instruments, in particular those dealing with the protection of human rights. But Judge Skotnikov questions whether this leads to a conclusion that the common interest of the States parties in ensuring the prevention of acts of torture is one and the same thing as a right of any State party to invoke the responsibility of any other State party before this Court, under the Convention against Torture, for an alleged breach of obligations *erga omnes partes*. The Court's position to the effect that any State party does have such a right is not based on the interpretation of the Convention. In fact, its provisions which allow any State party to shield itself from accountability before the Court as well as from the scrutiny of the Committee against Torture point to the opposite conclusion.

Judge Skotnikov observes that the Judgment cites no precedent in which a State has instituted proceedings before this Court or any other international judicial body in respect of alleged violations of an *erga omnes partes* obligation simply on the basis of it being a party to an instrument similar to the Convention against Torture. Nor does it refer to the draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission in 2001, which do not support the Court's position. In its commentary to the draft Articles, the Commission states in no ambiguous terms that:

> "[i]n order to take such steps, i.e. to invoke responsibility in the sense of the articles, some more specific entitlement is needed. In particular, for a State to invoke responsibility on its own account it should have a specific right to do so, e.g. a right of action specifically conferred by a treaty, or it must be considered an injured State."

No such right of action is conferred on States parties by the Convention against Torture.

Accordingly, Judge Skotnikov concludes with regret that the grounds which are intended to support the Court's correct ruling as to the admissibility of Belgium's claims do not seem to be founded in law, be it conventional or customary.

Separate opinion of Judge Cançado Trindade

1. In his Separate Opinion, composed of 16 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 *Questions Relating to the Obligation to Prosecute or Extradite*, for supporting the establishment by the ICJ of violations of Articles 6(2) and 7(1) of the 1984 U.N. Convention against Torture (CAT Convention), its assertion of the pressing need to take measures to comply with the duty of prosecution under that Convention, and its correct acknowledgment of the absolute prohibition of torture as one of *jus cogens*,—yet, there were two points of the Court's reasoning that he found inconsistent with its own conclusions, and on which he has a distinct reasoning, namely: the Court's jurisdiction in respect of obligations under customary international law, and the handling of the time factor under the U.N. Convention against Torture.

2. He thus feels bound, and cares, to leave on the records the foundations of his own personal position thereon, and on certain other related issues. 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 satisfactory or complete. As to factual considerations, he begins by reviewing the factual background of the present case, as reported in the findings (of 1992) of the Chadian Commission of Inquiry, as to the regime Habré in Chad (part II).

3. Such findings, referred to by both Belgium and Senegal in the written and oral phases of the proceedings before this Court, comprise: a) the organs of repression of the regime Habré in Chad (1982-1990); b) the systematic practice of torture of persons arbitrarily detained; c) the extra-judicial or summary executions; and d) massacres, and the intentionality of extermination of those who allegedly opposed the regime. According to the 1992 *Report* of the Truth Commission of the Chadian Ministry of Justice, referred to by both Belgium and Senegal, the numerous grave violations of human rights and of international humanitarian law committed during the Habré regime left more than 40,000 victims; more than 80,000 orphans; more than 30,000 widows; more than 200,000 people left with "no moral or material support as a result of this repression".

4. Judge Cançado Trindade next reviews the decision (of 19 May 2006) of the U.N. Committee against Torture in the case (lodged with it by the alleged victims on 18 April 2001) of *Souleymane Guengueng et alii versus Senegal* (part III). The petitioners or authors of the communication were Chadian nationals living in Chad, who claimed to be victims of a breach by Senegal of Articles 5(2) and 7 of the CAT Convention. The Committee, after referring to the findings in the 1992 *Report* of the Chadian Truth Commission *(supra)*, and further recalling the initiatives of legal action (from 2000 onwards) on the part of the alleged victims against Mr. H.

Habré, in Senegal and in Belgium, found the communication or petition admissible, and considered that the principle of universal jurisdiction enunciated in Articles 5(2) and 7 of the CAT Convention implies that the jurisdiction of States Parties "must extend to *potential* complainants in circumstances similar to the complainants".

5. As to the merits, the Committee found that Senegal had not fulfilled its obligations under Article 5(2) of the U.N. Convention against Torture; the Committee pondered that "the reasonable time-frame" within which the State Party should have complied with the obligation under Article 5(2) of the CAT Convention had been "considerably exceeded". The Committee found that Senegal was under an obligation to prosecute Mr. H. Habré for alleged acts of torture; as Senegal decided, so far, neither to prosecute nor to extradite him, the Committee found that it had failed to perform its obligations also under Article 7 of the CAT Convention. The Committee then concluded that Senegal violated Articles 5(2) and 7 of the CAT Convention, a decision of particular relevance to the present case before this Court.

6. Next, and still with regard to factual considerations, Judge Cançado Trindade reviews the responses provided by both Belgium and Senegal to the questions he deemed fit to put to both parties (part IV), at the end of the public hearings before the Court (on 16 March 2012). The probative value of the evidence produced, and invoked by the parties, appeared clear; in any case, he adds, it is for the competent tribunal to be eventually entrusted with the trial of Mr. H. Habré to pronounce on the issue. Moving on to the "everlasting quest for the realization of justice" in the present case, Judge Cançado Trindade reviews (part VI): a) legal actions in domestic courts (in Senegal and Belgium); b) Belgium's requests of extradition; c) initiatives at international level (e.g., African Court on Human and Peoples' Rights, Court of Justice of the Economic Community of West African States [ECOWAS], U.N. Committee against Torture and the *rapporteur* of the CAT Convention on the follow-up of communications or petitions, Office of the U.N. High Commissioner for Human Rights); c) initiative of entities of African civil society; and d) initiatives and endeavours of the African Union (part VII).

7. Moving on to his considerations at the conceptual and epistemological levels, Judge Cançado Trindade sustains the view (part V) that the State obligations (under Conventions for the protection of the human person) of prevention, investigation and sanction of grave violations of human rights and of International Humanitarian Law, "are not simple obligations of conduct, but rather obligations of result", as "we are in face of peremptory norms of international law, safeguarding the fundamental rights of the human person. (. . .). In the domain of *jus cogens*, such as the absolute prohibition of torture, the State obligations are of due diligence and of result" (para. 44). Otherwise, he adds, "the doors would then be left open to impunity. The handling of the case of Mr. Hissène Habré to date serves as a warning in this regard" (para. 45).

8. He further explains that the aforementioned distinction between the two kinds of obligations "introduced a certain hermeticism into the classic doctrine on the matter, generating some confusion" (resulting from the undue transposition into international law of a distinction proper to civil law/*droit des obligations*), and not appearing much helpful in the domain of the international protection of human rights (paras. 46-47). It is thus not surprising to find—he proceeds—that the said distinction has been highly criticized in legal doctrine, and has failed to have any significant impact on international case law. Obligations endowed with an imperative character are to be complied with, in the light of fundamental principles enunciated in the Universal Declaration of Human Rights, one of such principles being that of respect of the dignity of the human person.

9. The absolute prohibition of grave violations of human rights (such as torture) entails obligations which can only be of *result*, endowed with a necessarily objective character. In the framework of the International Law of Human Rights, wherein the U.N. Convention against Torture is situated, Judge Cançado Trindade proceeds, "it is not the result that is conditioned by the conduct of the State, but, quite on the contrary, *it is the conduct of the State that is conditioned by the attainment of the result aimed at by the norms of protection of the human person*. The conduct of the State ought to be the one which is conducive to compliance with the obligations of result (in the *cas d'espèce*, the proscription of torture)" (para. 50).

10. Judge Cançado Trindade stresses the manifest urgency surrounding the present case (affecting the surviving victims of torture, or their close relatives), since the Court's Order of 28 May 2009; in his view, as he sustained in his (previous) Dissenting Opinion appended to that Order, the Court should have then indicated provisional measures of protection (part VIII), to avoid all the uncertainties that have taken place ever since, and to assume the role of a guarantor under the U.N. Convention against Torture. In his view, the Court was mistaken not to have ordered provisional measures of protection, as

> "[a] promise of a government (any government, of any State anywhere in the world) does not suffice to efface the urgency of a situation, particularly when fundamental rights of the human person (such as the right to the realization of justice) are at stake. The ordering of provisional measures of protection (. . .) serves the prevalence of the rule of law at international level" (para. 76).

11. Judge Cançado Trindade further criticizes the attitude of "*laisser passer*" of the Court's Order of 28.05.2009; in his own words,

> "Unilateral acts of States—such as, *inter alia*, promise—were conceptualized in the traditional framework of the inter-State relations, so as to extract their legal effects, given the 'decentralization' of the international legal order. Here, in the present case, we are in an entirely distinct context, that of *objective* obligations established under a normative Convention—one of the most important of the United Nations, in the domain of the international protection of human rights, embodying an absolute prohibition of *jus cogens*, the U.N. Convention against Torture. In the ambit of these obligations, 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. 79).

12. The acknowledgment of the urgency of the situation, he adds, has at last been made by the ICJ: it underlies its present Judgment on the merits of the case, wherein it has determined that Senegal has breached Articles 6(2) and 7(1) of the U.N. Convention against Torture, and is under the duty to take "without further delay" the necessary measures to submit the case against Mr. H. Habré to its competent authorities for the purpose of prosecution (para. 121 and *dispositif*).

13. Judge Cançado Trindade then moves on to an issue he ascribes the utmost importance: the absolute prohibition of torture in the realm of *jus cogens* (part IX). He singles out, to start with, the conformation of a true international legal regime against torture, which finds expression at both *normative* and *jurisprudential* levels. In this respect, he examines, first, the international instruments on the matter, demonstrating that torture is clearly prohibited, as a grave violation of the International Law of Human Rights and of International Humanitarian Law, as well as of International Criminal Law: there is here, in his perception, a normative convergence to this effect. And secondly, he examines the relevant international case-law which provides judicial recognition of the existence of such international legal regime of absolute prohibition of all forms of torture.

14. In logical sequence, Judge Cançado Trindade addresses the *fundamental human values* underlying that prohibition, after observing that "the current absolute *(jus cogens)* prohibition of torture has taken place with the awareness of the horror and the inhumanity of the practice of torture. Testimonies of victims of torture—as in the proceedings of contemporary international human rights tribunals—give account of that" (para. 92), of its devastating consequences. And he adds that

> "The basic principle of humanity, rooted in the human conscience, has arisen and stood against torture. In effect, in our times, the *jus cogens* prohibition of torture emanates ultimately from the universal juridical conscience, and finds expression in the *corpus juris gentium*" (para. 84).

15. On the basis of his examination of the pertinent case law of contemporary international tribunals, Judge Cançado Trindade further warns that

> "In effect, the practice of torture, in all its perversion, is not limited to the physical injuries inflicted on the victim; it seeks to annihilate the victim's identity and integrity. It causes chronic psychological disturbances that continue indefinitely, making the victim unable to continue living normally as before. Expert opinions rendered before international tribunals consistently indicate that torture aggravates the victim's vulnerability, causing nightmares, loss of trust in others, hypertension, and depression; a person tortured in prison or detention loses the spatial dimension and even that of time itself" (para. 98).

16. In his next line of considerations (part X), Judge Cançado Trindade observes that, as the CAT Convention sets forth the absolute prohibition of torture, belonging to the domain of *jus cogens*, obligations *erga omnes partes* ensue therefrom. He recalls that, significantly, this had been expressly acknowledged by the two contending parties, Belgium and Senegal, in the proceedings before the Court, in response to a question he put to both of them, in the public sitting of the Court of 8 April 2009, at the earlier stage of provisional measures of protection in the *cas d'espèce*.

17. Such obligations *erga omnes partes*,—he proceeds,—grow in importance in face of the *gravity* of breaches of the absolute prohibition of torture, and conform the *collective guarantee* of the rights protected under the CAT Convention. He then supports the "material expansion" of *jus cogens* and the corresponding obligations *erga omnes* of protection, "in their two dimensions", namely, the horizontal (*vis-à-vis* the international community as a whole) as well as the vertical (projection into the domestic law regulation of relations mainly between the individuals and the public power of the State).

18. In sequence, Judge Cançado Trindade stresses the *gravity* of the human rights violations in the practice of torture, and the compelling struggle against impunity (part XI). The *collective guarantee* of the protected rights under human rights treaties was devised, in order to face and fight the human cruelty at the threshold of gravity. In the same line of thinking, the inadmissibility of impunity of the perpetrators is widely upheld. In this connection, Judge Cançado Trindade then examines the position taken, on distinct occasions, by Chad, against impunity, in the case of Mr. H. Habré. He ponders that "[i]mpunity, besides being an evil which corrodes the trust in public institutions", remains an obstacle which international supervisory organs "have not yet succeeded to overcome fully" (para. 124).

19. He further observes that the Court, in paragraph 68, captures the *rationale* of the CAT Convention (paras. 122-123), with the latter's denationalization of protection, and assertion of the principle of universal jurisdiction. Yet, in doing so, he adds, the Court "does not resist the temptation to quote itself, rescuing its own language of years or decades ago", such as the invocation of "legal interest" (in the *célèbre obiter dictum* in the *Barcelona Traction* case of 1970), or "common interest" (expressions used in the past in different contexts). Judge Cançado Trindade then ponders that

> "In order to reflect in an entirely faithful way the *rationale* of the CAT Convention, the Court, in my understanding, should have gone a bit further: more than a 'common interest', States Parties to the CAT Convention have a *common engagement* to give *effet utile* to the relevant provisions of the Convention; they have agreed to exercise its *collective guarantee*, in order to put an end to the impunity of the perpetrators of torture, so as to rid the world of this heinous crime. *We are here in the domain of obligations, rather than interests*. These obligations emanate from the *jus cogens* prohibition of torture" (para. 123).

20. Judge Cançado Trindade concludes this section of his Separate Opinion by examining the struggle against impunity in the Law of the United Nations. He recalls the relevant provisions, in this respect, of the final document of the II World Conference of Human Rights (Vienna, 1993),—the *Vienna Declaration and Programme of Action*, and the subsequent work, in pursuance of those provisions, undertaken by the [former] U.N. Commission on Human Rights, and its [former] Sub-Commission on the Promotion and Protection of

Human Rights, which engaged themselves in producing, e.g., in 1997, a *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (restated by the Commission in 2005), among other initiatives. In addition to several pertinent resolutions of the General Assembly and the Security Council, reference is also made to the *general comment n. 31* (of 2004) of the Human Rights Committee (supervisory organ of the U.N. Covenant on Civil and Political Rights).

21. In part XII of his Separate Opinion, Judge Cançado Trindade reminds that the prohibition of torture (enshrining fundamental human values) is one of both *conventional* as well as *customary* international law. He refers, in this respect, to the 2005 study on *Customary International Humanitarian Law* undertaken by the International Committee of the Red Cross (ICRC), and to the *general comment n. 2* (of 2008) of the U.N. Committee against Torture. He then draws attention to the point that the Court's determination as to the existence of a dispute rested on purely factual considerations of the case at issue. This is, in his view, *distinct from an examination by the Court of whether there is a legal basis of jurisdiction* (under Article 30(1) of the CAT Convention) over claims of alleged breaches of customary international law obligations.

22. The Court thus has, in his view, improperly stated that it did not have jurisdiction to dwell upon alleged breaches of a State's alleged obligations under customary international law (e.g., to prosecute perpetrators of core international crimes, such as raised in this case). What the Court really wished to say, in his perception, is that *there was no material object for the exercise of its jurisdiction* in respect of obligations under customary international law, rather than a lack of its own jurisdiction *per se*. The finding that, in the circumstances of the present case, a dispute did not exist between the contending parties as to the matter at issue, *does not necessarily mean that, as a matter of law, the Court would automatically lack jurisdiction*, to be exercised in relation to the determination of the existence of a dispute concerning breaches of alleged obligations under customary international law.

23. In the following part (XIII) of his Separate Opinion, Judge Cançado Trindade draws on the *décalage* to be bridged between the time of human justice and the time of human beings, so as to avoid further undue delays in the realization of justice in the present case. He then warns that

> "One cannot lose sight of the fact that those who claim to have been victimized by the reported atrocities of the Habré regime in Chad (1982-1990) have been waiting for justice for over two decades, and it would add further injustice to them to prolong further their ordeal by raising new obstacles to be surmounted. (. . .)
>
> (. . .) Victims of such a grave breach of their inherent rights (as torture), who furthermore have no access to justice (*lato sensu*, i.e., no realization of justice), are victims also of a *continuing* violation (denial of justice), to be taken into account as a whole, without the imposition of time-limits decharacterizing the continuing breach, until that violation ceases.
>
> The passing of time cannot lead to subsequent impunity either; oblivion cannot be imposed, even less so in face of such a grave breach of human rights and of International Humanitarian Law as torture. The imperative of the preservation of the integrity of human dignity stands well above pleas of non-retroactivity and/or prescription. It is high time to bridge the unfortunate *décalage* between the time of human justice and the time of human beings. Articles 5(2), 6(2) and 7(1)—interrelated as they are—of the CAT Convention forbid undue delays; if, despite the requirements contained therein, undue delays occur, there are breaches of those provisions of the CAT Convention. This is clearly what has happened in the present case, in so far as Articles 6(2) and 7(1) of the CAT Convention are concerned, as rightly upheld by this Court" (paras. 147-149).

24. In Judge Cançado Trindade's conception, in the present domain of protection, time is to be made to work *pro persona humana, pro victima*. As to the principle *aut dedere aut judicare* set forth in Article 7(1) of the CAT Convention, the segment *aut judicare* is ineluctably associated with the requirement of absence of undue delays. In this connection, the recent Judgment (of 2010) of the Court of Justice of the Economic Community of West African States (ECOWAS Court of Justice), cannot be seen as an obstacle to Senegal's compliance with its obligations under Article 7 of the CAT Convention. In his understanding, a supervening decision of an international tribunal (the ECOWAS Court of Justice) cannot encroach upon the current exercise of the judicial function of another international tribunal (the ICJ), performing its duty to pronounce on the interpretation and application of the CAT Convention,—one of the "core Conventions" of the United Nations in the domain of human rights,—in order to make sure that justice is done.

25. In Judge Cançado Trindade's understanding, "coexisting international tribunals perform a *common mission* of imparting justice, of contributing to the common goal of the *realization of justice*. The decision of any international tribunal is to be properly regarded as contributing to that goal, and not as disseminating discord". He adds that "[t]here is here a convergence, rather than a divergence, of the *corpus juris* of the International Law of Human Rights and International Criminal Law, for the correct interpretation and application by international tribunals" (para. 157).

26. He regards paragraph 99 of the present Judgment, wherein the ICJ expressly acknowledges that "the prohibition of torture is part of customary international law and it has become a peremptory norm *(jus cogens)*", as one of the most significant passages of the present Judgment (part XIV). Accordingly, he proceeds, the Court should not have promptly turned around to insert into its reasoning the issue of non-retroactivity; it did so *sponte sua*, without having been asked to pronounce itself on this point, alien to the CAT Convention, neither by Belgium nor by Senegal. It then regrettably embarked on a "regressive interpretation" of Article 7(1) of the CAT Convention.

27. The Court did so despite the fact that the CAT Convention, unlike other treaties, does not provide for, nor contains, any temporal limitation or express indication on non-retroactivity. It did so by picking out one older decision (of 1989) of the U.N. Committee against Torture that suited its argu-

ment, and at the same time overlooking or not properly valuing more recent decisions of the Committee *a contrario sensu* (the *B. Ltaief* and the *S. Guengueng* cases, of 2003 and 2006, respectively), wherein the Committee overruled its previous decision relied upon by the Court in its reasoning. Moreover, the two contending parties in the present case, Belgium and Senegal, agreed that the obligation under Article 7(1) of the CAT Convention can apply to offences committed before the CAT Convention entered into force for the States concerned.

28. The Court, however, he continues, "has proceeded to impose a temporal limitation *contra legem* to the obligation to prosecute under Article 7(1) of the CAT Convention". It overlooked another point, that "occurrences of systematic practice of torture conform *continuing situations* in breach of the CAT Convention, to be considered as a whole, without temporal limitations decharacterizing it, until they cease" (para. 165). Nor has the Court taken into account that: a) the approaches of domestic criminal law and contemporary international criminal law are distinct, with regard to pleas of non-retroactivity; and b) such pleas of non-retroactivity become a moot question wherever the crimes of torture had already been prohibited by customary international law (as in the present case) at the time of their repeated or systematic commission.

29. Ultimately, and summing up, Judge Cançado Trindade concludes on this point that

> "the Court has pursued, on this particular issue, a characteristic voluntarist reasoning, focused on the will of States within the confines of the strict and static inter-State dimension. But it so happens that the CAT Convention (the applicable law in *the cas d'espèce*) is rather focused on the victimized human beings, who stand in need of protection. It is further concerned to guarantee the non-repetition of crimes of torture, and to that end it enhances the struggle against impunity. Human conscience stands above the will of States. (. . .)
>
> Accordingly, it would seem inconsistent with the object and purpose of the Convention CAT if alleged perpetrators of torture could escape its application when found in a State in respect of which the Convention entered into force only *after* the alleged criminal acts occurred (as a result of the temporal limitation which the Court regrettably beheld in Article 7(1)). Worse still, although the present Judgment rightly recognizes that the prohibition of torture has attained the status of *jus cogens* norm (para. 99), it promptly afterwards fails to draw the necessary consequences of its own finding, in unduly limiting the temporal scope of application of the CAT Convention. The Court has insisted on overlooking or ignoring the persistence of a *continuing situation* in breach of *jus cogens*" (paras. 166 and 168).

30. Judge Cançado Trindade then turns to his remaining line of considerations on restorative justice (part XV). To him, the growing awareness nowadays of, and the growing attention shifted to, the sufferings of victims of grave breaches of the rights inherent to them, as well as the corresponding duty to provide reparation to them, demonstrate that this whole matter has become, in our days, a legitimate concern of the international community, envisaging the individual victims as members of humankind as a whole. Developments in the International Law of Human Rights and contemporary International Criminal Law have much contributed to this.

31. It appears—he proceeds—that restorative justice (present from ancient to modern legal and cultural traditions), is reflourishing in our times, shifting attention from the punishment of offender (central to retributive justice) also to the provision of redress to individual victims. It so appears that "restorative justice may have faded" (until the mid-XXth century), but "did not vanish". In Judge Cançado Trindade's perception,

> "Throughout the second half of the XXth century, the considerable evolution of the *corpus juris* of the International Law of Human Rights, being essentially *victim-oriented*, fostered the new stream of restorative justice, attentive to the needed rehabilitation of the victims (of torture). Its unprecedented projection nowadays into the domain of international criminal justice—in cases of core international crimes—makes us wonder whether we would be in face of the conformation of a new chapter in restorative justice.
>
> (. . .) The realization of justice appears, after all, as a form of reparation itself, rehabilitating—to the extent possible—victims (of torture). (. . .) I consider restorative justice as necessarily centred on the rehabilitation of the victims of torture, so as to render it possible to them to find bearable to keep on relating with fellow human beings, and, ultimately, to keep on living in this world" (paras. 171-172).

32. To him, restorative justice grows in importance in cases of grave and systematic violations of human rights, of the integrity of human beings, such as "the abominable practice of torture"; reparation to the victims naturally envisages their rehabilitation. The restorative nature of redress to victims is nowadays acknowledged in the domain not only of the International Law of Human Rights, but also of contemporary International Criminal Law (the Rome Statute of the ICC). Yet, he adds, "the matter at issue is susceptible of further development, bearing in mind the vulnerability of the victims and the gravity of the harm they suffered. In so far as the present case before this Court is concerned, the central position is that of the human person, the victimized one, rather than of the State" (para. 174).

33. Last but not least, Judge Cançado Trindade turns to his concluding reflections (part XVI). He nourishes the hope that the present Judgment of the ICJ, establishing violations of Articles 6(2) and 7(1) of the Convention against Torture, and asserting the duty of prosecution thereunder, will contribute to make time work *pro persona humana*, *pro victima*. In this second decade of the XXIst century, after a far too long a history, the principle of universal jurisdiction, as set forth in the CAT Convention (Articles 5(2) and 7(1)), appears nourished by the ideal of a universal justice, without limits in time (past or future) or in space (being transfrontier). Furthermore, he adds, it transcends the inter-State dimension, as it purports to safeguard not the interests of individual States, but rather the fundamental values shared by the international community as a whole. To him, what stands above all is the imperative of universal justice, in line with jusnaturalist thinking.

34. He ponders that, in this new and wider horizon, of the universalist international law, the new universal *jus gentium* of our times, remindful of the *totus orbis* of Francisco de Vitoria and the *societas generis humani* of Hugo Grotius, *jus cogens* marks its presence therein, in the absolute prohibition of torture, rendering it imperative to prosecute and judge cases of international crimes—like torture—that "shock the conscience of mankind". Torture is, after all, reckoned in our times as a grave breach of International Human Rights Law and International Humanitarian Law, prohibited by conventional and customary international law; when systematically practiced, it is a crime against humanity. This "transcends the old paradigm of State sovereignty: individual victims are kept in mind as belonging to humankind; this latter reacts, shocked by the perversity and inhumanity of torture" (para. 178).

35. The advent of the International Law of Human Rights, in his perception, "has fostered the expansion of international legal personality and responsibility, and the evolution of the domain of reparations (in their distinct forms) due to the victims of human rights violations. (. . .) This development has a direct bearing on reparations due to victims of torture" (para. 179). Rehabilitation of victims, in his understanding, plays an important role here,

> "bringing to the fore a renewed vision of restorative justice. In effect, restorative justice, with its ancient roots (going back in time for some millennia, and having manifested itself in earlier legal and cultural traditions around the world), seems to have reflourished again in our times. This is due, in my perception, to the recognition that: a) a crime such as torture, systematically practiced, has profound effects not only on the victims and their next-of-kin, but also on the social *milieu* concerned; b) punishment of the perpetrators cannot be dissociated from rehabilitation of the victims; c) it becomes of the utmost importance to seek to heal the damage done to the victims; d) in the hierarchy of values, making good the harm done stands above punishment alone; and e) the central place in the juridical process is occupied by the victim, the human person, rather than by the State (with its monopoly of sanction)" (para. 180).

36. In Judge Cançado Trindade's conception, with the acknowledgment that the realization of justice, with the judicial recognition of the sufferings of the victims, is a form of the reparation due to them, we have moved from *jus dispositivum* to *jus cogens*, beyond the traditional inter-State outlook. Here, the central position is that of the individual victims, rather than of their States; "had the inter-State dimension not been surmounted, not much development would have taken place in the present domain" (para. 181). And he adds that

> "*jus cogens* exists indeed to the benefit of human beings, and ultimately of humankind. Torture is absolutely prohibited in all its forms, whichever misleading and deleterious neologisms are invented and resorted to, to attempt to circumvent this prohibition" (para. 182).

37. To Judge Cançado Trindade, the *jus cogens* prohibition of torture contains no limitations in time or space; it has discarded all such limitations, with the firm support it has received from a lucid trend of international legal thinking. This latter "has promptly discarded the limitations and shortsightedness (in space and time) of legal positivism, and has further dismissed the myopia and fallacy of so-called 'realism'" (para. 183). State duties (of protection, investigation, prosecution, sanction and reparation) emanate directly from international law. To Judge Cançado Trindade, of capital importance here are the *prima principia* (the general principles of law), amongst which the principles of humanity, and of respect for the inherent dignity of the human person (recalled by the U.N. Convention against Torture itself); "[a]n ethical content is thus rescued and at last ascribed to the *jus gentium* of our times" (para. 184).

Separate opinion of Judge Yusuf

1. In his separate opinion, Judge Yusuf expresses his views on three key aspects of the Judgment namely: the Court's reliance on Article 30 of the Convention against Torture (CAT) to found its jurisdiction; Senegal's obligation under Article 6 (2) of the Convention and the inquiry it carried out in 2000; and the Court's interpretation of the obligation *aut dedere aut judicare* contained in Article 7 (1).

2. First, Judge Yusuf disagrees that the jurisdiction of the Court in the present case can be founded on Article 30 of the Convention against Torture (CAT) since two of the four conditions prescribed by the provision have not been met. These conditions are: *(a)* that the dispute could not be settled by negotiation; and *(b)* that the Parties were unable to agree on the organization of arbitration. With respect to the condition that the dispute could not be settled by negotiation, he agrees with the Court's finding that the formula "cannot be settled" implies that "no reasonable probability exists that further negotiations would lead to a settlement". However, he holds the view that the Court drew incorrect conclusions from these statements in light of the evidence available. A review of the evidence demonstrates that neither a deadlock nor an impasse was ever reached in the negotiations between the Parties, and that those negotiations continued even after the filing of Belgium's Application with the Court. Thus, he finds it unpersuasive for the Court to conclude that, by 2006, the dispute could not be settled through negotiation and negotiations offered no further prospect for settlement.

3. Regarding the requirement that the parties are unable to agree on the organization of arbitration, Judge Yusuf notes that this implies an attempt to initiate the organization of the arbitration, or a suggestion of modalities by one or both parties regarding such organization. The proposal by one or both parties, showing an effort to organize arbitration, is thus to be distinguished from the request for arbitration and has to be subsequent to it. He states that in light of the fact that Senegal acknowledged Belgium's initial request for arbitration, the onus lay on Belgium, as the requesting State, to take steps to suggest the procedure for organizing the said arbitration. In his view, the present case is different from *DRC* v. *Rwanda* and from *Libya* v. *USA*, where the Conventions concerned included similar treaty provisions. Absent such inability to agree, the dispute cannot be referred to the Court, and if it is referred to the Court, the latter has no jurisdiction on such a dispute, since a basic condition of Article 30 has not been satisfied. The Court should have therefore concluded that it

had no jurisdiction under Article 30 of the CAT, and should have instead based its jurisdiction on the declarations made by Belgium and Senegal under Article 36, paragraph 2, of its Statute.

4. Secondly, Judge Yusuf disagrees with the Court's finding that Senegal breached its obligation under Article 6 (2) in 2000, and states that a clear distinction should have been made between the steps taken by the Senegalese authorities in 2000, and the absence of similar acts following the submission of new claims against Mr. Habré in 2008. He holds the view that the nature and scope of such a preliminary inquiry is determined to a large extent by domestic law and the circumstances of the case. As such, the Court should not be dismissive of a State's choice of means for conducting such a preliminary inquiry. In his opinion, the conduct of an inquiry, particularly one of a preliminary nature, is implicit in the fact that Mr. Habré was indicted by the investigating magistrate, and placed under house arrest in 2000. Judge Yusuf also observes in his separate opinion that the Judgment elevates a preliminary inquiry to the level of a full investigation and appears to suggest the existence of a general standard for the conduct of such inquiries.

5. Finally, while Judge Yusuf agrees with the Court's interpretation of the obligation *aut dedere aut judicare* contained in Article 7 (1) of the CAT, he believes that the Court could have further clarified the meaning and nature of this obligation within the context of this Convention. He notes that the prevalence of the formula *aut dedere aut judicare* has led to some confusion within legal scholarship over the relationship between extradition and prosecution in conventional clauses containing this formula. He briefly reviews the variety of provisions with a similar construction and notes that in light of the Court's interpretation of Article 7 (1), Belgium had no right to insist upon the extradition of Mr. Habré. Judge Yusuf emphasizes that in the context of the Convention, it is only the violation of the obligation to submit the case for prosecution which engages the responsibility of the State on whose territory the suspect is present. Extradition is an option which a State may adopt to relieve itself of the obligation to submit the case for prosecution; but extradition itself is not an obligation under the CAT.

Dissenting opinion of Judge Xue

In principle, Judge Xue agrees with the Judgment that Senegal as a party to the Convention against Torture should submit without delay the case of Mr. Hissène Habré to the competent authorities for the purpose of prosecution, if it decides not to extradite him. However, she disagrees with the majority of the Members of the Court on a number of issues in the Judgment.

On the issue of admissibility, Judge Xue considers that the nationality of the victims has a direct bearing on the question of admissibility; should the nationality of the victim be established at the time of the commission of the alleged acts, Belgium's claim should be inadmissible. In her view, Belgium's law and practice have relevance to the issue in this case.

Judge Xue recalls that Belgium amended its criminal law in 2003, which provides to the extent that on the count of a crime under international humanitarian law committed abroad, *criminal prosecution can be exercised only when the victim is, at the time of the events, Belgian*. She further adds that Belgian judicial decisions indicate that the legislative intention of such amendment was to avoid "an obviously abusive political use of this law" by those who settled in Belgium "for the sole purpose of obtaining the possibility . . . of securing the jurisdiction of the Belgian courts".

Judge Xue holds that, by its own legislative and judicial acts, particularly the jurisdictional limits its 2003 law imposes on passive nationality, Belgium is precluded from denying the applicability of the nationality rule in case it wishes to exercise passive personal jurisdiction. She does not think Belgium has provided any evidence to show that the national link of the victims is not solely meant to secure the jurisdiction of the Belgian courts.

Judge Xue regrets that the Court fails to address this crucial issue presented by Senegal in the Judgment, and instead bases its reasoning on the notion of obligations *erga omnes partes*.

By virtue of the nature of such obligations, the Court concludes that Belgium, as a State party to the Convention against Torture, has standing to invoke Senegal's responsibility for the alleged breaches of its obligations under the Convention. She is of the opinion that this conclusion is abrupt and unpersuasive. Judge Xue expresses the concern that the Court's reference to the *Barcelona Traction* case misuses the *obiter dictum* with regard to obligations *erga omnes*. She observes that in that case, in terms of standing, the Court only spelt out the conditions for the breach of obligations in bilateral relations and stopped short of the question of standing in respect of obligations *erga omnes*.

Secondly, Judge Xue considers that the Court's view on obligations *erga omnes partes* in this case is not in conformity with the rules of State responsibility. She observes that even though prohibition of torture has become part of *jus cogens* in international law, such obligations as to make immediately an inquiry and the obligation to prosecute or extradite under the Convention are treaty rules, subject to the terms of the Convention. In her view, under international law, it is one thing that each State party has an interest in the compliance with these obligations, and it is another that every State party has standing to bring a claim against another State for the breach of such obligations in the Court. She adds that a State party must show what obligations that another State party owes to it under the Convention have been breached, and such procedural rules in no way diminish the importance of prohibition of torture as *jus cogens*. *Jus cogens*, likewise, by its very nature, does not automatically trump the applicability of these procedural rules.

Judge Xue adds that thirdly, the Court's reasoning on admissibility is contrary to the terms of the Convention. She observes that conditions for the operation of the monitoring and communication mechanisms demonstrate that the State parties in no way intended to create obligations *erga omnes partes* under the Convention. If the State parties had intended to create obligations *erga omnes partes*, as pronounced by the Court, Articles 21 and Article 30, paragraph 1, should have

been made mandatory rather than optional for the State parties.

Regarding the relationship between the obligations concerned, Judge Xue is of the view that the Court's decision on lack of jurisdiction over Article 5, paragraph 2, has two legal implications: one is that the Court eschews the need to pronounce on the merits of the issue, namely, Senegal's breach of its obligation under Article 5, paragraph 2, has ceased to exist by the time of Belgium's institution of the Application; secondly, Senegal's obligation to make a preliminary inquiry under Article 6, paragraph 2, and obligation to prosecute under Article 7, paragraph 1, of the Convention are separated from the obligation under Article 5, paragraph 1, in the Court's reasoning.

In her consideration, Articles 5, paragraph 2, Article 6, paragraph 2, and Article 7, paragraph 1, are intrinsically interrelated; Article 5, paragraph 2, is the precondition for the implementation of the other two provisions for the exercise of universal jurisdiction. Without established jurisdictional ground, the competent authorities of a State party would not be able to fulfil the obligation to prosecute or take a decision on a request for extradition from another State party. She takes the view that the fact that Senegal's breach of its obligation under Article 5, paragraph 2, ceased to exist in 2007 has consequential effect on Senegal's implementation of its obligations under Article 6, paragraph 2, and Article 7, paragraph 1. In her opinion, the relevant time for the consideration of whether or not Senegal has breached its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, should be the time since Senegal adopted necessary legislation in 2007 rather than from 2000, or even earlier.

On Article 6, paragraph 2, Judge Xue considers that in 2000, when the first complaint was filed in the Senegalese courts, the Senegal competent authorities did take legal action and actually indicted Mr. Habré. As far as the complaint in 2008 is concerned, the fact is that by 2008 Senegal had already been in the process of preparing for the trial of Mr. Habré. Under such circumstances, the Court's pronouncement on the obligation to make a preliminary inquiry under Article 6, paragraph 2, seems unnecessarily formalistic.

On the obligation *aut dedere aut judicare* under Article 7, paragraph 1, Judge Xue disagrees with the majority on the interpretation of this clause. In her view, if the State where the alleged offender is present decides to extradite him to the requesting State, the requested State would be relieved from the obligation to prosecute. Should the State decide otherwise not to submit the case to its own competent authorities for prosecution, it is obliged under Article 7, paragraph 1, to submit the case to the extradition proceedings. Logically, if the State concerned has taken the decision to prosecute, by virtue of general principles of criminal justice that no one should be tried twice for the same offence, the extradition request should be rejected. She considers that while the decision on extradition is still pending, it is questionable for Belgium to claim that Senegal has breached its obligation under Article 7, paragraph 1, for failing to prosecute. She expresses the concern that if Senegal's obligation to prosecute is presumed or mandated, Belgium's request for extradition may be deemed playing a different role: monitoring the implementation of Senegal's obligations under the Convention. While acknowledging that Belgium's request for extradition has actually pushed the process to bring Mr. Habré to prosecution, she questions whether it goes beyond the legal framework of the Convention by giving a State party an entitlement to monitor the implementation of any State party on the basis of *erga omnes partes*. When the decision on prosecution is taken or extradition request is being considered under due process, she finds it questionable for the Court to pronounce that Senegal has breached its obligation under Article 7, paragraph 1.

On the issue of referral of the Habré case to the African Union (AU), Judge Xue considers that none of the decisions taken by the Organization can be considered as contrary to the object and purpose of the Convention, and it would only do justice to say that the AU's decision adopted in July 2006 that urged Senegal to ensure that Hissène Habré be tried in Africa and by the Senegalese courts actually accelerated Senegal's process to amend its national law in accordance with the provisions of the Convention and paved the way for the trial of Mr. Habré. She is further of the view that even if the AU ultimately decides to establish a special tribunal for the trial of Mr. Habré, Senegal's surrender of Mr. Habré to such a tribunal could not be regarded as a breach of its obligation under Article 7, paragraph 1, because such a tribunal is created precisely to fulfil the object and purpose of the Convention.

Judge Xue recognizes that as a State party to the Convention, Senegal cannot justify its failure to implement its obligations by claiming financial difficulties. However, in her opinion, the Court should not downplay the practical difficulties that Senegal faces in the preparation of the trial, given the scale of the trial with tens of thousands of victims and hundreds of witnesses. The experiences of many existing international/special criminal tribunals have proved that a trial on such a large scale could go on for years, even decades, with astronomical sums of money budgeted from international organizations and donated by States. After giving examples of the Special Court for Sierra Leone, the Special Tribunal for Lebanon, and the International Criminal Tribunal for the former Yugoslavia, Judge Xue concludes that, the Hissène Habré trial being the first case of its kind, it is only prudent for Senegal to get things ready before the prosecution commences.

In conclusion, Judge Xue disagrees with the Court that Senegal has breached its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention since it adopted the necessary legislation and established universal jurisdiction over torture in 2007, nevertheless, she wishes to reiterate her view that Senegal should take its decision on Belgium's request for extradition as soon as possible so as to, as it declared, submit the case of Mr. Habré to the competent authorities for prosecution.

Declaration of Judge Donoghue

Judge Donoghue agrees with the Judgment of the Court and submits a declaration in order to address in additional detail the meaning of Article 6, paragraph 2, and Article 7, paragraph 1, of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (hereinafter, the "Conven-

tion"). She agrees with the Court that Article 7, paragraph 1, sets forth an obligation to prosecute, not an obligation to extradite. This obligation arises as a result of the presence of the alleged offender in the territory of a State party, regardless of whether there has been an extradition request for that individual.

With respect to the question of Belgium's standing to bring this case to the Court, Judge Donoghue notes her agreement with the conclusion that Senegal's duties to conduct a preliminary inquiry and to submit Mr. Habré's case for prosecution, if it does not extradite him, are duties *erga omnes partes*. She also observes that the Court has treated the question whether the duties imposed by Article 6, paragraph 2, and Article 7, paragraph 1 are *erga omnes partes* as an aspect of the admissibility of Belgium's claims. It is not obvious, however, that substantive obligations created by the Convention should be considered as a question of admissibility, rather than on the merits. In future cases premised on alleged non-compliance with obligations *erga omnes partes*, a different approach may be necessary.

On the question of the temporal scope of Article 7, paragraph 1, Judge Donoghue agrees with the Court's conclusion that Senegal's obligation to submit Mr. Habré's case to prosecution does not extend to offences alleged to have taken place prior to the date of the Convention's entry into force. The conclusion that Senegal is not required to submit these earlier offences for prosecution does not mean that it is precluded from doing so. Moreover, there are serious allegations of Mr. Habré's responsibility for torture during the period after entry into force of the Convention.

Separate opinion of Judge Sebutinde

Judge Sebutinde expresses her disagreement with the Court's reasoning behind the operative paragraph 122 (1) of the Judgment. While agreeing with the Court's finding that it has jurisdiction to entertain the dispute between the Parties concerning the interpretation and application of the Convention against Torture, Judge Sebutinde nonetheless considers that such jurisdiction can only derive from the Parties' declarations pursuant to Article 36, paragraph 2, of the Statute of the Court, and not from Article 30, paragraph 1, of the Convention against Torture.

In Judge Sebutinde's view, the cumulative preconditions for the Court's jurisdiction under Article 30, paragraph 1, of the Convention against Torture, have not been fulfilled in the present case. In particular, she is of the view that, measured against the rather strict standard concerning the "failure of negotiations" as established in the Court's jurisprudence, the diplomatic exchanges between the Parties do not support the conclusion that negotiations between the Parties concerning Senegal's obligations under the Convention had failed by June 2006, as Belgium claims, nor at any other time prior to the date of Belgium's Application on 19 February 2009. In addition, Judge Sebutinde is of the view that the preconditions of prior request for arbitration and failure to agree on the organization of such arbitration within six months from the date of the arbitration request have also not been met.

In the absence of the Court's jurisdiction pursuant to Article 30, paragraph 1, of the Convention, Judge Sebutinde nonetheless considers that the Court has jurisdiction over the dispute between the Parties concerning the alleged violations by Senegal of the Convention against Torture, pursuant to the Parties' declarations under Article 36, paragraph 2, of the Statute of the Court. She recalls that by virtue of reciprocity applied to the two declarations of acceptance, the jurisdiction of the Court on that basis extends to all legal disputes arising between the Parties after 2 December 1985, provided that they concern situations or facts subsequent to 13 July 1948, with the exception of disputes in regard to which the parties have agreed to have recourse to some other method of settlement and dispute concerning questions which fall exclusively within the domestic jurisdiction of one of the Parties. In her view, the present dispute between the Parties concerning Senegal's obligations under the Convention against Torture clearly falls within the material and temporal scope of the Parties' declarations and the Court's jurisdiction over that dispute is not precluded by virtue of the Parties' reservation regarding agreements on an alternative method of settlement.

Finally, Judge Sebutinde points out that the Court's jurisdiction pursuant to Article 36, paragraph 2, of the Statute of the Court, does not extend to Belgium's claims concerning the alleged violation by Senegal of its obligation *aut dedere aut judicare* on the basis of rules of international law other than the Convention against Torture, since no dispute between the Parties existed in this regard at the date of Belgium's Application.

Dissenting opinion of Judge *ad hoc* Sur

In his dissenting opinion, Judge *ad hoc* Sur regrets the hasty nature of the reasoning of the Judgment and the excessive number of unproven statements underlying the solution adopted by the Court. The solution would seem to be more in keeping with an advisory opinion on the Convention against Torture than the settlement of a dispute between two States. Lastly, he sets out the reasons why he voted against subparagraphs (2), (3) and (5) of the operative part.

With respect to the jurisdiction of the Court, Judge *ad hoc* Sur considers that three issues have not been properly considered or settled in the Judgment. Firstly, he considers that the subject-matter and the critical date of the dispute are not adequately stated in the Judgment. In his view, the dispute does not concern the interpretation of the Convention against Torture, but rather an alleged delay in its implementation and enforcement by Senegal. Secondly, he has doubts whether the precondition concerning the inability to agree on the organization of arbitration, provided for in Article 30 of the Convention against Torture, has been met. Thirdly, he considers that the refusal of the Court to hear the dispute regarding customary rules is unfounded and that the Court should have ruled on the merits of Belgium's claim in that regard.

Judge *ad hoc* Sur disagrees with the Court's position on the admissibility of Belgium's Application. The Court bases itself on the existence of an obligation *erga omnes partes* on the Parties in the Convention against Torture: to submit to their competent authorities for the purpose of prosecution suspicions concerning individuals present in their territory.

Any State party would then be allowed, on that basis alone, to request any other State party that might have failed to comply with that obligation to cease its breach thereof. First, he recalls that Belgium initially based its claim on its passive criminal jurisdiction, but the Court excluded an examination of this basis. Furthermore, while emphasizing that the prohibition of torture is both an intransgressible and an *erga omnes partes* obligation, Judge *ad hoc* Sur considers that the *erga omnes partes* character of the obligation does not extend to all the other obligations under the Convention, in particular the obligation to institute proceedings. Only certain categories of interested parties can claim a right in that regard, and that is not the case for Belgium. Recalling the general rules of interpretation of treaties, he emphasizes the textual difficulties of such a conception of the obligation, which is asserted rather than proven, and the lack of relevant practice of the parties supporting the Court's position on this point, even though the Convention has been in force for 25 years. He concludes that Senegal is required to submit the case to its competent authorities for the purpose of prosecuting Mr. Hissène Habré, but that Belgium does not thereby derive a right it can claim from Senegal.

As regards the merits of the case, Judge *ad hoc* Sur agrees with the position of the Court in finding that Senegal has breached the obligation under Article 6, paragraph 2, of the Convention against Torture to immediately make "a preliminary inquiry into the facts" when a person suspected of acts of torture is found in its territory. He also agrees with the position of the Court when it considers that the dispute regarding the establishment of Senegal's jurisdiction under Article 5 of the Convention against Torture is extinguished. However, he disagrees with subparagraph (5) of the operative part which finds that Senegal has breached its obligation under Article 7, paragraph 1, of the Convention to submit the case to its competent authorities for the purpose of prosecution. In his opinion, the subject-matter of the dispute is Senegal's delay in submitting the case to its competent authorities for the purpose of instituting proceedings and this delay is not unjustified to the extent that it constitutes a breach of its obligation. Following Belgium's requests in 2005, Senegal initiated the necessary reforms of its domestic law, which were carried out in 2007, kept Hissène Habré under house arrest, prohibited him from leaving the territory and set about organizing a trial. The period that has elapsed since Belgium's request is no longer than the time Belgium itself took to investigate the case. Furthermore, Senegal's public authorities, at the governmental level, are taking practical steps to open a trial shortly and have sought and obtained international co-operation to that effect. Accordingly, Judge *ad hoc* Sur regrets the finding of a failure by Senegal to fulfil its obligation in that regard, a finding which ignores the existence of an ongoing process instead of encouraging it.

In this spirit, he shares the unanimous decision of the Court, stated in subparagraph (6) of the operative part, that Senegal must, without further delay, submit the case of Mr. Hissène Habré to its competent authorities for the purpose of prosecution.

Lastly, Judge *ad hoc* Sur considers that, on the basis of the Convention, Belgium is not entitled to obtain Hissène Habré's extradition, and he regrets that no element of the operative part concerns this request presented by Belgium in its submissions.

195. TERRITORIAL AND MARITIME DISPUTE (NICARAGUA *v.* COLOMBIA)

Judgment of 19 November 2012

On 19 November 2012, the International Court of Justice rendered its Judgment in the case concerning the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*.

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

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The operative paragraph (para. 251) of the Judgment reads as follows:

" . . .

The Court,

(1) Unanimously,

Finds that the Republic of Colombia has sovereignty over the islands at Alburquerque, Bajo Nuevo, East-Southeast Cays, Quitasueño, Roncador, Serrana and Serranilla;

(2) By fourteen votes to one,

Finds admissible the Republic of Nicaragua's claim contained in its final submission I (3) requesting 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";

In favour: *President* Tomka; *Vice-President* Sepúlveda-Amor; *Judges* Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Sebutinde; *Judges* ad hoc Mensah, Cot;

Against: *Judge* Owada;

(3) Unanimously,

Finds that it cannot uphold the Republic of Nicaragua's claim contained in its final submission I (3);

(4) Unanimously,

Decides that the line of the single maritime boundary delimiting the continental shelf and the exclusive economic zones of the Republic of Nicaragua and the Republic of Colombia shall follow geodetic lines connecting the points with co-ordinates:

Latitude north	Longitude west
1. 13° 46' 35.7"	81° 29' 34.7"
2. 13° 31' 08.0"	81° 45' 59.4"
3. 13° 03' 15.8"	81° 46' 22.7"
4. 12° 50' 12.8"	81° 59' 22.6"
5. 12° 07' 28.8"	82° 07' 27.7"
6. 12° 00' 04.5"	81° 57' 57.8"

From point 1, the maritime boundary line shall continue due east along the parallel of latitude (co-ordinates 13° 46' 35.7" N) until it reaches the 200-nautical-mile limit from the baselines from which the breadth of the territorial sea of Nicaragua is measured. From point 6 (with co-ordinates 12° 00' 04.5" N and 81° 57' 57.8" W), located on a 12-nautical-mile envelope of arcs around Alburquerque, the maritime boundary line shall continue along that envelope of arcs until it reaches point 7 (with co-ordinates 12° 11' 53.5" N and 81° 38' 16.6" W) which is located on the parallel passing through the southernmost point on the 12-nautical-mile envelope of arcs around East-Southeast Cays. The boundary line then follows that parallel until it reaches the southernmost point of the 12-nautical-mile envelope of arcs around East-Southeast Cays at point 8 (with co-ordinates 12° 11' 53.5" N and 81° 28' 29.5" W) and continues along that envelope of arcs until its most eastward point (point 9 with co-ordinates 12° 24' 09.3" N and 81° 14' 43.9" W). From that point the boundary line follows the parallel of latitude (co-ordinates 12° 24' 09.3" N) until it reaches the 200–nautical–mile limit from the baselines from which the territorial sea of Nicaragua is measured;

(5) Unanimously,

Decides that the single maritime boundary around Quitasueño and Serrana shall follow, respectively, a 12-nautical-mile envelope of arcs measured from QS 32 and from low-tide elevations located within 12 nautical miles from QS 32, and a 12-nautical-mile envelope of arcs measured from Serrana Cay and the other cays in its vicinity;

(6) Unanimously,

Rejects the Republic of Nicaragua's claim contained in its final submissions requesting the Court to declare that the Republic of Colombia is not acting in accordance with its obligations under international law by preventing the Republic of Nicaragua from having access to natural resources to the east of the 82nd meridian.

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Judge Owada appended a dissenting opinion to the Judgment of the Court; Judge Abraham appended a separate opinion to the Judgment of the Court; Judges Keith and Xue appended declarations to the Judgment of the Court; Judge Donoghue appended a separate opinion to the Judgment of the Court; Judges *ad hoc* Mensah and Cot appended declarations to the Judgment of the Court.

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Chronology of the procedure
(paras. 1-17)

The Court recalls that, on 6 December 2001, the Republic of Nicaragua (hereinafter "Nicaragua") filed in the Registry of

the Court an Application instituting proceedings against the Republic of Colombia (hereinafter "Colombia") in respect of a dispute "concerning title to territory and maritime delimitation" in the western Caribbean. The Court further recalls that on 13 December 2007 it rendered a Judgment on preliminary objections to the jurisdiction of the Court raised by Colombia, in which it concluded that it had jurisdiction, under Article XXXI of the Pact of Bogotá, to adjudicate upon the dispute concerning sovereignty over the maritime features claimed by the Parties, other than the islands of San Andrés, Providencia and Santa Catalina[1], and upon the dispute concerning the maritime delimitation between the Parties.

I. Geography
(paras. 18-24)

The area where the maritime features in dispute (Alburquerque Cays, East-Southeast Cays, Roncador, Serrana, Quitasueño, Serranilla and Bajo Nuevo) are located and within which the delimitation sought is to be carried out lies in the Caribbean Sea (see sketch-map No. 1: Geographical context).

II. Sovereignty
(paras. 25-103)

1. Whether the maritime features in dispute are capable of appropriation

Before addressing the question of sovereignty, the Court must determine whether the maritime features in dispute are capable of appropriation. It is well established in international law that islands, however small, are capable of appropriation. By contrast, low-tide elevations (features which are above water at low tide but submerged at high tide) cannot be appropriated, although a coastal State has sovereignty over low-tide elevations which are situated within its territorial sea, and these low-tide elevations may be taken into account for the purpose of measuring the breadth of the territorial sea.

The Parties agree that Alburquerque Cays, East-Southeast Cays, Roncador, Serrana, Serranilla and Bajo Nuevo remain above water at high tide and thus, as islands, they are capable of appropriation. They disagree, however, as to whether any of the features on Quitasueño qualify as islands. Taking into account the scientific evidence in the case file, in particular, an Expert Report on Quitasueño relied on by Colombia, prepared by Dr. Robert Smith, the Court concludes that the feature referred to in the Smith Report as QS 32 is above water at high tide and is thus capable of appropriation. With regard to the other maritime features at Quitasueño, the Court considers that the evidence advanced by Colombia cannot be regarded as sufficient to establish that any of them constitutes an island, as defined in international law; it finds that they are low-tide elevations.

2. Sovereignty over the maritime features in dispute

In addressing the question of sovereignty over the maritime features in dispute, the Court first considers the 1928 Treaty. The Court notes that under the terms of the 1928 Treaty, Colombia has sovereignty over "San Andrés, Providencia and Santa Catalina and over the other islands, islets and reefs forming part of the San Andrés Archipelago". Therefore, in order to address the question of sovereignty over the maritime features in dispute, the Court needs first to ascertain what constitutes the San Andrés Archipelago. The Court observes that Article I of the 1928 Treaty does not specify the composition of that Archipelago. As to the 1930 Protocol of Exchange of Ratifications of the 1928 Treaty, it only fixes the western limit of the San Andrés Archipelago at the 82nd meridian and sheds no light on the scope of the Archipelago to the east of that meridian. The Court further observes that the historical material adduced by the Parties to support their respective arguments does not shed light on the composition of the San Andrés Archipelago. In particular, the historical records do not specifically indicate which features were considered to form part of that Archipelago. The Court finds that neither the 1928 Treaty nor the historical records is conclusive as to the composition of that Archipelago.

In order to resolve the dispute before it, the Court must therefore examine arguments and evidence submitted by the Parties in support of their respective claims to sovereignty, which are not based on the composition of the Archipelago under the 1928 Treaty.

The Court thus turns to the claims of sovereignty asserted by both Parties on the basis of *uti possidetis juris* (a principle according to which, upon independence, new States inherit territories and boundaries of former colonial provinces). The Court concludes that, in the present case, the principle of *uti possidetis juris* affords inadequate assistance in determining sovereignty over the maritime features in dispute between Nicaragua and Colombia because nothing in the historical record clearly indicates whether these features were attributed to the colonial provinces of Nicaragua or of Colombia prior to or upon independence from Spain.

The Court next considers whether sovereignty can be established on the basis of *effectivités* (State acts manifesting a display of authority on a given territory). The Court notes that it is Colombia's submission that *effectivités* confirm its prior title to the maritime features in dispute. The Court considers the different categories of *effectivités* presented by Colombia, namely: public administration and legislation, regulation of economic activities, public works, law enforcement measures, naval visits and search and rescue operations and consular representation. On the basis of the evidence on the case file, the Court finds that for many decades Colombia continuously and consistently acted *à titre de souverain* in respect of the maritime features in dispute. This exercise of sovereign authority was public and there is no evidence that it met with any protest from Nicaragua prior to 1969, when the dispute crystallized. Moreover, the evidence of Colombia's acts of administration with respect to the islands is in contrast to the absence of any evidence of acts *à titre de souverain* on the part of Nicaragua. The Court concludes that the facts provide very strong support for Colombia's claim of sovereignty over the maritime features in dispute.

[1] In its 2007 Judgment on preliminary objections, the Court held that it had no jurisdiction with regard to Nicaragua's claim to sovereignty over the islands of San Andrés, Providencia and Santa Catalina, because the question of sovereignty over these three islands had been determined by the Treaty concerning Territorial Questions at Issue between Colombia and Nicaragua, signed at Managua on 24 March 1928, by which Nicaragua recognized Colombian sovereignty over these islands.

The Court also notes that, while not being evidence of sovereignty, Nicaragua's conduct with regard to the maritime features in dispute, the practice of third States and maps afford some support to Colombia's claim.

The Court concludes that Colombia, and not Nicaragua, has sovereignty over the islands at Alburquerque, Bajo Nuevo, East-Southeast Cays, Quitasueño, Roncador, Serrana and Serranilla.

III. Admissibility of Nicaragua's claim for delimitation of a continental shelf extending beyond 200 nautical miles
(paras. 104-112)

The Court observes that, from a formal point of view, the claim made in Nicaragua's final submission I (3)—requesting the Court to effect a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties (see sketch-map No. 2: Delimitation claimed by Nicaragua)—is a new claim in relation to the claims presented in the Application and the Memorial, in which the Court was requested to determine the "single maritime boundary" between the continental shelf areas and exclusive economic zones appertaining respectively to Nicaragua and Colombia in the form of a median line between the mainland coasts of the two States. The Court is not however convinced by Colombia's contentions that this revised claim transforms the subject-matter of the dispute brought before the Court. The fact that Nicaragua's claim to an extended continental shelf is a new claim does not, in itself, render the claim inadmissible. In the Court's view, the claim to an extended continental shelf falls within the dispute between the Parties relating to maritime delimitation and cannot be said to transform the subject-matter of that dispute. Moreover, it arises directly out of that dispute. The Court concludes that the claim contained in final submission I (3) by Nicaragua is admissible.

IV. Consideration of Nicaragua's claim for delimitation of a continental shelf extending beyond 200 nautical miles
(paras. 113-131)

The Court turns to the question whether it is in a position to delimit a maritime boundary between an extended continental shelf of Nicaragua and Colombia's continental shelf as requested by Nicaragua in its final submission I (3). The Court notes that Colombia is not a State party to the United Nations Convention on the Law of the Sea (UNCLOS) and that, therefore, the law applicable in the case is customary international law. The Court considers that the definition of the continental shelf set out in Article 76, paragraph 1, of UNCLOS forms part of customary international law. At this stage, in view of the fact that the Court's task is limited to the examination of whether it is in a position to carry out a continental shelf delimitation as requested by Nicaragua, it does not need to decide whether other provisions of Article 76 of UNCLOS form part of customary international law.

The Court further observes that in the case concerning *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)*, it stated that "any claim of continental shelf rights beyond 200 miles [by a State party to UNCLOS] must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder". Given the object and purpose of UNCLOS, as stipulated in its Preamble, the fact that Colombia is not a party thereto does not relieve Nicaragua of its obligations under Article 76. The Court notes that Nicaragua submitted to the Commission only "Preliminary Information" which, by its own admission, falls short of meeting the requirements for the Commission to be able to make a recommendation relating to the establishment of the outer limits of the continental shelf.

As the Court was not presented with any further information, it finds that, in the present proceedings, Nicaragua 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 therefore not in a position to delimit the maritime boundary as requested by Nicaragua. The Court concludes that Nicaragua's claim contained in its final submission I (3) cannot be upheld.

V. Maritime boundary
(paras. 132–247)

1. The task now before the Court

In light of the decision it has taken regarding Nicaragua's proposed maritime delimitation as set out in its final submission I (3), the Court must consider what maritime delimitation should be effected. The Court observes that Colombia, for its part, has requested that the delimitation of the exclusive economic zone and the continental shelf between Nicaragua and Colombia be effected by a single maritime boundary, constructed as a median line between Nicaraguan fringing islands and the islands of the San Andrés Archipelago (see sketch-map No. 3: Delimitation claimed by Colombia).

The Court notes that there is an overlap between Nicaragua's entitlement to a continental shelf and exclusive economic zone extending to 200 nautical miles from its mainland coast and adjacent islands and Colombia's entitlement to a continental shelf and exclusive economic zone derived from the islands over which the Court has held that Colombia has sovereignty. Thus, notwithstanding its decision regarding Nicaragua's final submission I (3), the Court is still called upon to effect a delimitation between the overlapping maritime entitlements of Colombia and Nicaragua within 200 nautical miles of the Nicaraguan coast.

2. Applicable law

As the Court has already noted, the law applicable to this delimitation is customary international law. The Court considers that the principles of maritime delimitation enshrined in Articles 74 and 83 and the legal régime of islands set out in UNCLOS Article 121 reflect customary international law.

3. Relevant coasts

The Court begins by determining what the relevant coasts of the Parties are, namely, those coasts the projections of which overlap. After briefly setting out the positions of the Parties regarding their respective coasts (see sketch-map No. 4: The relevant coasts and the relevant area according to Nicaragua, and sketch-map No. 5: The relevant coasts and the relevant area according to Colombia), the Court proceeds to make its own determination.

For Nicaragua, the Court finds that the relevant coast is its whole coast with the exception of the short stretch of coast near Punta de Perlas, which faces due south and thus does not project into the area of overlapping potential entitlements. The Court also considers that Nicaragua's entitlement to a 200-nautical-mile continental shelf and exclusive economic zone has to be measured from the islands fringing the Nicaraguan coast. The east-facing coasts of the Nicaraguan islands are parallel to the mainland and do not, therefore, add to the length of the relevant coast, although they contribute to the baselines from which Nicaragua's entitlement is measured.

For Colombia, in view of the fact that Nicaragua's claim to a continental shelf on the basis of natural prolongation has not been upheld, the Court is concerned in the present proceedings only with those Colombian entitlements which overlap with the continental shelf and exclusive economic zone entitlements within 200 nautical miles of the Nicaraguan coast. Since the mainland coast of Colombia does not generate any entitlement in that area, it follows that it cannot be regarded as part of the relevant coast for present purposes. The relevant Colombian coast is thus confined to the coasts of the islands under Colombian sovereignty facing the Nicaraguan mainland. Since the area of overlapping potential entitlements extends well to the east of the Colombian islands, the Court considers that it is the entire coastline of these islands, not merely the west-facing coasts, which has to be taken into account. The most important islands are obviously San Andrés, Providencia and Santa Catalina. The Court also considers that the coasts of Alburquerque Cays, East-Southeast Cays, Roncador and Serrana must be considered part of the relevant coast. The Court has, however, disregarded Quitasueño, Serranilla and Bajo Nuevo for the purposes of determining Colombia's relevant coast.

The lengths of the relevant coasts are therefore 531 km (Nicaragua) and 65 km (Colombia), a ratio of approximately 1:8.2 in favour of Nicaragua (see sketch-map No. 6: The relevant coasts as identified by the Court).

4. Relevant maritime area

The Court then considers the extent of the relevant maritime area in which the potential entitlements of the Parties overlap. The Court begins by setting out the positions of the Parties regarding the relevant maritime area (see sketch-maps Nos. 4 and 5) before making its own determination.

The Court recalls that the legal concept of the "relevant area" has to be taken into account as part of the methodology of maritime delimitation. Depending on the configuration of the relevant coasts in the general geographical context, the relevant area may include certain maritime spaces and exclude others which are not germane to the case in hand. In addition, the relevant area is pertinent when the Court comes to verify whether the line which it has drawn produces a result which is disproportionate. However, the Court emphasizes that the calculation of the relevant area does not purport to be precise but is only approximate and that the object of delimitation is to achieve a delimitation that is equitable, not an equal apportionment of maritime areas.

The relevant area comprises that part of the maritime space in which the potential entitlements of the parties overlap. Accordingly, the relevant area extends from the Nicaraguan coast to a line in the east 200 nautical miles from the baselines from which the breadth of Nicaragua's territorial sea is measured. Since Nicaragua has not yet notified the Secretary-General of the location of those baselines under Article 16, paragraph 2, of UNCLOS, the eastern limit of the relevant area can be determined only on an approximate basis.

In both the north and the south, the interests of third States become involved. In the north, there is a boundary between Nicaragua and Honduras, established by the Court in its Judgment of 8 October 2007, and a maritime boundary between Colombia and Jamaica established in 1993 through a bilateral Agreement. There is also a Colombia-Jamaica "Joint Regime Area" (an area in which Colombia and Jamaica have agreed upon shared development, rather than delimitation). In the south, there is a boundary between Colombia and Panama established pursuant to a bilateral Agreement which was signed in 1976 and entered into force in 1977. There is also a boundary between Colombia and Costa Rica established in 1977 by means of a bilateral Agreement, which has not yet been ratified.

The Court notes that, while the agreements between Colombia, on the one hand, and Costa Rica, Jamaica and Panama, on the other, concern the legal relations between the parties to each of those agreements, they are *res inter alios acta* so far as Nicaragua is concerned. Accordingly, none of those agreements can affect the rights and obligations of Nicaragua vis-à-vis Costa Rica, Jamaica or Panama; nor can they impose obligations, or confer rights, upon Costa Rica, Jamaica or Panama vis-à-vis Nicaragua. It follows that, when it effects the delimitation between Colombia and Nicaragua, the Court is not purporting to define or to affect the rights and obligations which might exist as between Nicaragua and any of these three States. The position of Honduras is somewhat different. The boundary between Honduras and Nicaragua was established by the Court's 2007 Judgment, although the endpoint of that boundary was not determined. Nicaragua can have no rights to the north of that line and Honduras can have no rights to the south. It is in the final phase of delimitation, however, not in the preliminary phase of identifying the relevant area, that the Court is required to take account of the rights of third parties. Nevertheless, if the exercise of identifying, however approximately, the relevant area is to be a useful one, then some awareness of the actual and potential claims of third parties is necessary. In the present case, there is a large measure of agreement between the Parties as to what this task must entail. Both Nicaragua and Colombia have accepted that the area of their overlapping entitlements does not extend beyond the boundaries already established between either of them and any third State.

The Court recalls that the relevant area cannot extend beyond the area in which the entitlements of both Parties overlap. Accordingly, if either Party has no entitlement in a particular area, whether because of an agreement it has concluded with a third State or because that area lies beyond a judicially determined boundary between that Party and a third State, that area cannot be treated as part of the relevant

area for present purposes. Since Colombia has no potential entitlements to the south and east of the boundaries which it has agreed with Costa Rica and Panama, the relevant area cannot extend beyond those boundaries. In addition, although the Colombia-Jamaica "Joint Regime Area" is an area in which Colombia and Jamaica have agreed upon shared development, rather than delimitation, the Court considers that it has to be treated as falling outside the relevant area. The Court notes that more than half of the "Joint Regime Area" (as well as the island of Bajo Nuevo and the waters within a 12-nautical-mile radius thereof) is located more than 200 nautical miles from Nicaragua and thus could not constitute part of the relevant area in any event. It also recalls that neither Colombia, nor (at least in most of its pleadings) Nicaragua, contended that it should be included in the relevant area. Although the island of Serranilla and the waters within a 12-nautical-mile radius of the island are excluded from the "Joint Regime Area", the Court considers that they also fall outside the relevant area for the purposes of the present case, in view of potential Jamaican entitlements and the fact that neither Party contended otherwise.

The Court therefore concludes that the boundary of the relevant area in the north follows the maritime boundary between Nicaragua and Honduras, laid down in the Court's Judgment of 8 October 2007, until it reaches latitude 16 degrees north. It then continues due east until it reaches the boundary of the Colombia-Jamaica "Joint Regime Area". From that point, it follows the boundary of that Area, skirting a line 12 nautical miles from Serranilla, until it intersects with the line 200 nautical miles from Nicaragua. In the south, the boundary of the relevant area begins in the east at the point where the line 200 nautical miles from Nicaragua intersects with the boundary line agreed between Colombia and Panama. It then follows the Colombia-Panama line to the west until it reaches the line agreed between Colombia and Costa Rica. It follows that line westwards and then northwards, until it intersects with a hypothetical equidistance line between the Costa Rican and Nicaraguan coasts. (See sketch-map No. 7: The relevant maritime area as identified by the Court.)

The relevant area thus drawn has a size of approximately 209,280 sq km.

5. Entitlements generated by maritime features

The Parties agree that San Andrés, Providencia and Santa Catalina are entitled to a territorial sea, exclusive economic zone and continental shelf. In principle, that entitlement is capable of extending up to 200 nautical miles in each direction. The Parties differ regarding the entitlements which may be generated by Alburquerque Cays, East-Southeast Cays, Roncador, Serrana, Serranilla and Bajo Nuevo.

The Court begins by recalling that Serranilla and Bajo Nuevo fall outside the relevant area as defined in the preceding section of the Judgment and that it is accordingly not called upon in the present proceedings to determine the scope of their maritime entitlements. With regard to Alburquerque Cays, East-Southeast Cays, Roncador and Serrana, the Court observes that international law today sets the breadth of the territorial sea which the coastal State has the right to establish at 12 nautical miles. These features are therefore each entitled to a territorial sea of 12 nautical miles, irrespective of whether they fall within the exception stated in Article 121, paragraph 3, of UNCLOS. The Court does not deem it necessary to determine the precise status of the smaller islands, since any entitlement to maritime spaces which they might generate within the relevant area (outside the territorial sea) would entirely overlap with the entitlement to a continental shelf and exclusive economic zone generated by the islands of San Andrés, Providencia and Santa Catalina.

The Court finds that Colombia is entitled to a territorial sea of 12 nautical miles around QS 32 at Quitasueño. Moreover, in measuring that territorial sea, Colombia is entitled to use those low-tide elevations within 12 nautical miles of QS 32 for the purpose of measuring the breadth of its territorial sea. The Court observes that it has not been suggested by either Party that QS 32 is anything other than a rock which is incapable of sustaining human habitation or economic life of its own under Article 121, paragraph 3, of UNCLOS, so this feature generates no entitlement to a continental shelf or exclusive economic zone.

6. Method of delimitation

To effect the delimitation, the Court follows the three-stage methodology employed in its case law. In the first stage, the Court establishes a provisional delimitation line between territories (including the island territories) of the Parties. The line is constructed using the most appropriate base points on the coasts of the Parties. In the second stage, the Court considers whether there are any relevant circumstances which may call for an adjustment or shifting of the provisional equidistance/median line so as to achieve an equitable result. In the third and final stage, the Court conducts a disproportionality test in which it assesses whether the effect of the line, as adjusted or shifted, is that the Parties' respective shares of the relevant area are markedly disproportionate to their respective relevant coasts.

7. Determination of base points and construction of the provisional median line

For the Nicaraguan coast, the Court uses base points located on Edinburgh Reef, Muerto Cay, Miskitos Cays, Ned Thomas Cay, Roca Tyra, Little Corn Island and Great Corn Island.

So far as the Colombian coast is concerned, the Court considers that Quitasueño should not contribute to the construction of the provisional median line. The part of Quitasueño which is undoubtedly above water at high tide is a minuscule feature, barely 1 sq m in dimension. When placing base points on very small maritime features would distort the relevant geography, it is appropriate to disregard them in the construction of a provisional median line. In the Court's view, neither should a base point be placed on Serrana or on Low Cay. The base points on the Colombian side will, therefore, be located on Santa Catalina, Providencia and San Andrés islands and on Alburquerque Cays.

The provisional median line constructed from these two sets of base points is, therefore, controlled in the north by the Nicaraguan base points on Edinburgh Reef, Muerto Cay and Miskitos Cays and Colombian base points on Santa Catalina

and Providencia, in the centre by base points on the Nicaraguan islands of Ned Thomas Cay and Roca Tyra and the Colombian islands of Providencia and San Andrés, and in the south by Nicaraguan base points on Little Corn Island and Great Corn Island and Colombian base points on San Andrés and Alburquerque Cays. (See sketch-map No. 8: Construction of the provisional median line.)

8. Relevant circumstances

The Court notes that the Parties invoked several different circumstances which they found relevant to the achievement of an equitable solution, which the Court now considers in turn.

A. Disparity in the lengths of the relevant coasts

The Court begins by observing that a substantial difference in the lengths of the parties' respective coastlines may be a factor to be taken into consideration in order to adjust or shift the provisional delimitation line. In the present case, the disparity between the relevant Colombian coast and that of Nicaragua is approximately 1:8.2. This is undoubtedly a substantial disparity and the Court considers that it requires an adjustment or shifting of the provisional line, especially given the overlapping maritime areas to the east of the Colombian islands.

B. Overall geographical context

The Court does not believe that any weight should be given to Nicaragua's contention that the Colombian islands are located on "Nicaragua's continental shelf". It has repeatedly made clear that geological and geomorphological considerations are not relevant to the delimitation of overlapping entitlements within 200 nautical miles of the coasts of States.

The Court agrees, however, that the achievement of an equitable solution requires that, so far as possible, the line of delimitation should allow the coasts of the Parties to produce their effects in terms of maritime entitlements in a reasonable and mutually balanced way. The effect of the provisional median line is to cut Nicaragua off from some three quarters of the area into which its coast projects. The Court therefore concludes that the cut-off effect is a relevant consideration which requires adjustment or shifting of the provisional median line in order to produce an equitable result.

C. Conduct of the Parties

The Court does not consider that the conduct of the Parties in the present case is so exceptional as to amount to a relevant circumstance which itself requires it to adjust or shift the provisional median line.

D. Security and law enforcement considerations

The Court states that it will bear in mind any legitimate security concerns in determining what adjustment to make to the provisional median line or in what way that line should be shifted.

E. Equitable access to natural resources

The Court considers that the present case does not present issues of access to natural resources so exceptional as to warrant it treating them as a relevant consideration.

F. Delimitations already effected in the area

The Court accepts that Panama's agreement with Colombia amounts to recognition by Panama of Colombian claims to the area to the north and west of the boundary line laid down in that agreement. Similarly the unratified treaty between Colombia and Costa Rica entails at least potential recognition by Costa Rica of Colombian claims to the area to the north and east of the boundary line which it lays down, while the Colombia-Jamaica agreement entails recognition by Jamaica of Colombian claims to the area to the south-west of the boundary of the Colombia-Jamaica "Joint Regime Area". The Court cannot, however, agree with Colombia that this recognition amounts to a relevant circumstance which the Court must take into account in effecting a maritime delimitation between Colombia and Nicaragua. It is a fundamental principle of international law that a treaty between two States cannot, by itself, affect the rights of a third State. In accordance with that principle, the treaties which Colombia has concluded with Jamaica and Panama and the treaty which it has signed with Costa Rica cannot confer upon Colombia rights against Nicaragua and, in particular, cannot entitle it, vis-à-vis Nicaragua, to a greater share of the area in which its maritime entitlements overlap with those of Nicaragua than it would otherwise receive.

The Court further observes that, as Article 59 of the Statute of the Court makes clear, it is axiomatic that a judgment of the Court is not binding on any State other than the parties to the case. Moreover, the Court has always taken care not to draw a boundary line which extends into areas where the rights of third States may be affected. The Judgment by which the Court delimits the boundary addresses only Nicaragua's rights as against Colombia and vice versa and is, therefore, without prejudice to any claim of a third State or any claim which either party may have against a third State.

9. Course of the maritime boundary

Having thus identified relevant circumstances which mean that a maritime boundary following the course of the provisional median line would not produce an equitable result, the Court proceeds by way of shifting the provisional median line. In this context, the Court draws a distinction between that part of the relevant area which lies between the Nicaraguan mainland and the western coasts of Alburquerque Cays, San Andrés, Providencia and Santa Catalina, where the relationship is one of opposite coasts, and the part which lies to the east of those islands, where the relationship is more complex. In the first, western, part of the relevant area, the relevant circumstances call for the provisional median line to be shifted eastwards. The disparity in coastal lengths is so marked as to justify a significant shift. The line cannot, however, be shifted so far that it cuts across the 12-nautical-mile territorial sea around any of the Colombian islands.

The Court notes that there are various techniques which allow for relevant circumstances to be taken into consideration in order to reach an equitable solution. In the present case, the Court proceeds by giving a weighting of one to each of the Colombian base points and a weighting of three to each of the Nicaraguan base points. The Court notes that, while all

of the Colombian base points contribute to the construction of this line, only the Nicaraguan base points on Miskitos Cays, Ned Thomas Cay and Little Corn Island control the weighted line. As a result of the fact that the line is constructed using a 3:1 ratio between Nicaraguan and Colombian base points, the effect of the other Nicaraguan base points is superseded by those base points. The line ends at the last point that can be constructed using three base points. The weighted line, constructed on this basis, has a curved shape with a large number of turning points (see sketch-map No. 9: Construction of the weighted line). Mindful that such a configuration of the line may create difficulties in its practical application, the Court proceeds to a further adjustment by reducing the number of turning points and connecting them by geodetic lines. This produces a simplified weighted line (see sketch-map No. 10: The simplified weighted line). The line thus constructed forms the boundary between the maritime entitlements of the two States between points 1 and 5.

The Court considers, however, that to extend that line into the parts of the relevant area north of point 1 or south of point 5 would not lead to an equitable result. While the simplified weighted line represents a shifting of the provisional median line which goes some way towards reflecting the disparity in coastal lengths, it would, if extended beyond points 1 and 5, still leave Colombia with a significantly larger share of the relevant area than that accorded to Nicaragua, notwithstanding the fact that Nicaragua's relevant coast is more than eight times the length of Colombia's relevant coast. It would thus give insufficient weight to the first relevant circumstance which the Court has identified. Moreover, by cutting off Nicaragua from the areas east of the principal Colombian islands into which the Nicaraguan coast projects, such a boundary would fail to take into account the second relevant circumstance, namely, the overall geographical context.

The Court must take proper account both of the disparity in coastal length and the need to avoid cutting either State off from the maritime spaces into which its coasts project. In the view of the Court an equitable result which gives proper weight to those relevant considerations is achieved by continuing the boundary line out to the line 200 nautical miles from the Nicaraguan baselines along lines of latitude.

With this in mind, the Court plots the boundary line as follows (see sketch-map No. 11: Course of the maritime boundary).

First, from the extreme northern point of the simplified weighted line (point 1), which is located on the parallel passing through the northernmost point on the 12-nautical-mile envelope of arcs around Roncador, the line of delimitation will follow the parallel of latitude until it reaches the 200–nautical–mile limit from the baselines from which the territorial sea of Nicaragua is measured (endpoint A). As the Court has explained, since Nicaragua has yet to notify the baselines from which its territorial sea is measured, the precise location of endpoint A cannot be determined and the location depicted on sketch-map No. 11 is therefore approximate.

Secondly, from the extreme southern point of the adjusted line (point 5), the line of delimitation will run in a south-east direction until it intersects with the 12–nautical–mile envelope of arcs around South Cay of Alburquerque Cays (point 6). It then continues along that 12-nautical-mile envelope of arcs around South Cay of Alburquerque Cays until it reaches the point (point 7) where that envelope of arcs intersects with the parallel passing through the southernmost point on the 12-nautical-mile envelope of arcs around East-Southeast Cays. The boundary line then follows that parallel until it reaches the southernmost point of the 12-nautical-mile envelope of arcs around East-Southeast Cays (point 8) and continues along that envelope of arcs until its most eastward point (point 9). From that point the boundary line follows the parallel of latitude until it reaches the 200–nautical–mile limit from the baselines from which the territorial sea of Nicaragua is measured (endpoint B, the approximate location of which is shown on sketch-map No. 11).

That leaves Quitasueño and Serrana, both of which the Court has held fall on the Nicaraguan side of the boundary line described above. In the Court's view, to take the adjusted line described in the preceding paragraphs further north, so as to encompass these islands and the surrounding waters, would allow small, isolated features, which are located at a considerable distance from the larger Colombian islands, to have a disproportionate effect upon the boundary. The Court therefore considers that the use of enclaves achieves the most equitable solution in this part of the relevant area.

Quitasueño and Serrana are each entitled to a territorial sea which, for the reasons already given by the Court, cannot be less than 12 nautical miles in breadth. Since Quitasueño is a rock incapable of sustaining human habitation or an economic life of its own and thus falls within the rule stated in Article 121, paragraph 3, of UNCLOS, it is not entitled to a continental shelf or exclusive economic zone. Accordingly, the boundary between the continental shelf and exclusive economic zone of Nicaragua and the Colombian territorial sea around Quitasueño will follow a 12-nautical-mile envelope of arcs measured from QS 32 and from the low-tide elevations located within 12 nautical miles from QS 32.

In the case of Serrana, the Court recalls that it has already concluded that it is unnecessary to decide whether or not it falls within the rule stated in Article 121, paragraph 3, of UNCLOS. Its small size, remoteness and other characteristics mean that, in any event, the achievement of an equitable result requires that the boundary line follow the outer limit of the territorial sea around the island. The boundary will therefore follow a 12-nautical-mile envelope of arcs measured from Serrana Cay and other cays in its vicinity.

10. The disproportionality test

In carrying out the disproportionality test, the Court notes that it is not applying a principle of strict proportionality. Maritime delimitation is not designed to achieve even an approximate correlation between the ratio of the lengths of the Parties' relevant coasts and the ratio of their respective shares of the relevant area. The Court's task is to check for a significant disproportionality so gross as to "taint" the result and render it inequitable. In the present case, the boundary line has the effect of dividing the relevant area between the Parties in a ratio of approximately 1:3.44 in Nicaragua's favour, while the ratio of relevant coasts is approximately 1:8.2. The ques-

tion, therefore, is whether, in the circumstances of the present case, this disproportion is so great as to render the result inequitable. The Court concludes that, taking account of all the circumstances of the present case, the result achieved by the maritime delimitation does not entail such a disproportionality as to create an inequitable result.

VI. Nicaragua's request for a declaration (paras. 248–250)

In addition to its claims regarding a maritime boundary, in its final submissions, Nicaragua requested that the Court adjudge and declare that "Colombia is not acting in accordance with her obligations under international law by stopping and otherwise hindering Nicaragua from accessing and disposing of her natural resources to the east of the 82nd meridian".

The Court observes that Nicaragua's request for this declaration is made in the context of proceedings regarding a maritime boundary which had not been settled prior to the decision of the Court. The consequence of the Court's Judgment is that the maritime boundary between Nicaragua and Colombia throughout the relevant area has now been delimited as between the Parties. In this regard, the Court observes that the Judgment attributes to Colombia part of the maritime spaces in respect of which Nicaragua seeks a declaration regarding access to natural resources. In this context, the Court considers that Nicaragua's claim is unfounded.

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Dissenting opinion of Judge Owada

In his dissenting opinion, Judge Owada states that, although he has voted in favour of all the conclusions of the Court relating to the merits of the dispute as contained in subparagraphs (1) and subparagraphs (3) through (6) of the operative paragraph, he has been unable to vote in favour of subparagraph (2) relating to the issue of admissibility of the claim by Nicaragua contained in its final submission I (3). In his view, the conclusion of the Court on this point is not in line with the criterion for judging admissibility of a claim as developed by the Court and not right as a matter of principle.

Judge Owada notes that both the Applicant and the Respondent cite the jurisprudence of this Court—particularly the cases concerning *Certain Phosphate Lands in Nauru* and *Ahmadou Sadio Diallo*—to determine whether or not the allegedly newly formulated claim of the Applicant can be considered admissible. In Judge Owada's view, however, it is doubtful whether either of these two cases is strictly pertinent to the present case. Judge Owada points out that in each of these cases, the alleged new claim was, in its essential character, a new *additional claim* which had not expressly been included in the original Application. Judge Owada submits that this is not the situation in the present case, where the Applicant attempted to *replace* the original formulation of the claim submitted to the Court in its Application by a newly formulated, ostensibly different, claim relating to the existing dispute.

Judge Owada states that the *Société Commerciale de Belgique* case is more akin to the situation in the present case. In that case, the Court accepted a claim that was reformulated by the Belgian Government in its final submissions. Judge Owada remarks, however, that the Court in that case emphasized that its decision to accept Belgium's reformulated claim was based in large part on the lack of an objection by Greece to the reformulated claim. Judge Owada notes that, by comparison, in the present case the Respondent raised a strong objection to the Applicant's novel formulation of its claim.

Judge Owada observes that, at the oral hearings, the Applicant explained that it adjusted its submissions (and its line of argument) following the Court's Judgment of 13 December 2007, in which the Court upheld Colombia's first preliminary objection concerning the Court's jurisdiction as regards the question of sovereignty over the islands of San Andrés, Providencia, and Santa Catalina. Judge Owada remarks, however, that, whatever may be the background behind the Applicant's change of position, the 2007 Judgment of the Court did not produce such a fundamental change in the legal situation as to require the Applicant to give up its original position and to drastically change its principal claim as well as its legal basis.

Judge Owada notes that the present Judgment rejects the contention of Colombia that this revised claim transforms the subject-matter of the dispute. He observes that, in so doing, the Judgment relies largely upon the argument of the Applicant. Judge Owada respectfully differs from this perception of the Court about the nature and the subject-matter of the dispute as submitted to the Court by the Applicant. In Judge Owada's view, this sudden change of position on the part of the Applicant cannot be described as anything but a radical transformation of the subject-matter of the dispute itself.

Although the Applicant argues that the subject of the dispute has not been modified, Judge Owada states that he is unable to agree with this position, given that the legal character of a continental shelf based on the distance criterion and that of a continental shelf based on the natural prolongation criterion are quite distinct. As a result, in Judge Owada's opinion, what is proposed by the Applicant by way of its newly reformulated submission I (3) is not something that can be characterized as relating only to the *means* by which it is suggested to resolve the dispute, as the Applicant claimed.

Judge Owada notes that there is no express definition in the Application to indicate what, in the view of the Applicant, constitutes the dispute being submitted by the Applicant in the present case. In his view, the crucial part of the Application is paragraph 8, in which the Applicant asks the Court "to determine the course of the single maritime boundary between the areas of continental shelf and exclusive economic zone appertaining respectively to Nicaragua and Colombia, in accordance with equitable principles and relevant circumstances recognized by general international law as applicable to such a delimitation of a single maritime boundary". Judge Owada states that this language could not be clearer; its purport is to identify a very specific objective that the Applicant seeks to attain by the Judgment: delimitation of the course of a single maritime boundary constituting both the continental shelf boundary and the economic zone boundary.

Judge Owada adds that this language cannot be read as merely indicating one possible means to be employed by the Court for achieving the general objective of demarcating maritime areas lying between the two Parties.

Judge Owada then turns to what in his view is an even more important point—namely, the consideration of judicial policy of this Court. Judge Owada points out that in the *Certain Phosphate Lands in Nauru* case, the Court came to the conclusion that the claim made by Nauru was inadmissible because it constituted, both in form and in substance, a new claim. The Court in that case also emphasized that the subject of the dispute would have been transformed if it entertained that claim. In Judge Owada's view, the same consideration should apply in the present case: if the Court were to accept this radical change in the Applicant's submission, then the whole issue of maritime delimitation would acquire a totally different character, not only in form but also in substance. Specifically, according to Judge Owada, the Court would have to consider a number of legal issues that were not envisaged by the Parties or by the Court when the original submission of the Applicant was made in its Application and its Memorial.

Judge Owada states that one important point for the Court to consider is that this radical change in the Applicant's position took its concrete form only in late 2007, more than six years after the dispute was originally submitted. In his view, the rationale of the prohibition of the transformation of the dispute into a new dispute is solidly founded on the consideration of fair administration of justice to be applied to both Parties and the consideration of legal stability and predictability.

Separate opinion of Judge Abraham

In his separate opinion, Judge Abraham states that, although he has voted in favour of all of the points in the operative clause of the Court's Judgment, he nevertheless disagrees with two aspects of the reasoning followed by the Court in its Judgment.

As regards sovereignty over the maritime features in dispute, Judge Abraham is of the view that, before turning to consider *uti possidetis juris* and the post-colonial *effectivités*, the Court should have interpreted the 1928 Treaty in order to determine whether the latter made it possible to settle the issue of sovereignty over the maritime features in dispute, or over certain of them. In Judge Abraham's opinion, the Court, without providing any valid justification, has refrained from interpreting the Treaty, confining itself to finding that the composition of the San Andrés Archipelago, which the Treaty awarded to Colombia, was not clearly defined. In so doing, the Court has not fulfilled its duty.

With regard to the maritime delimitation, Judge Abraham considers that the so-called equidistance method was unsuitable in this instance on account of the geographical facts of this case. Thus, it was not possible in this case to draw a provisional median line which takes into account all of the "relevant [Colombian] coasts", as defined by the Court's Judgment, namely a provisional line which is drawn from the most relevant points of the western—but also eastern, northern and southern—coasts of the Colombian islands. Moreover, in Judge Abraham's opinion, the Court, by adding two horizontal lines and four frontier points to the provisional line, is wrong to assert that it is carrying out a mere "adjustment" or "shifting" of the provisional median line in the light of the particular relevant circumstances. In conclusion, Judge Abraham is of the view that, although the Court has claimed to apply its "standard method" for maritime delimitation in this case, it has in fact departed greatly from it, which was inevitable because of its unsuitability in this case.

Declaration of Judge Keith

Judge Keith in his declaration states that he agrees with the conclusions the Court reaches. He also agrees in general, with one exception, with the reasons the Court gives. That exception concerns the law to be applied to the delimitation of the maritime boundary and the application of the law to the facts.

Judge Keith briefly reviews the development of the law and practice of delimitation since the International Law Commission took up the matter in the 1950s. By reference particularly to what the Court said in 1969 in the *North Sea Continental Shelf* cases and the development through the 1970s of the relevant articles of the 1982 Convention on the Law of the Sea he emphasizes the aim, stated in those articles, of achieving an equitable result. That is to be achieved by whatever method or combination of methods is appropriate.

Judge Keith, addressing the most unusual geographic situation presented by this case, indicates the combination of methods that he considers should have been used in this case to achieve an equitable result. They would achieve that result, he considers, more directly than the heavily modified version of the usual delimitation method used by the Court. He recognizes that the application of the methods he proposes would result in essentially the same line as that established by the Court.

Declaration of Judge Xue

In her declaration, Judge Xue expresses her reservations on two key aspects of the Judgment, the three-stage methodology adopted by the Court and the treatment of the interest of third States.

On the first issue, while acknowledging the Court's effort in developing a certain approach to provide for legal certainty and predictability for the process of delimitation in the recent *Black Sea* case, Judge Xue emphasizes that the guiding principle for maritime delimitation as laid down in Articles 74 and 83 of the Convention on the Law of the Sea has not been changed by this development. In her opinion, the methodology cannot be predetermined, because the aim to achieve an equitable solution requires that the selection of method(s) for the delimitation be considered in the light of the geographic features and the relevant circumstances in each case.

Judge Xue takes issue on the three-stage method employed by the Court for the reason that the relevant circumstances of the present case are considerably different from those in the *Black Sea* case and it is inappropriate and infeasible to delimit the entire relevant area on the basis of a provisional median line located to the west of the Colombian islands. In her view, any subsequent "adjustment or shifting", however substantial, of the provisional median line in the western part would not be able to overcome the gross disproportion in the lengths of

the coasts and the ratio of the relevant area between the Parties as determined by the Court, hence unable to achieve an equitable result.

Considering the disparity in the lengths of the relevant coasts and the overall geographical context, the Court adjusted the median line by using a 3:1 ratio between Nicaraguan and Colombian base points, as a result of which, some base points on the Nicaraguan side are "superseded". Judge Xue questions whether this is a shifting of the provisional median line or rather a reconstruction of a new line by 3:1 ratio between the base points of the Parties. In her opinion, the Court could have achieved the same result by directly selecting a couple of outermost base points by equal number from each side of the Parties as the controlling points and drawing up the line by 3:1 ratio. She notes that the rationale of the 3:1 ratio method is based on the delimitation principle—to achieve an equitable solution. This method stands in its own right; it does not have to be mixed up with the provisional median line. Judge Xue further observes that the Court has apparently drawn the boundary in the northern and southern sections by different methods—enclaving and latitude line. She finds it hard to justify them as "adjustment of" or "shifting from" the provisional median line, if the latter does not mean total departure. She questions the Court's approach to proceed with the three-stage method simply for the sake of standardization of methodology.

Notwithstanding her reservation, Judge Xue agrees with the Court's concurrent use of different methods in this case, as long as an equitable solution can be so achieved. In her view, the Judgment reaffirms the established jurisprudence in the maritime delimitation that the goal to arrive at an equitable result excludes any recourse to a method chosen beforehand.

Her second reservation relates to the interest of third States in the south. In her view, the boundary should stop at Point 8 with an arrow pointing eastward.

Judge Xue explains that from Point 8 to further east, the boundary line will enter into the area where potentially the maritime entitlements of three or even four States may overlap, as coastal projections of Nicaragua and Colombia, as well as those of Costa Rica and Panama, all extend to that area. Judge Xue considers that regardless of being mainland coasts or islands, they all enjoy full and the same maritime entitlements under general international law. The fact that Colombian entitlements do not go beyond the treaty boundaries with third States does not mean third States do not have interest against Nicaragua in the relevant area above the treaty boundaries. In the view of Judge Xue, by restricting the coastal projections of Colombian islands against those of the Nicaraguan coast, the Court also unduly restricts the coastal projections of Colombian islands against those of the other two third States, which has gone beyond the jurisdiction of the Court in this case. She is concerned that the principle *res inter alios acta* and Article 59 of the Statute may not help in the present situation. She believes that the Court could have avoided that effect by resting the boundary at Point 8 with an arrow pointing eastward for the time being, a technique that the Court normally employs in the maritime delimitation for the protection of the interest of third States.

In regard to the cut-off effect, Judge Xue notes that the coastal relationship between the three adjacent coastal States and Colombia in the south of the Caribbean Sea is a complicated one. She considers the extent to which the Nicaraguan mainland coast can project eastward against the coastal projections of Costa Rica and possibly those of Panama depends on the maritime delimitation between Nicaragua and its adjacent neighbour(s). Once that is decided, it would be more proper to determine how far the boundary between the Parties in the present case will run eastward from Point 8.

Lastly, Judge Xue holds that the consideration of the public order and stable legal relations should apply to the southern area as well. The boundary line in the south as drawn by the Court would virtually produce the effect of invalidating the existing bilateral agreements and drastically changing the maritime relations in the area. In her opinion, the better approach is to just point out the direction of the boundary between the Parties in this area, allowing enough space for the States concerned to first draw up their respective boundaries and then readjust their maritime relations. She regrets that the Court does not take that course.

Separate opinion of Judge Donoghue

In a separate opinion, Judge Donoghue notes that she agrees with the Court's decision not to uphold Nicaragua's claim to continental shelf in the area more than 200 nautical miles of its coast, because Nicaragua did not adduce sufficient evidence to support the claim. She has misgivings about the reasoning that the Court gives for rejecting the claim, which suggests that the Court will not delimit continental shelf beyond 200 nautical miles of the coast of any State party to the 1982 United Nations Convention on the Law of the Sea ("UNCLOS") before the outer limits of such continental shelf have been established by that State in accordance with Article 76 of UNCLOS. She takes the view that delimitation of maritime boundaries and delineation of the outer limits of continental shelf are distinct exercises. The methodology proposed by Nicaragua blurs this distinction, because it uses the delineation of the outer limits of the continental shelf as a step in delimitation of the boundary. Nonetheless, in other circumstances, it may be appropriate to delimit an area of continental shelf beyond 200 nautical miles of a State's coast before the outer limits of the continental shelf have been established. It is better to leave open the door to such an outcome, so that the Court and the Commission on the Limits of the Continental Shelf, a body established by UNCLOS, may proceed in parallel to contribute to the public order of the oceans and the peaceful resolution of maritime boundary disputes.

Judge Donoghue also recalls that she dissented from the Court's 2011 Judgments denying applications for intervention by Costa Rica and Honduras. She continues to believe that both States met the criteria for intervention and offers an illustration of a concrete interest of a legal nature on the part of Honduras.

Declaration of Judge *ad hoc* Mensah

Judge *ad hoc* Mensah states in a declaration that although he agrees with the decision not to uphold Nicaragua's claim to a continental shelf in the area beyond 200 nautical miles of its

coast, he has some concerns regarding the Court's reasoning for the decision.

In particular, Judge Mensah has problems with the reference in the Judgment to the 2007 decision in the *Nicaragua* v. *Honduras* case, where the Court stated that "any claim to continental shelf rights beyond 200 miles must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder". Judge Mensah notes the Court's suggestion that the statement in the 2007 Judgment was intended to apply only to claims by States parties to the 1982 United Nations Convention on the Law of the Sea (UNCLOS), but asserts that the Court's reliance on that statement, as well as the Court's arguments based on Nicaragua's obligations under UNCLOS, in a case agreed to be governed by customary international law, may nonetheless have troubling implications for States that are not parties to UNCLOS when they seek delimitation of their entitlements to continental shelf vis-à-vis non-parties to the treaty. Judge Mensah's concern is that the Judgment might be interpreted to suggest that a court or tribunal must, in every case, automatically rule that it cannot decide a dispute that concerns the delimitation of continental shelf beyond 200 nautical miles of a State's coast if that State has not established the outer limits of its continental shelf pursuant to Article 76. In his view, the possibility should be left open that, depending on the circumstances of the particular case, it may be possible and appropriate to decide on such a dispute.

With respect to the present case, Judge Mensah explains that he would have preferred the Judgment to make it clear that the evidence submitted by Nicaragua did not provide a sufficient basis for the Court to accede to Nicaragua's delimitation request in the area beyond 200 nautical miles of its coast not because Nicaragua had not yet established outer limits on the basis of a recommendation from the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8, of UNCLOS, but rather because the evidence presented to the Court by Nicaragua was inadequate.

Judge Mensah also considers that the Judgment does not give sufficient weight to the rights and interests of third States, the effect and significance of bilateral agreements concluded in the area and their implications for the "public order of the oceans". It is not clear, in his view, that reliance on Article 59 of the Court's Statute alone will provide adequate protection to those third States or achieve the objective of stability and practicability in the Western Caribbean Sea.

Declaration of Judge *ad hoc* Cot

Judge *ad hoc* Cot agrees on the whole with the Judgment of the Court. However, he has serious reservations about certain points.

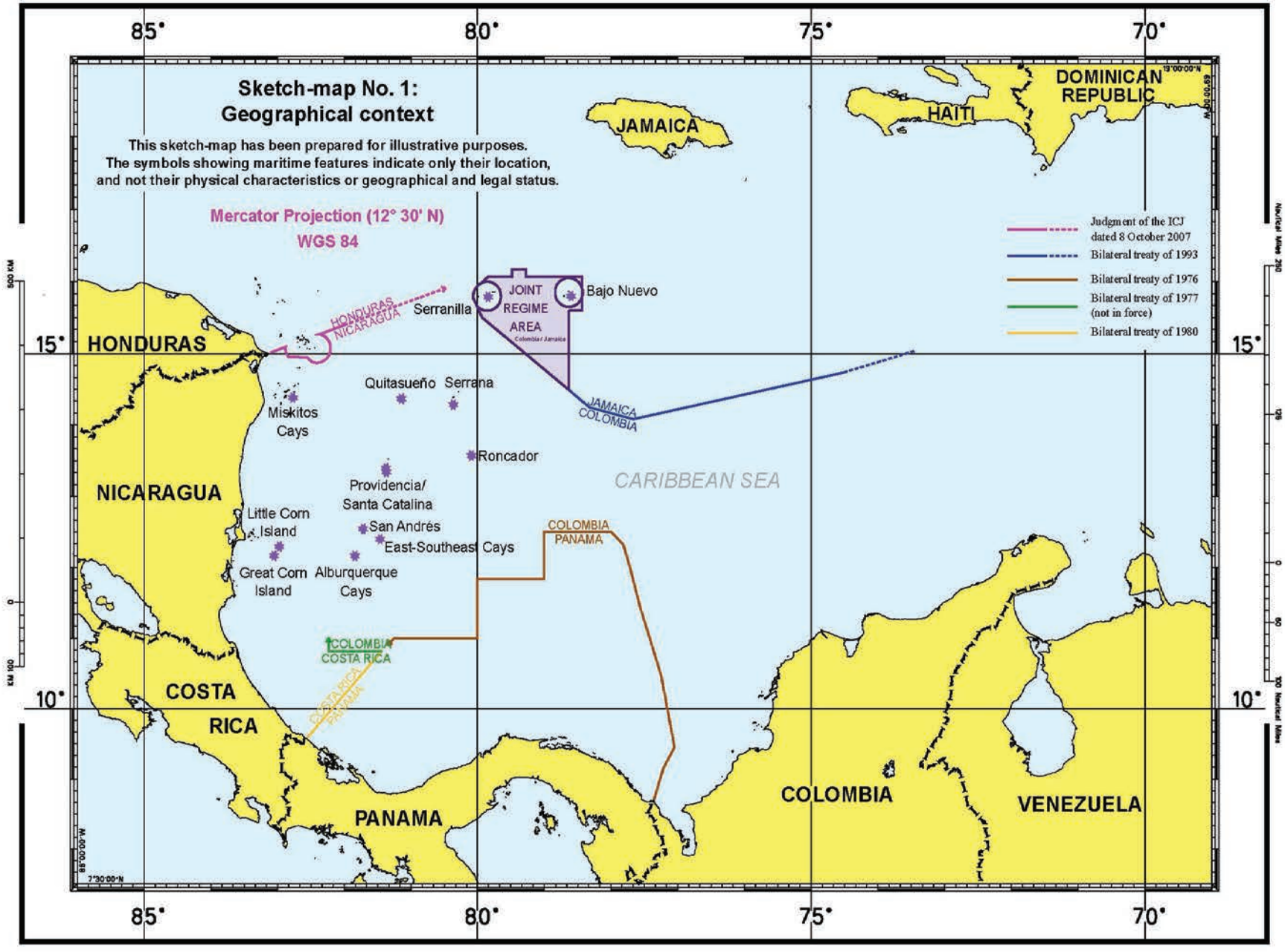
Judge Cot regrets the strictly bilateral approach adopted by the Court in its treatment of the dispute. The western Caribbean is a complex and sensitive maritime area. States have established a series of treaties which go beyond mere questions of delimitation and deal with the protection of the marine environment, the sharing of fish stocks, the exploitation of resources, scientific research and the fight against drug trafficking. It is this multilateral management of the maritime area that is today called into question by the Judgment. More specifically, Judge Cot considers that the delimitation as established by the Judgment affects the rights of third States. Article 59 of the Statute of the Court does not suffice to protect those rights.

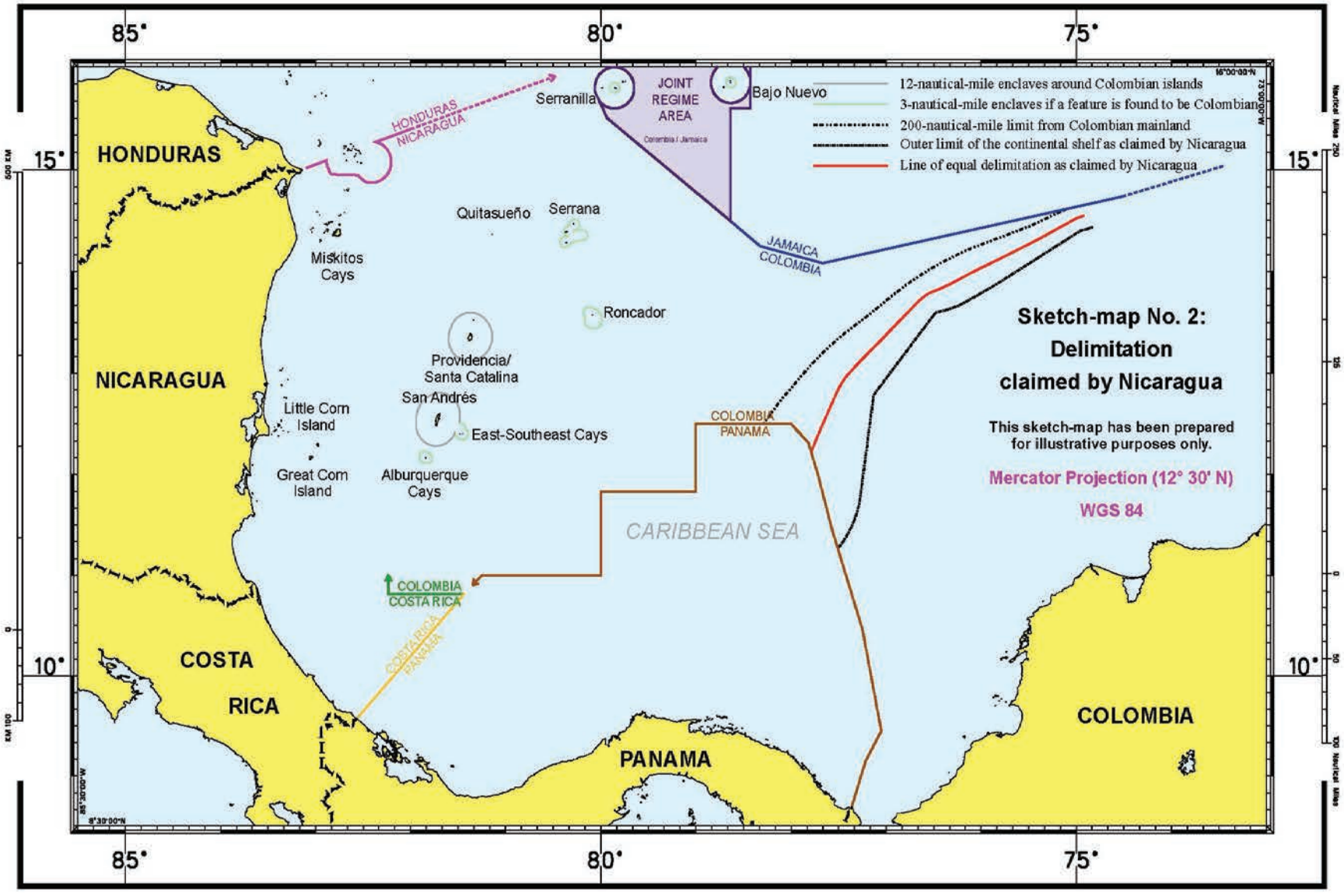
Moreover, Judge Cot considers that the delimitation line drawn between the mainland coast of Nicaragua and the San Andrés Archipelago appears overly complicated. The Court would have done well to adhere to its past jurisprudence *(Libya/Malta, Jan Mayen)*, and drawn a basically simplified provisional median line, and then displaced that line eastwards in order to take account of the considerable disparity of coastal lengths. The result would not have been very different from the one reached by the Court. However, it would have been clearer, more readily justifiable, and easier for the many parties involved to comply with in the Caribbean Sea.

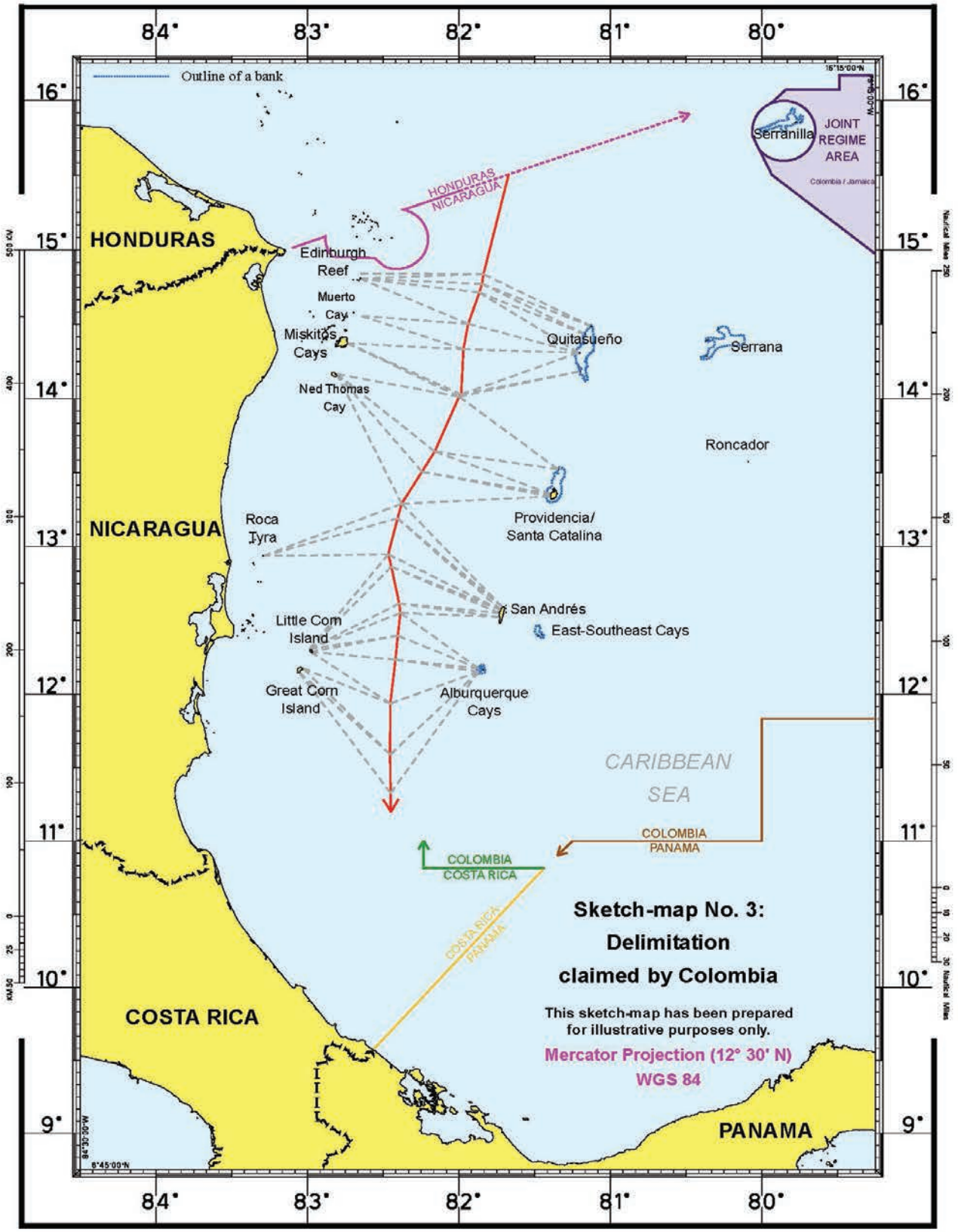
Lastly, Judge Cot considers that the procedure provided for by Article 76, paragraph 8, of the 1982 Convention does not fall within the scope of customary international law and is thus not relevant to the present case, since Colombia is not a party to the Convention. The Court should have confined itself to examining the evidence produced by Nicaragua to find that it was not sufficient and to reject Nicaragua's request to delimit its continental shelf beyond 200 nautical miles. On this point, Judge Cot fully agrees with the views expressed by Judge *ad hoc* Mensah.

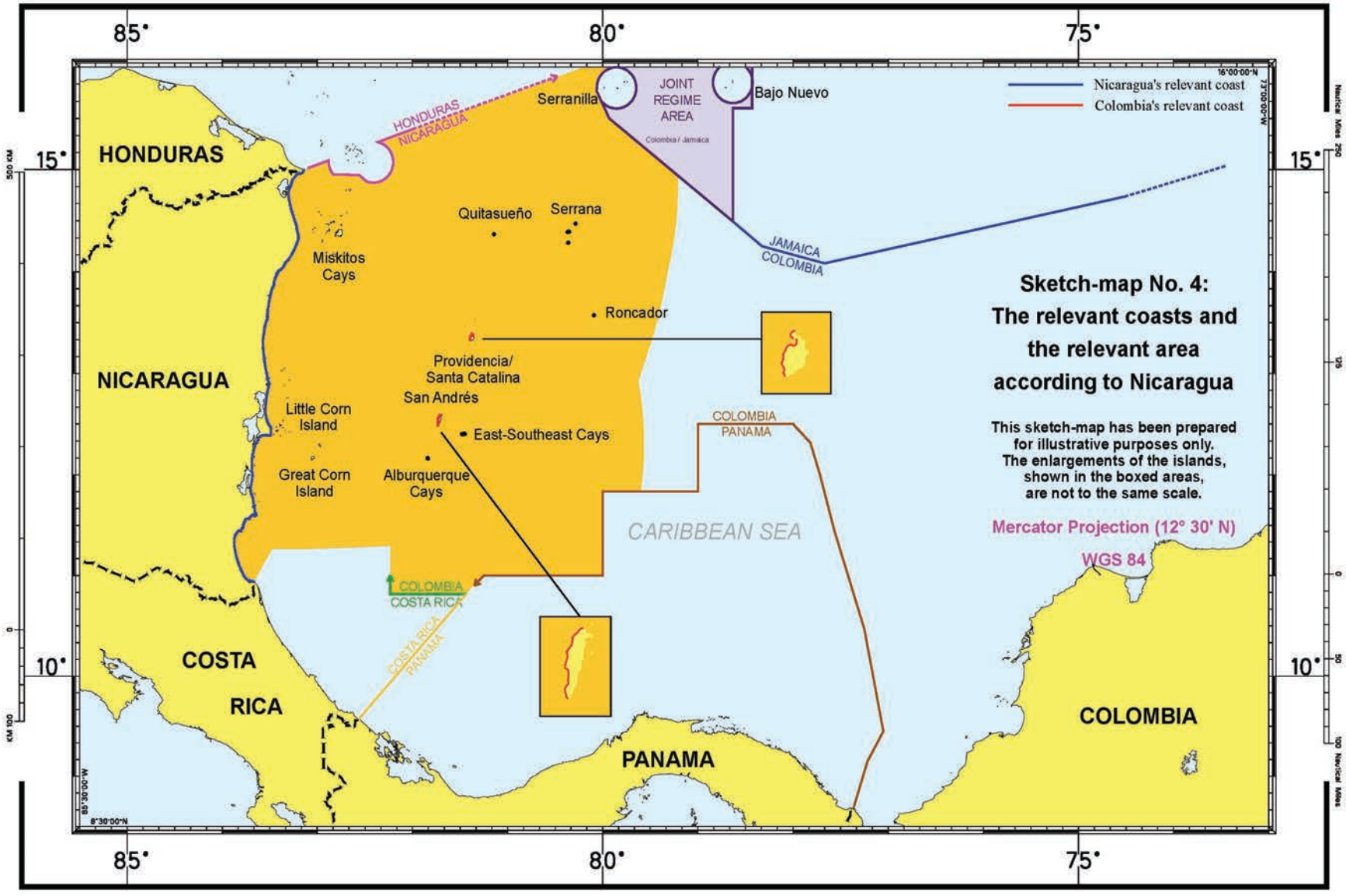
Annex 2 to Summary 2012/5

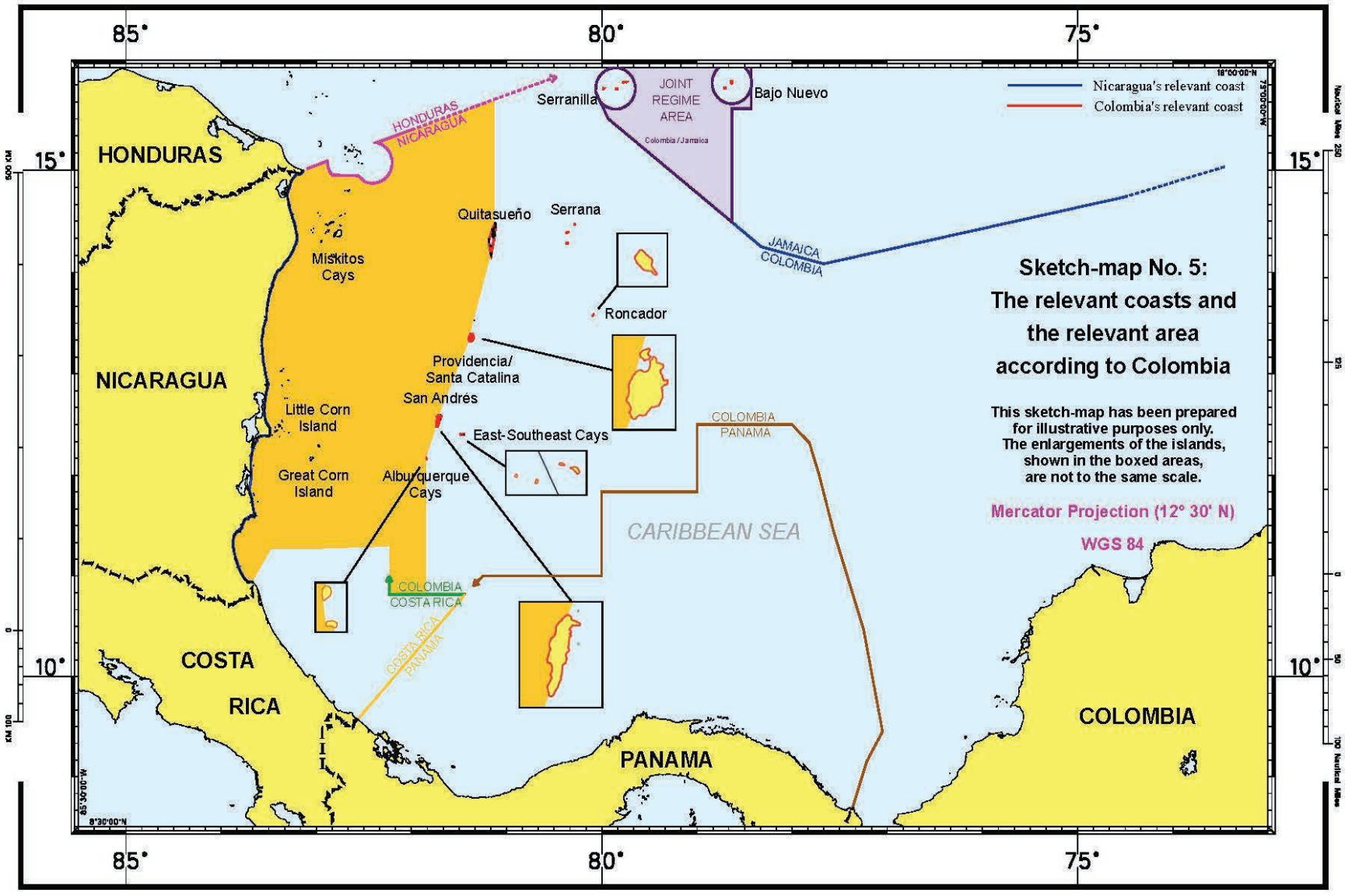
Sketch-map No. 1: Geographical context;
Sketch-map No. 2: Delimitation claimed by Nicaragua;
Sketch-map No. 3: Delimitation claimed by Colombia;
Sketch-map No. 4: The relevant coasts and the relevant area according to Nicaragua;
Sketch-map No. 5: The relevant coasts and the relevant area according to Colombia;
Sketch-map No. 6: The relevant coasts as identified by the Court;
Sketch-map No. 7: The relevant maritime area as identified by the Court;
Sketch-map No. 8: Construction of me provisional median line;
Sketch-map No. 9: Construction of the weighted line;
Sketch-map No. 10: The simplified weighted line;
Sketch-map No. 11: Course of the maritime boundary.

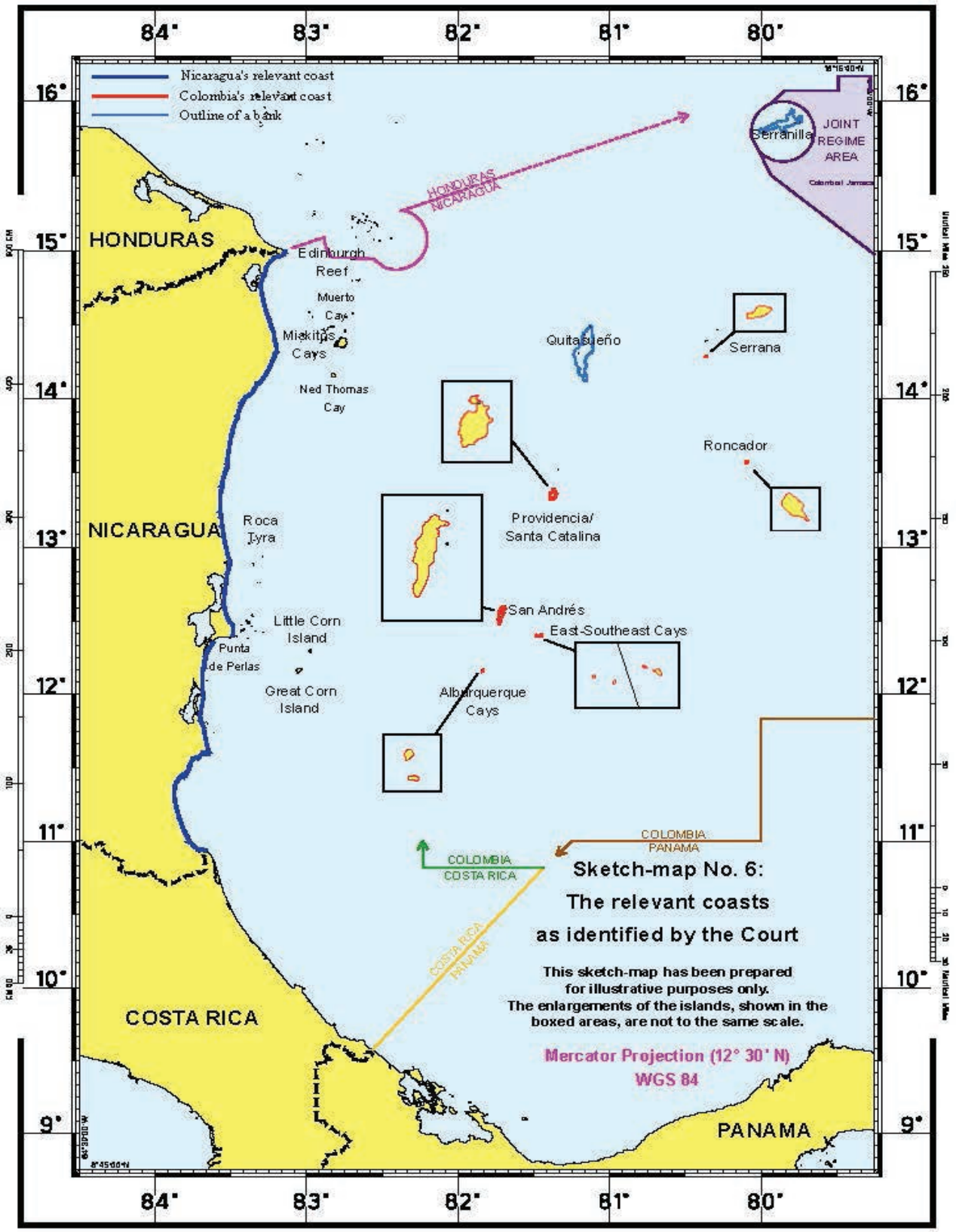

Sketch-map No. 1:
Geographical context
This sketch-map has been prepared for illustrative purposes.
The symbols showing maritime features indicate only their location,
and not their physical characteristics or geographical and legal status.
Mercator Projection (12° 30' N)
WGS 84
85°
80°
75°
70°
15°
10°
JAMAICA
HAITI
DOMINICAN REPUBLIC
HONDURAS
NICARAGUA
COSTA RICA
PANAMA
COLOMBIA
VENEZUELA
CARIBBEAN SEA
JOINT REGIME AREA
Colombia / Jamaica
Bajo Nuevo
Serranilla
HONDURAS NICARAGUA
JAMAICA COLOMBIA
COLOMBIA PANAMA
COLOMBIA COSTA RICA
COSTA RICA PANAMA
Quitasueño
Serrana
Roncador
Miskitos Cays
Providencia/ Santa Catalina
San Andrés
East-Southeast Cays
Little Corn Island
Great Corn Island
Alburquerque Cays
Judgment of the ICJ dated 8 October 2007
Bilateral treaty of 1993
Bilateral treaty of 1976
Bilateral treaty of 1977 (not in force)
Bilateral treaty of 1980
Nautical Miles
KM

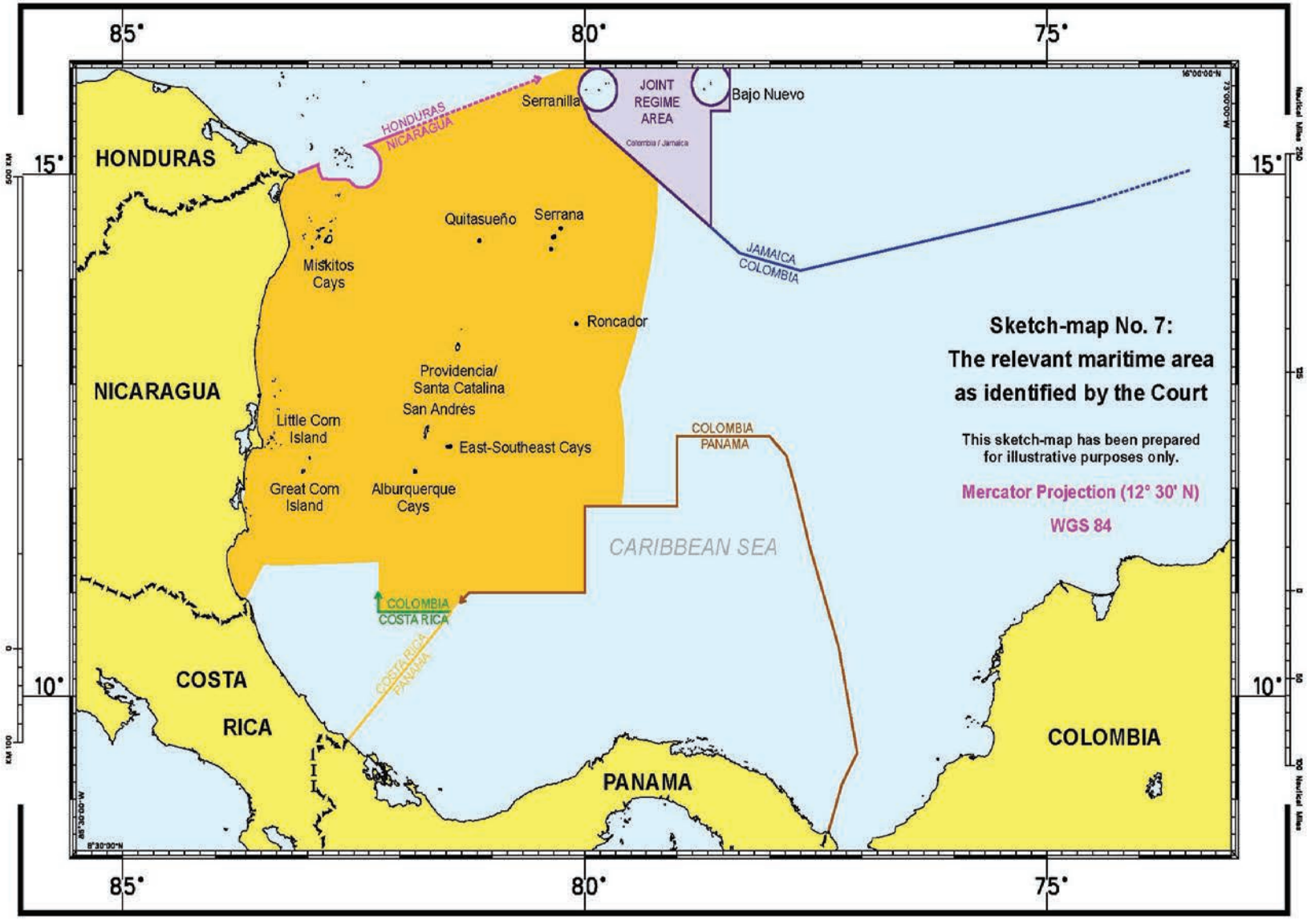

85°
80°
75°
15°
10°
HONDURAS
NICARAGUA
COSTA RICA
PANAMA
COLOMBIA
HONDURAS NICARAGUA
Serranilla
JOINT REGIME AREA
Bajo Nuevo
Quitasueño
Serrana
Miskitos Cays
Roncador
Providencia/ Santa Catalina
San Andrés
Little Corn Island
East-Southeast Cays
Great Corn Island
Alburquerque Cays
CARIBBEAN SEA
COLOMBIA COSTA RICA
COSTA RICA PANAMA
JAMAICA COLOMBIA
COLOMBIA PANAMA
12-nautical-mile enclaves around Colombian islands
3-nautical-mile enclaves if a feature is found to be Colombian
200-nautical-mile limit from Colombian mainland
Outer limit of the continental shelf as claimed by Nicaragua
Line of equal delimitation as claimed by Nicaragua
Sketch-map No. 2:
Delimitation
claimed by Nicaragua
This sketch-map has been prepared for illustrative purposes only.
Mercator Projection (12° 30' N)
WGS 84

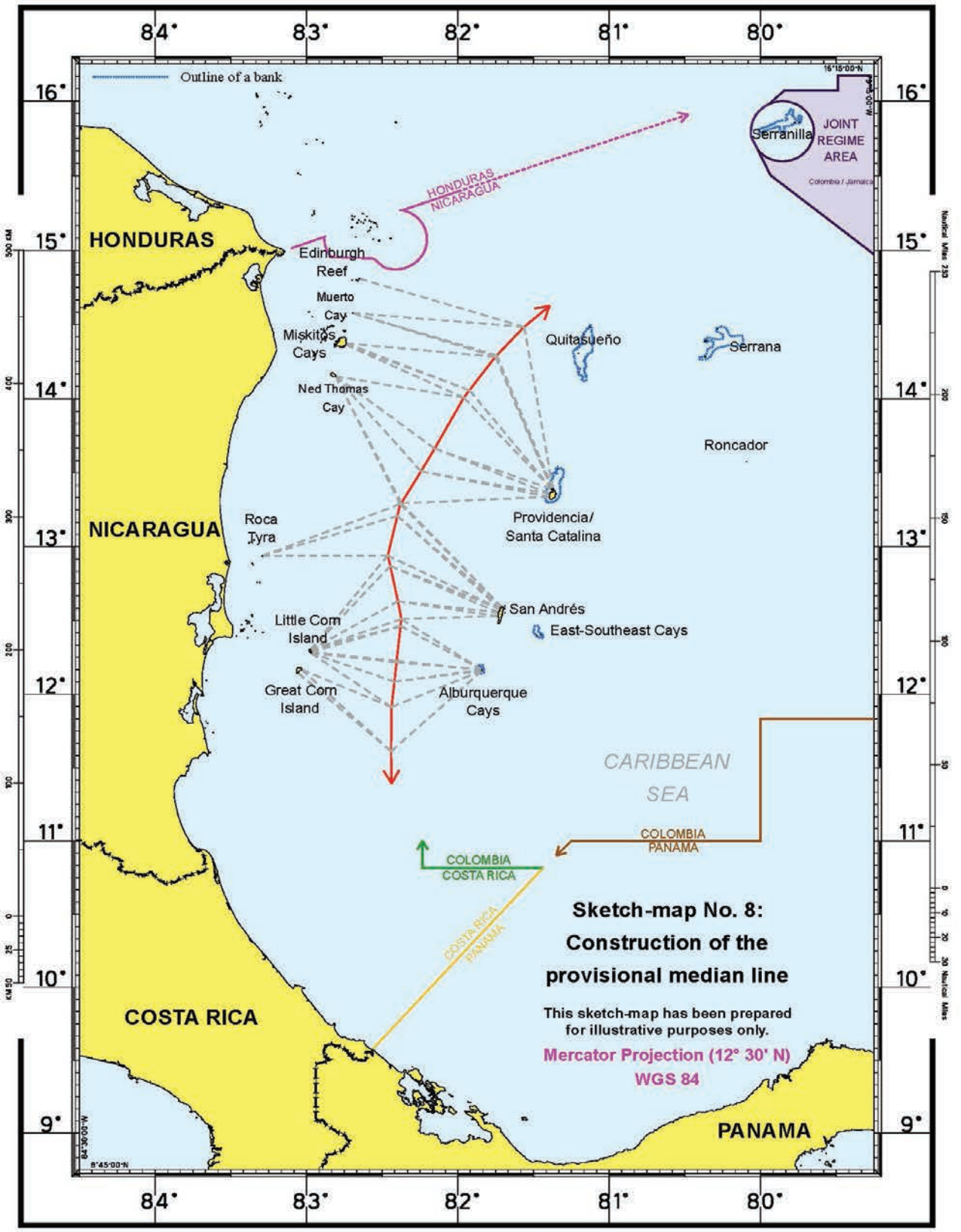

Outline of a bank
HONDURAS
NICARAGUA
COSTA RICA
PANAMA
JOINT REGIME AREA
Colombia / Jamaica
Serranilla
HONDURAS
NICARAGUA
Edinburgh Reef
Muerto Cay
Miskitos Cays
Ned Thomas Cay
Quitasueño
Serrana
Roncador
Roca Tyra
Providencia/ Santa Catalina
San Andrés
East-Southeast Cays
Little Corn Island
Great Corn Island
Alburquerque Cays
CARIBBEAN SEA
COLOMBIA
PANAMA
COLOMBIA
COSTA RICA
COSTA RICA
PANAMA
Sketch-map No. 3:
Delimitation
claimed by Colombia
This sketch-map has been prepared for illustrative purposes only.
Mercator Projection (12° 30' N)
WGS 84
84°
83°
82°
81°
80°
16°
15°
14°
13°
12°
11°
10°
9°

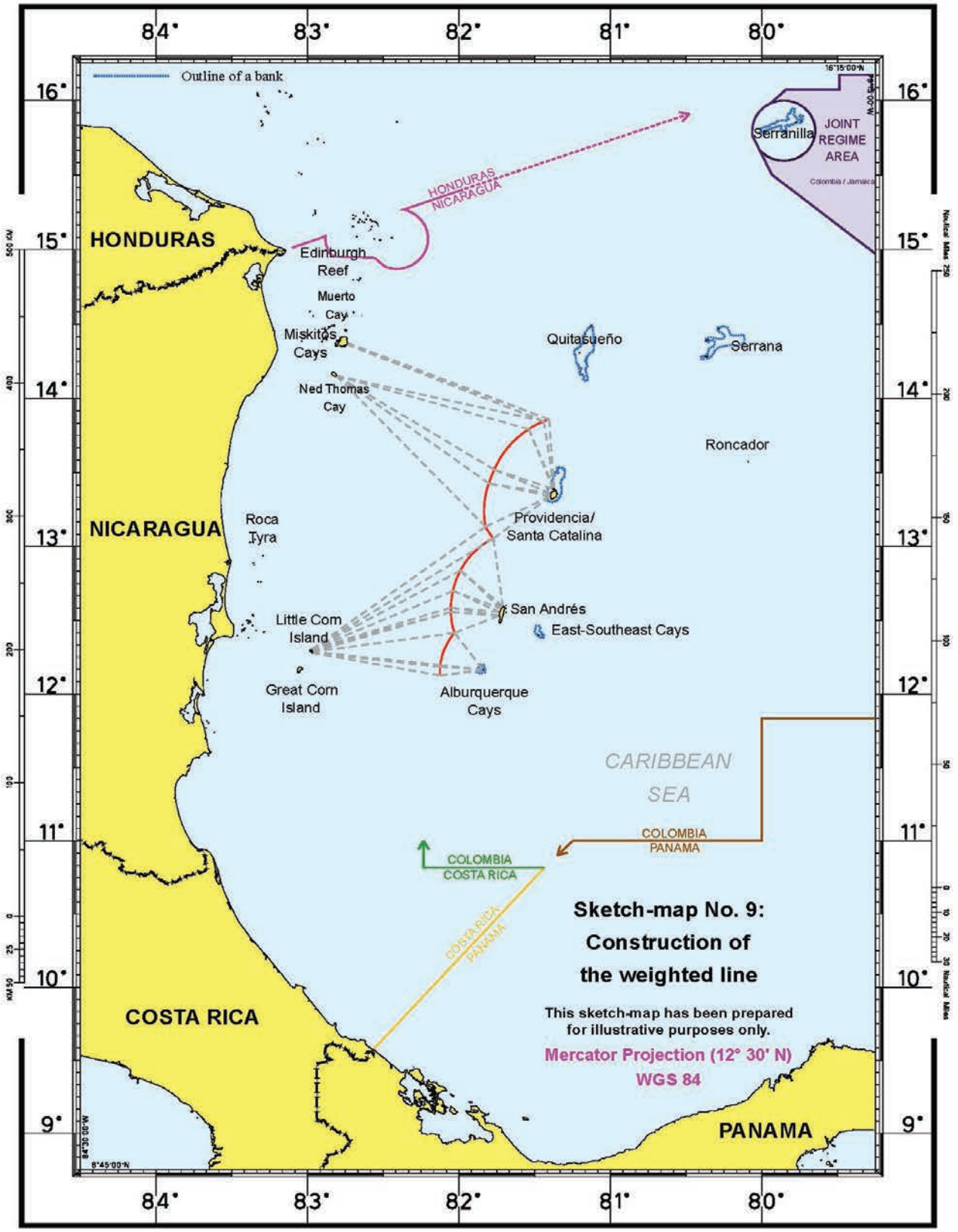

85°
80°
75°
15°
10°
HONDURAS
NICARAGUA
COSTA RICA
PANAMA
COLOMBIA
CARIBBEAN SEA
HONDURAS NICARAGUA
Serranilla
JOINT REGIME AREA
Colombia / Jamaica
Bajo Nuevo
Nicaragua's relevant coast
Colombia's relevant coast
Quitasueño
Serrana
Miskitos Cays
JAMAICA COLOMBIA
Roncador
Providencia/ Santa Catalina
San Andrés
Little Corn Island
East-Southeast Cays
Great Corn Island
Alburquerque Cays
COLOMBIA PANAMA
COLOMBIA COSTA RICA
COSTA RICA PANAMA
Sketch-map No. 4:
The relevant coasts and the relevant area according to Nicaragua
This sketch-map has been prepared for illustrative purposes only.
The enlargements of the islands, shown in the boxed areas, are not to the same scale.
Mercator Projection (12° 30' N)
WGS 84
16°00'00"N
77°00'00"W
82°30'00"W
8°30'00"N
500 KM
0
100 KM
Nautical Miles 250
125
0
50
100 Nautical Miles

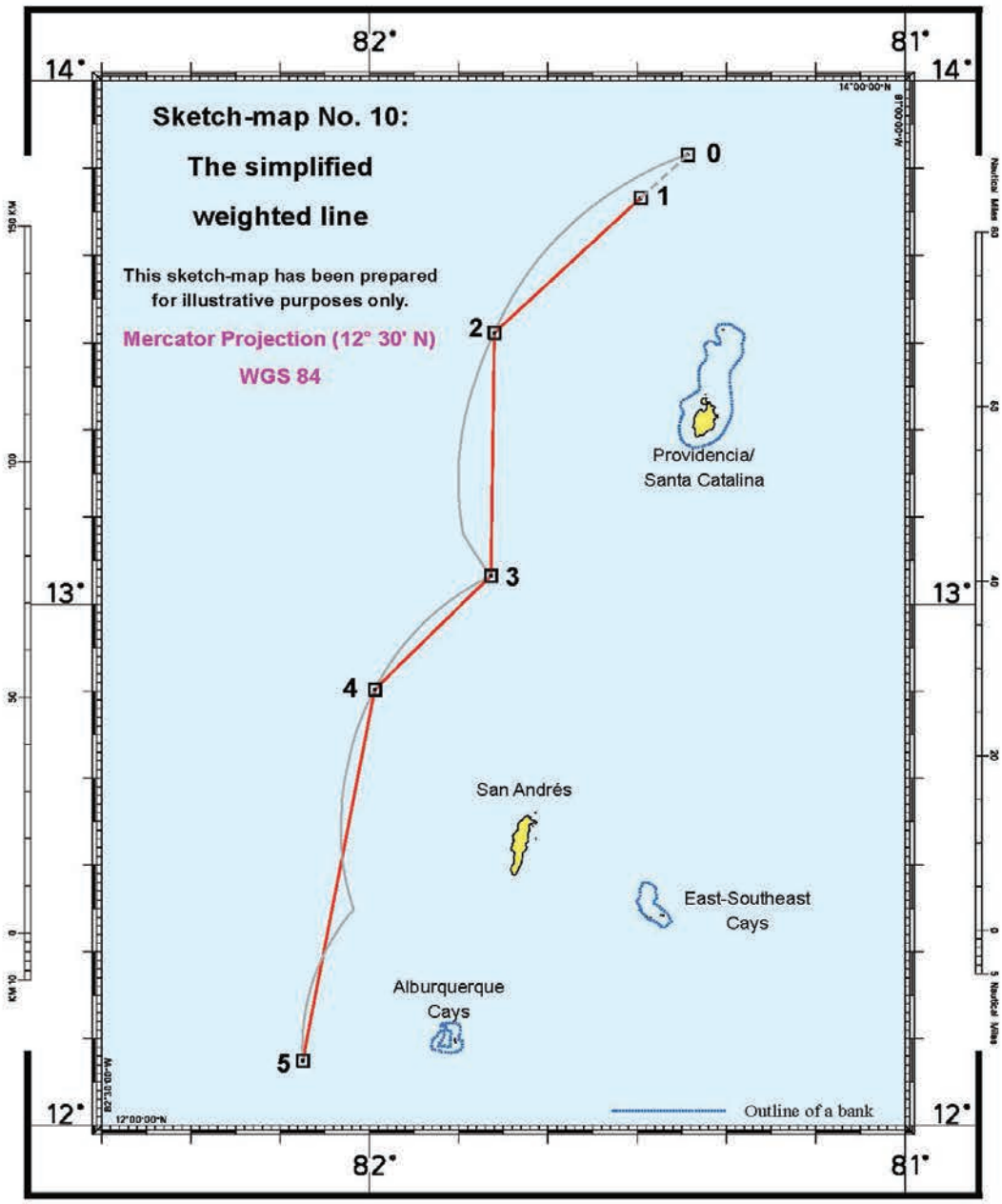

85°
80°
75°
15°
10°
HONDURAS
NICARAGUA
COSTA RICA
PANAMA
COLOMBIA
HONDURAS
NICARAGUA
Serranilla
JOINT REGIME AREA
Colombia / Jamaica
Bajo Nuevo
Nicaragua's relevant coast
Colombia's relevant coast
JAMAICA
COLOMBIA
Quitasueño
Serrana
Miskitos Cays
Roncador
Providencia/ Santa Catalina
San Andrés
Little Corn Island
Great Corn Island
East-Southeast Cays
Albuquerque Cays
COLOMBIA
PANAMA
CARIBBEAN SEA
COLOMBIA
COSTA RICA
COSTA RICA
PANAMA
Sketch-map No. 5:
The relevant coasts and the relevant area according to Colombia
This sketch-map has been prepared for illustrative purposes only.
The enlargements of the islands, shown in the boxed areas, are not to the same scale.
Mercator Projection (12° 30' N)
WGS 84


Nicaragua's relevant coast
Colombia's relevant coast
Outline of a bank
HONDURAS
NICARAGUA
COSTA RICA
PANAMA
Edinburgh Reef
Muerto Cay
Miskitos Cays
Ned Thomas Cay
Roca Tyra
Little Corn Island
Punta de Perlas
Great Corn Island
Quitasueño
Serrana
Roncador
Providencia/ Santa Catalina
San Andrés
East-Southeast Cays
Albuquerque Cays
Serranilla
JOINT REGIME AREA
HONDURAS NICARAGUA
COLOMBIA PANAMA
COLOMBIA COSTA RICA
COSTA RICA PANAMA
Sketch-map No. 6:
The relevant coasts
as identified by the Court
This sketch-map has been prepared for illustrative purposes only.
The enlargements of the islands, shown in the boxed areas, are not to the same scale.
Mercator Projection (12° 30' N)
WGS 84
84°
83°
82°
81°
80°
16°
15°
14°
13°
12°
11°
10°
9°


85°
80°
75°
15°
10°
HONDURAS
NICARAGUA
COSTA RICA
PANAMA
COLOMBIA
HONDURAS
NICARAGUA
Serranilla
JOINT REGIME AREA
Colombia / Jamaica
Bajo Nuevo
JAMAICA
COLOMBIA
Quitasueño
Serrana
Miskitos Cays
Roncador
Providencia/ Santa Catalina
San Andrés
Little Corn Island
East-Southeast Cays
Great Corn Island
Alburquerque Cays
COLOMBIA
PANAMA
CARIBBEAN SEA
COLOMBIA
COSTA RICA
COSTA RICA
PANAMA
Sketch-map No. 7:
The relevant maritime area
as identified by the Court
This sketch-map has been prepared for illustrative purposes only.
Mercator Projection (12° 30' N)
WGS 84


Outline of a bank
HONDURAS
NICARAGUA
COSTA RICA
PANAMA
HONDURAS
NICARAGUA
Edinburgh Reef
Muerto Cay
Miskitos Cays
Ned Thomas Cay
Roca Tyra
Little Corn Island
Great Corn Island
Quitasueño
Serrana
Roncador
Providencia/ Santa Catalina
San Andrés
East-Southeast Cays
Alburquerque Cays
Serranilla
JOINT REGIME AREA
Colombia / Jamaica
CARIBBEAN SEA
COLOMBIA PANAMA
COLOMBIA COSTA RICA
COSTA RICA PANAMA
Sketch-map No. 8:
Construction of the provisional median line
This sketch-map has been prepared for illustrative purposes only.
Mercator Projection (12° 30' N)
WGS 84
84°
83°
82°
81°
80°
16°
15°
14°
13°
12°
11°
10°
9°


Outline of a bank
HONDURAS
NICARAGUA
COSTA RICA
PANAMA
Edinburgh Reef
Muerto Cay
Miskitos Cays
Ned Thomas Cay
Roca Tyra
Little Corn Island
Great Corn Island
Providencia/ Santa Catalina
San Andrés
East-Southeast Cays
Alburquerque Cays
Quitasueño
Serrana
Roncador
Serranilla
JOINT REGIME AREA
HONDURAS NICARAGUA
CARIBBEAN SEA
COLOMBIA PANAMA
COLOMBIA COSTA RICA
COSTA RICA PANAMA
Sketch-map No. 9:
Construction of
the weighted line
This sketch-map has been prepared for illustrative purposes only.
Mercator Projection (12° 30' N)
WGS 84


Sketch-map No. 10:
The simplified
weighted line
This sketch-map has been prepared for illustrative purposes only.
Mercator Projection (12° 30' N)
WGS 84
0
1
2
3
4
5
Providencia/
Santa Catalina
San Andrés
East-Southeast
Cays
Alburquerque
Cays
Outline of a bank
82°
81°
14°
13°
12°
14°00'00"N
81°00'00"W
12°00'00"N
82°30'00"W
150 KM
100
50
0
KM 10
Nautical Miles 60
40
20
0
5 Nautical Miles

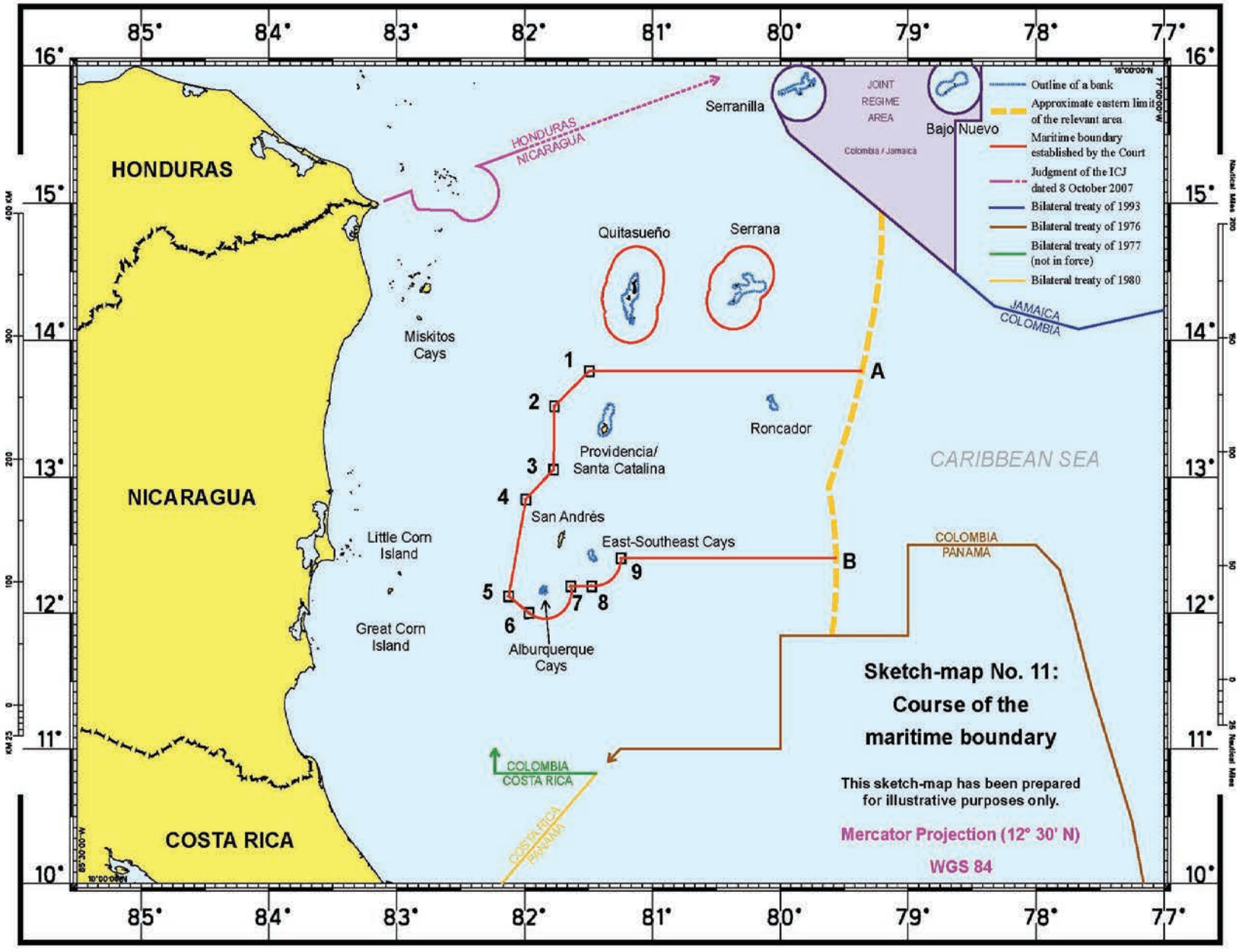

HONDURAS
NICARAGUA
COSTA RICA
CARIBBEAN SEA
Serranilla
Bajo Nuevo
JOINT REGIME AREA
Colombia / Jamaica
Quitasueño
Serrana
Roncador
Providencia/ Santa Catalina
San Andrés
East-Southeast Cays
Miskitos Cays
Little Corn Island
Great Corn Island
Alburquerque Cays
HONDURAS NICARAGUA
JAMAICA COLOMBIA
COLOMBIA PANAMA
COLOMBIA COSTA RICA
COSTA RICA PANAMA
Outline of a bank
Approximate eastern limit of the relevant area
Maritime boundary established by the Court
Judgment of the ICJ dated 8 October 2007
Bilateral treaty of 1993
Bilateral treaty of 1976
Bilateral treaty of 1977 (not in force)
Bilateral treaty of 1980
Sketch-map No. 11: Course of the maritime boundary
This sketch-map has been prepared for illustrative purposes only.
Mercator Projection (12° 30' N)
WGS 84

Table of cases by date of introduction

1. Contentious cases

Appeal Relating to the Jurisdiction of the ICAO Council (India *v.* Pakistan)

Judgment of 18 August 1972	ST/LEG/SER.F/1, p. 82

Fisheries Jurisdiction (United Kingdom *v.* Iceland)

Order of 17 August 1972 (Interim Protection)	ST/LEG/SER.F/1, p. 81
Judgment of 2 February 1973 (Jurisdiction of the Court)	ST/LEG/SER.F/1, p. 84
Order of 12 July 1973 (Interim Protection)	ST/LEG/SER.F/1, p. 91
Judgment of 25 July 1974	ST/LEG/SER.F/1, p. 92

Fisheries Jurisdiction (Federal Republic of Germany *v.* Iceland)

Order of 17 August 1972 (Interim Protection)	ST/LEG/SER.F/1, p. 81
Judgment of 2 February 1973 (Jurisdiction of the Court)	ST/LEG/SER.F/1, p. 86
Order of 12 July 1973 (Interim Protection)	ST/LEG/SER.F/1, p. 91
Judgment of 25 July 1974	ST/LEG/SER.F/1, p. 94

Nuclear Tests (Australia *v.* France)

Order of 22 June 1973 (Interim Protection)	ST/LEG/SER.F/1, p. 87
Judgment of 20 December 1974	ST/LEG/SER.F/1, p. 97

Nuclear Tests (New Zealand *v.* France)

Order of 22 June 1973 (Interim Protection)	ST/LEG/SER.F/1, p. 88
Judgment of 20 December 1974	ST/LEG/SER.F/1, p. 97

Aegean Sea Continental Shelf (Greece *v.* Turkey)

Order of 11 September 1976 (Interim Protection)	ST/LEG/SER.F/1, p. 102
Judgment of 19 December 1978 (Jurisdiction of the Court)	ST/LEG/SER.F/1, p. 103

Continental Shelf (Tunisia/Libyan Arab Jamahiriya)

Judgment of 14 April 1981 (Application by Malta for Permission to Intervene)	ST/LEG/SER.F/1, p. 113
Judgment of 24 February 1982	ST/LEG/SER.F/1, p. 116

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

Order of 15 December 1979 (Provisional measures)	ST/LEG/SER.F/1, p. 106
Judgment of 24 May 1980	ST/LEG/SER.F/1, p. 106

Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)

Order of 20 January 1982 (Constitution of Chamber)	ST/LEG/SER.F/1, p. 115
Judgment of 12 October 1984	ST/LEG/SER.F/1, p. 130

Land and Maritime Boundary between Cameroon and Nigeria (Cameroon *v.* Nigeria: Equatorial Guinea intervening)

Order of 15 March 1996 (Provisional measures)	ST/LEG/SER.F/1/Add.1, p. 85
Order of 21 October 1999 (Intervention)	ST/LEG/SER.F/1/Add.2, p. 126
Judgment of 11 June 1998 (Preliminary Objections)	ST/LEG/SER.F/1/Add.2, p. 33
Judgment of 10 October 2002 (Merits)	ST/LEG/SER.F/1/Add.2, p. 225

Fisheries Jurisdiction (Spain *v.* Canada)

Judgment of 4 December 1998 (Jurisdiction of the Court)	ST/LEG/SER.F/1/Add.2, p. 45

Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the *Nuclear Tests* (*New Zealand* v. *France*) Case

Order of 22 September 1995 (Provisional measures)	ST/LEG/SER.F/1/Add.1, p. 81

Kasikili/Sedudu Island (Botswana/Namibia)

Judgment of 13 December 1999	ST/LEG/SER.F/1/Add.2, p. 129

Vienna Convention on Consular Relations (Paraguay *v.* United States of America)

Order of 9 April 1998 (Provisional measures)	ST/LEG/SER.F/1/Add.2, p. 29
Order of 10 November 1998 (Discontinuance)	ST/LEG/SER.F/1/Add.2, p. 44

Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections* (Nigeria *v.* Cameroon)

Judgment of 25 March 1999	ST/LEG/SER.F/1/Add.2, p. 59

Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)

Judgment of 23 October 2001 (Application by the Philippines for Permission to Intervene)	ST/LEG/SER.F/1/Add.2, p. 201
Judgment of 17 December 2002 (Merits)	ST/LEG/SER.F/1/Add.2, p. 263

Ahmadou Sadio Diallo (Republic of Guinea *v.* Democratic Republic of the Congo)

Judgment of 24 May 2007 (Preliminary objections)	ST/LEG/SER.F/1/Add.3, p. 190
Judgment of 30 November 2010	ST/LEG/SER.F/1/Add.5, p. 148
Judgment of 19 June 2012 (Compensation owed by the Democratic Republic of the Congo to the Republic of Guinea)	ST/LEG/SER.F/1/Add.5, p. 266

LaGrand (Germany *v.* United States of America)

Judgment of 27 June 2001	ST/LEG/SER.F/1/Add.2, p. 189

Legality of Use of Force (Serbia and Montenegro *v.* Belgium)

Order of 2 June 1999 (Provisional measures)	ST/LEG/SER.F/1/Add.2, p. 71
Judgment of 15 December 2004 (Preliminary Objections)	ST/LEG/SER.F/1/Add.3, p. 59

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia *v.* Serbia)

Aerial Incident of 10 August 1999 (Pakistan *v.* India)

Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua *v.* Honduras)

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo *v.* Belgium)

Application for Revision of the Judgment of 11 July 1996 in the Case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections* (Yugoslavia *v.* Bosnia and Herzegovina)

Certain Property (Liechtenstein *v.* Germany)

Territorial and Maritime Dispute (Nicaragua *v.* Colombia)

Frontier Dispute (Benin/Niger)

Armed Activities on the Territory of the Congo (New Application : 2002) (Democratic Republic of the Congo *v.* Rwanda)

Application for Revision of the Judgment of 11 September 1992 in the Case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*(El Salvador *v.* Honduras)

Jurisdictional Immunities of the State (Germany *v.* Italy: Greece intervening)

Order of 6 July 2010 (Counter-claim) ST/LEG/SER.F/1/Add.5, p. 125

Order of 4 July 2011 ST/LEG/SER.F/1/Add.5, p. 217

(Application by the Hellenic Republic for Permission to Intervene)

Judgment of 3 February 2012 ST/LEG/SER.F/1/Add.5, p. 252

Questions relating to the Obligation to Prosecute or Extradite (Belgium *v.* Senegal)

Order of 28 May 2009 (Provisional measures) ST/LEG/SER.F/1/Add.5, p. 80

Judgment of 20 July 2012 ST/LEG/SER.F/1/Add.5, p. 276

Certain questions concerning diplomatic relations (Honduras *v.* Brazil)

Order of 12 May 2010 (Discontinuance) ST/LEG/SER.F/1/Add.5, p. 124

Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Belgium *v.* Switzerland)

Order of 5 April 2011 (Discontinuance) ST/LEG/SER.F/1/Add.5, p. 199

Certain Activities carried out by Nicaragua in the Border Area (Costa Rica *v.* Nicaragua)

Order of 8 March 2011 (Provisional measures) ST/LEG/SER.F/1/Add.5, p. 169

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)

Order of 18 July 2011(Provisional measures) ST/LEG/SER.F/1/Add.5, p. 221

2. Advisory Opinions

Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)

Advisory Opinion of 28 May 1948 ST/LEG/SER.F/1, p. 4

Reparation for Injuries Suffered in the Service of the United Nations

Advisory Opinion of 11 April 1949 ST/LEG/SER.F/1, p. 8

Interpretation of Peace Treaties with Bulgaria, Hungary and Romania

Advisory Opinion of 30 March 1950 (first phase) ST/LEG/SER.F/1, p. 11

Advisory Opinion of 18 July 1950 (second phase) ST/LEG/SER.F/1, p. 14

Competence of the General Assembly for the Admission of a State to the United Nations

Advisory Opinion of 3 March 1950 ST/LEG/SER.F/1, p. 10

International Status of South West Africa

Advisory Opinion of 11 July 1950 ST/LEG/SER.F/1, p. 12